Neutral Citation Number: [2021] EWHC 2033 (Ch)

Case No: BL-2018-000628

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2021

Before :

Mrs Justice Joanna Smith DBE

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Between :

TMO Renewables Limited (in Liquidation)	**Claimant**
- and –	
(1) Timothy Stephen Kenneth Yeo	**Defendants**
(2) David William Weaver	
(3) Desmond George Reeves	
(4) Michael Peter McBraida	
(5) Maxwell Charles Audley	

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Mr Andrew Sutcliffe QC, Mr George McPherson and Mr Ravi Jackson (instructed by **Hewlett Swanson Limited**) for the **Claimant**
Mr Yeo, who is unrepresented and the **First Defendant**
Mr Weaver, who is unrepresented and the **Second Defendant**
Mr Matthew Collings QC and Mr Ted Loveday (instructed by **Blake Morgan LLP**) for the **Third and Fifth Defendants**
Mr Richard Morgan QC (instructed by **Alius Law**) for the **Fourth Defendant**

Hearing dates: 1-26 March 2021

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Approved Judgment

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

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Covid-19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 20 July 2021.

MRS JUSTICE JOANNA SMITH:

Introduction

1. This claim is brought by the joint liquidators of TMO Renewables Limited ("**TMO**") and arises out of the circumstances in which TMO entered administration in December 2013, when the first to fourth defendants were its directors (together the "**Director Defendants**") and the fifth defendant ("**Mr Audley**") is alleged to have been its legal adviser.

2. At the heart of the case is an allegation that the Director Defendants gerrymandered a vote at an extraordinary general meeting of TMO held on 28 October 2013 ("**the EGM**") with a view to defeating resolutions aimed at changing control of the TMO board of directors (the "**Board**") presented by a major shareholder, Sinoside Investments Ltd ("**Sinoside**"). The alleged gerrymandering consisted principally of the issue of 75 million ordinary shares to a new investor on terms which (i) permitted payment to be deferred for up to two years notwithstanding that TMO was in dire financial straits; and (ii) enabled that investor to vote in favour of the status quo and thus prevent the take-over.

3. TMO alleges that in issuing the new shares, the Director Defendants exercised the powers conferred on them as directors of TMO for an improper purpose, recklessly and in bad faith in pursuit of a dishonest strategy for maintaining control of the Board and that they thereby acted in breach of their statutory and fiduciary duties. TMO also alleges that the Director Defendants deliberately intended to mislead existing shareholders into thinking that a cornerstone investor had injected a substantial sum of money into TMO, thereby securing its future, and that they knowingly or recklessly made or authorised untrue representations to shareholders in order to achieve their improper purpose of defeating the EGM resolutions.

4. In addition, TMO alleges that Mr Audley was acting as legal adviser to the Director Defendants pursuant to an agreement dated 22 April 2013 and that he failed to use his best endeavours to promote the interests of TMO when providing his services, in breach of his contractual and fiduciary duties.

5. Had the Director Defendants and Mr Audley not acted in breach of their duties, it is TMO's case that control of the Board would have changed hands at the EGM and that thereafter TMO would not have entered administration on 19 December 2013 and creditors' voluntary liquidation on 8 December 2014. Instead, TMO would have pursued a business plan which would have been substantially similar to the business plan that has in fact been pursued by the company that acquired TMO's business and assets from TMO's joint administrators on 7 March 2014, Rebio Technologies Limited ("**Rebio**"), a company incorporated in the United Kingdom.

6. TMO makes a very substantial claim for equitable compensation based on TMO's lost opportunity to develop its business and assets (as they have subsequently been successfully developed by Rebio) (the "**Business and Assets**").

Relevant Procedural Background

7. There were two PTRs in this case prior to trial, taking place respectively on 27 January 2021 and 22 February 2021. A number of issues arose at the PTRs which I should record in this judgment.

Confidentiality

8. Given TMO's case that Rebio is effectively to be regarded as a proxy for TMO, a substantial amount of evidence at trial concerned the development of the Rebio business together with details about its products, investors, business forecasts and competitors. This information was contained in disclosed documents, witness statements and expert reports and is regarded by Rebio as highly confidential and commercially sensitive. By the date of the first PTR, this information had already been provided to all the parties, but TMO (effectively acting on behalf of Rebio) was concerned that if referred to in open court that confidentiality would be damaged. Accordingly it sought directions at the first PTR for the implementation of a confidentiality regime in respect of such information (the "**Rebio Confidential Information**").

9. For reasons I need not go into here, I refused to put a confidentiality regime in place at the first PTR, requiring TMO instead to take further time to consider whether the information that it was seeking to protect really required such protection. The matter was raised again at the second PTR, by which point TMO had produced a confidential bundle with all matters said to be confidential highlighted in the documents contained within that bundle. Following further submissions on this material, Mr Sutcliffe QC, acting on behalf of TMO, helpfully accepted that it would not in fact be necessary to set up a formal confidentiality regime and that he was content to proceed at trial on the basis that all parties would endeavour not to refer to the Rebio Confidential Information unless absolutely necessary, in which case an application would be made to me at that point to sit in private.

10. In the circumstances, the trial has proceeded, for the most part, in open court, albeit that there has been a small amount of cross examination which has had to take place in private. No suggestions were made to me by the parties as to how I should deal with the Rebio Confidential Information in my judgment, but I have determined that it is not necessary to refer to any such information and I have not done so.

Applications to amend

11. At the first PTR and on the first day of trial, TMO sought to make numerous substantive amendments to its Particulars of Claim (including amendments to plead further allegations of dishonesty against the Director Defendants, together with a claim of dishonest assistance against Mr Audley) the vast majority of which I rejected for the reasons set out in my two judgments dated 27 January and 2 March 2021 respectively.

12. I made it clear that the trial would proceed on the basis of the allegations made in TMO's Re-Amended Particulars of Claim, provided in final form on 4 March 2021. However, I should note that Mr Sutcliffe cross examined the Defendants with a view to establishing the dishonest conduct pleaded in the rejected amendments (which he asserted was relevant factual background to the existing pleaded allegations) and also sought to make submissions in closing by reference to those rejected amendments.

13. By an order dated 11 May 2021, Newey LJ granted TMO permission to appeal against my decision to refuse permission to amend to add a claim in dishonest assistance against Mr Audley. Newey LJ also ordered that it was appropriate to stay the appeal pending my judgment on the claim. This resulted in a flurry of correspondence to the Court, with

TMO's solicitors, Hewlett Swanson, inviting me specifically to address in my judgment (giving reasons) the decision I would have reached on TMO's dishonest assistance claim against Mr Audley if I had permitted that claim to be pursued at trial so that TMO can consider (if applicable) any potential grounds of appeal on a fully informed basis. The solicitors for Mr Audley, Blake Morgan, objected to this proposed course of action and invited me instead to determine the case on the basis of the parties' pleaded cases as they currently stand.

14. In circumstances where there is no extant claim of dishonest assistance against Mr Audley in the Re-Amended Particulars of Claim and Mr Audley prepared for trial on the basis that he did not stand accused of dishonest assistance beyond some unparticularised reference to dishonest assistance in the Reply, I intend to determine the case on the basis of the parties' pleaded cases as they actually stand. I note, however, that it was acknowledged on behalf of Mr Audley in closing submissions that allegations of fraud made in the Reply against him (including the unparticularised allegation of dishonest assistance) would need to be addressed in my judgment, not least because of TMO's case that there is a fraud exclusion to the limitation of liability in Mr Audley's retainer.

Hybrid Trial

15. Pursuant to my order at the first PTR on 27 January 2021, the trial proceeded as a hybrid hearing. Submissions were made remotely and, with one exception, TMO's witnesses gave evidence remotely. The experts' evidence was also given remotely. At their request (and in light of the serious nature of the allegations made against them), the Defendants and their witnesses all gave evidence in person at a socially distanced hearing subject to a strict pre-agreed protocol designed to ensure (insofar as possible) the safety of everyone in attendance. I am satisfied that these arrangements gave the Defendants every chance to be seen and heard by the Court when giving their evidence.

16. The third defendant ("**Mr Reeves**") and Mr Audley were represented at trial by Mr Collings QC. The fourth defendant ("**Mr McBraida**") was represented by Mr Morgan QC. For reasons to which I shall return later in this judgment, the first defendant ("**Mr Yeo**") and the second defendant ("**Mr Weaver**") represented themselves.

Documents and Trial Timetable

17. The trial was due to take place in a 19 day window, to include one day of pre-reading. As it turned out, this estimate was inadequate. The pre-reading, which I in fact undertook in advance of the 19 day window, took two full days and the trial then lasted for 20 days, with the Court's additional reading day for expert evidence having to be abandoned and with only one working day between the end of the evidence and closing submissions, which (insofar as they related to liability and causation) were submitted at 10am on the morning of that day, whilst submissions on quantum were submitted at 5pm (or, in the case of TMO's submissions, rather later in the evening). It was only possible to fit the trial into 20 days owing to the Court sitting both early and late on a significant number of days so as to accommodate extended cross examination of the witnesses. This state of affairs was extremely unsatisfactory; parties in any case, but particularly a case of this complexity and length, must ensure that they provide realistic time estimates to the Court and that those time estimates are kept constantly under review in the lead up to trial.

18. The documents for the trial were voluminous and provided to me in an electronic bundle form. Throughout the course of the trial (as is commonplace), various of the parties wished to refer to additional documents not already included in the electronic bundle and this meant that additional bundles had to be created. The original chronological bundle was bundle D, but we had reached bundle V by the close of the trial. Whilst electronic bundles are extremely convenient and to be encouraged, it is important in my judgment that where the Court is left at the end of the day with potentially key chronological documents appearing in numerous different electronic files and no easy way of reading all of the chronological documents to which reference has been made during the trial from beginning to end, the parties should produce a global index identifying all of the chronological documents to which reference was made during the trial and providing their page references. At my request, the parties in this claim were able to agree on a global index which has proved most useful in the preparation of this judgment.

Background to the Claim

19. I begin by setting out the (largely) uncontroversial background to the dispute. The facts as they emerge from the evidence will be analysed in more detail in the context of my consideration of the individual elements of the claim. For present purposes I note only that there were regular meetings of the Board of TMO and that these meetings were all minuted in considerable detail by Ms Gaye Bramwell ("**Ms Bramwell**"), TMO's company secretary. It is common ground between the parties that the minutes accurately reflect the discussions that took place at these Board meetings and that the Court can safely rely upon them.

TMO

20. TMO was a scientific research company incorporated on 27 March 2002. From the date of its incorporation, it was involved in the research and development of the properties of thermophilic micro-organisms with a view to the production of chemicals and liquid fuels from waste biomass materials. Within a few years, TMO had identified and modified its chosen organism (referred to in these proceedings by its laboratory classification as "**TM242**") for ethanol production (a process described as second generation ("**2G**") bioethanol production).

21. In around 2008, TMO constructed a process demonstration unit (the "**PDU**") at its site at Dunsfold Park, near Guildford ("**Dunsfold Park**"). The PDU was constructed originally to demonstrate that the production processes developed by TMO in the laboratory for the production of biochemicals such as bioethanol could be scaled up to operate successfully as industrial processes. At some point, however, the PDU was "mothballed" and it was certainly not in operation by 2012. In addition to the PDU, TMO also constructed a scale through unit (the "**STU**"), which was essentially a smaller version of the PDU that could be used on a stand-alone basis to demonstrate the processes developed by TMO in the laboratory.

22. The research and development undertaken by TMO appears to have been extremely expensive and TMO never progressed to the stage of commercial production. Indeed in the 11 years between TMO's incorporation and entering into administration, its filed accounts evidence that it never generated any revenue from commercial activity.

23. As a so-called pre-revenue company, however, TMO's need for cash was unrelenting and, throughout this period, TMO conducted various equity funding rounds. By the date of its

administration, TMO had raised substantial sums of money from private investors, amounting to something in the region of £45 million from the issue of just under 327 million shares.

24. In addition, in 2009 and 2011 TMO raised over £8 million through the issue of unsecured convertible redeemable loan notes to investors (together the "**Loan Notes**"). Amongst the subscribers for the Loan Notes were Diverso Management Limited ("**Diverso**") (in the sum of £2,000,000) and Andbell AS ("**Andbell**") (in the sum of £1,999,993), alongside associates of these two companies. The remaining Loan Notes were held by Vidacos Nominees Limited (as nominee of Noble AIM VCT plc) and private investors (most of whom were existing shareholders).

25. TMO created three classes of Loan Notes each of which was subject to differing terms. Andbell and Diverso both received Loan Notes which were convertible at their option at the price of 55p per share and which enjoyed "downround protection" (such that if TMO were to issue shares at less than 55p in the future, there would be a corresponding increase in the number of shares issued to Loan Note Holders on conversion, thereby providing protection against dilution). These Loan Notes bore interest at 10% per annum. By a side letter of 15 October 2012, TMO undertook to Andbell and Diverso that, save with the prior approval of Andbell, it would not create or issue securities (including equity) or debt instruments which would result in the holders of such securities or debt ranking ahead of, or equal to, Andbell and Diverso's Loan Notes.

26. The last published financial statements of TMO, to 31 December 2011, show accumulated losses of £23,592,000. The notes to those financial statements emphasise that TMO's continued operational existence was dependent upon fundraising. By the time of its administration, TMO had unsecured debts of £6,859,089.

27. I have already referred to some of TMO's investors and creditors over the years, but I should now identify the key entities and individuals:

    i) Diverso, an investment vehicle for Mr Stephen Edkins ("**Mr Edkins**") and Mr Jonathan Glen ("**Mr Glen**") and holder of convertible Loan Notes issued by TMO.

    ii) Sinoside, a BVI company acting as an investment vehicle for Messrs Edkins and Glen. In May 2009 and November 2010, Sinoside made substantial investments in TMO. By the date of the EGM, Sinoside held 66,241,349 shares in TMO, approximately 20% of TMO's issued share capital.

    iii) Andbell, a Norwegian company owned by the family of Mr Kristoffer Andenaes ("**Mr Andenaes**"). Andbell was a major shareholder and Loan Note holder in TMO. By the date of the EGM, Andbell held 34,650,735 shares in TMO, approximately 10% of its issued share capital.

    iv) James ('Jock') Miller ("**Mr Miller**) a former director and chairman of TMO. By the date of the EGM, Mr Miller held 30,223,949 shares in TMO, approximately 9% of its issued share capital.

    v) Presnow Limited ("**Presnow**") a company owned by a wealthy Argentinian family and represented by Mr Anthony Parker ("**Mr Parker**") and Mr Gonzalo Caraballo ("**Mr Caraballo**") of Beagle Partners LLP, an investment advisory company. The contact at Presnow was Mr Pryor ("**Mr Pryor**"), who was based in Sao Paolo. By the date of

the EGM, Presnow held 27,900,000 shares in TMO, approximately 8% of TMO's issued share capital.

vi) Rock (Nominees) Limited ("**Rock Nominees**"), a nominee investment company managed by Charles Stanley & Co Limited ("**Charles Stanley**") an English company providing wealth management services. Hugo Akerman, a director at Charles Stanley ("**Mr Akerman**"), managed Rock Nominees' investments. By the date of the EGM, Rock Nominees held 9,035,525 shares in TMO, approximately 2.75% of its issued share capital.

vii) St Peter Port Capital Limited ("**St Peter Port**"), a Guernsey based venture capital fund. By the date of the EGM, St Peter Port held 3,598,125 shares in TMO, approximately 1% of its issued share capital.

The Director Defendants

28. Messrs Yeo, Weaver and Reeves were all appointed directors of TMO pursuant to service agreements, as follows:

i) on 24 November 2010 Mr Yeo was appointed to act as a non-executive director of TMO. From the date of his appointment until TMO entered administration on 19 December 2013, Mr Yeo acted as the Chairman of TMO's Board. He formally resigned as a director on 8 February 2017.

ii) on 14 May 2012 Mr Weaver was appointed director and Chief Executive Officer of TMO, a position he held until TMO entered administration.

iii) on 27 February 2013 Mr Reeves was appointed to act as a non-executive director of TMO from 1 March 2013. He ceased to have any active involvement with TMO when it entered administration and resigned as a director on 15 October 2018.

29. Mr McBraida is the principal owner and director of McBraida Holdings Limited. He was appointed a director of TMO on 19 June 2013 in circumstances described further below, a position he held until 16 November 2015. It is common ground that he was an independent non-executive director.

30. On various different dates, Mr Reeves and Mr McBraida (on his own account and through McBraida Holdings Limited) each invested in TMO in both equity and Loan Notes.

Mr Audley

31. Mr Audley is a longstanding friend of Mr Reeves. In early 2006, when Mr Audley was a partner at the US law firm Faegre & Benson ("**F&B**"), Mr Reeves introduced him to TMO, which became a client. Mr Audley was the partner responsible for the relationship and the principal point of contact for TMO. When Mr Audley left F&B in 2008 to go to Olswang LLP ("**Olswang**"), TMO followed, remaining a client of Olswang until TMO entered administration.

32. Over the course of acting for TMO as a partner in the company law department at Olswang, Mr Audley became very familiar with the legal and capital structure of the company. He drafted TMO's Articles of Association and amendments thereto and was well versed in the contracts to which TMO was a party. Between 2009 and 2011, Mr Audley (on his own account and through his personal pension plan) also invested in TMO as a shareholder and a subscriber for Loan Notes.

33. In July 2011, Mr Audley retired from the Olswang partnership, becoming a consultant and so continuing to advise clients as before. This arrangement continued until his full retirement in April 2017.

34. At a TMO Board meeting on 16 April 2013, Mr Audley presented a proposal to the Board that was recorded in the minutes as an offer of "legal representation to the company". The Board approved the proposal and on 22 April 2013, Mr Audley entered into a consultancy agreement with TMO ("**the Consultancy Agreement**").

35. Until closing submissions, the proper interpretation of the Consultancy Agreement was in dispute, with Mr Audley relying upon its express wording to support his pleaded case that he was not required to give, and did not give, legal advice under the Consultancy Agreement. However, that case has now been abandoned, and it is accepted by Mr Audley that the services provided by him under the Consultancy Agreement included legal advice.

Funding Issues November 2012-February 2013

36. By late 2012, TMO was on the brink of administration and was receiving regular advice from Mr Zelf Hussain, ("**Mr Hussain**") a licensed insolvency practitioner and a partner at PwC, regarding the possibility of insolvency and the potential need to appoint administrators. Substantial interest payments were due on the Loan Notes and TMO was not generating any revenue to enable it to service this debt. The very existence of the Loan Notes, requiring regular interest payments by TMO, was proving a disincentive to investors who were anxious not to see their investment used to pay off existing debt. Furthermore, owing to the terms of the Loan Notes, TMO could not obtain unsubordinated loans without the consent of the noteholders. There appears to have been, what a number of witnesses described as, "investor fatigue".

37. Mr Yeo made it clear to shareholders in a letter dated 30 November 2012 that if the most recent funding round proved unsuccessful, management would have to decide whether TMO should be placed into administration.

38. On 31 December 2012, interest of £80,000 was paid out to some of the Loan Note holders, but Diverso, Andbell and their associates agreed to defer their interest payments of in excess of £300,000 until 31 January 2013 to give the Board of TMO time to consider its options. Discussions then took place with TMO's largest shareholders and creditors, including Messrs Glen and Edkins as directors of Sinoside and Diverso, Mr Andenaes as director of Andbell, Mr Parker as representative of Presnow, Mr Miller and Mr Reeves, with a view to finding an alternative to administration.

39. The discussions culminated in a restructuring deal (the "**January 2013 Restructuring**") which was approved by the Board of TMO on 29 January 2013. In summary, there were to be two stages to this deal. Stage one involved the provision of immediate funds

to enable TMO to continue trading solvently and to start the process of restructuring the debt owed pursuant to the Loan Notes. Stage two addressed the longer term financial future and consequential growth of TMO which would involve TMO making an offer to raise up to £6 million from shareholders by the issue of Ordinary Shares at 4p per share.

40. At the heart of the January 2013 Restructuring was the agreement by the Loan Note holders that for every £1 raised in the proposed fundraising round, £1.25 of principal outstanding on the Loan Notes would be subject to automatic conversion into Ordinary Shares at 4p per share, thereby freeing TMO from its debt under the Loan Notes and from its substantial interest payments. At the same time, Diverso and Andbell agreed to surrender their down round protection.

41. On 8 February 2013, Sinoside and Mr Gary Carlisle ("**Mr Carlisle**"), an existing shareholder who appears to have been operating as leader of a syndicate of co-participants, each provided irrevocable undertakings by letters to TMO that if by 31 May 2013 (the closing date for the proposed fundraising round) TMO had not received a minimum of £3 million in cash, they would subscribe at 4p per share for shares up to a maximum of £3 million, enforceable *pari passu* between them (together the "**Underwriting Agreement**"). Sinoside's obligation to release the underwritten amount to TMO by no later than 7 June 2013 was conditional upon it first receiving written confirmation from TMO of TMO's receipt of £1.5 million from Mr Carlisle.

42. Sarum Partners LLP ("**Sarum**"), a firm of corporate finance brokers, was retained to act as lead brokers in respect of the fundraising. On 20 February 2013, TMO notified shareholders of (i) the failure of the October/November 2012 fundraise, (ii) the January 2013 Restructuring and (iii) the planned new £6 million fundraise.

43. At a Board meeting held on 27 February 2013, Messrs Andenaes and Glen (together with Mr Reeves) were appointed as directors of TMO in furtherance of the January 2013 Restructuring. The Board of TMO now consisted of Messrs Yeo, Weaver, Reeves, Glen and Andenaes.

44. By a deed of variation dated 5 March 2013, the Loan Notes were amended so that, upon the issue of new shares in TMO, they automatically converted into shares in accordance with the January 2013 Restructuring. At Schedule 3, clause 4(f)(iii), TMO undertook not to issue shares at a price of less than 4p without the consent of the Loan Note holders.

The development of Business Plans for TMO in 2012/2013

45. Since the date of his appointment in May 2012, Mr Weaver had been looking to develop a business plan designed to ensure the continued survival of TMO by way of a successful commercial offering.

46. At the first Board meeting attended by Messrs Andenaes, Glen and Reeves as new directors, on 27 February 2013, Mr Weaver presented a Business Plan document to the Board designed to move TMO towards commercialisation. The strategy identified in the plan was presented in what he described as four units: (i) the conversion of the PDU to a biochemicals production facility that could generate revenue from the sale of products (the "**PDU Business Option**"); (ii) the development of an advanced Anaerobic Digestion ("**AD**") business; (iii) the development of a 2G bioethanol conversion plant in Brazil; and (iv) the development of a 2G bioethanol conversion plant in China.

47. There is some dispute between the parties as to the extent to which Mr Glen was involved in producing this business plan. The Board minutes record that Mr Glen expressed the opinion that the biochemical route should be explored as ethanol subsidies were being taken away and second generation plants were difficult to finance. He took the view that "a business strategy of AD and biochemical is viable".

48. Throughout the Spring and Summer of 2013, Mr Weaver and his technical team at TMO were engaged in investigating each of the options identified in the Business Plan.

49. At a Board meeting on 4 July 2013, Mr Weaver and Paul Bennett ("**Mr Bennett**"), TMO's Chief Technical Officer, reported with optimism on a recent trip to Brazil, making it clear that the development of a 2G bioethanol plant at a facility in Santa Maria (known as Usina Santa Maria) was viable and should be pursued subject to funding. Current opportunities in China would, however, require disproportionally more resources and investment and were not recommended. As for the PDU Business Option, whilst various strategies had been explored to produce high value biochemicals at the PDU, the preferred choice was the production of Poly Lactic Acid ("**PLA**"), a biodegradable plastic for which the primary market was food packaging and plastic cups. A £3 million capital expenditure budget was required for modifications to the PDU "to debottleneck the facility and allow maximum lactic acid production". It was recommended that the Board should create a PDU business entity and that a PDU test programme should be put together for process validation and to facilitate the raising of project finance. As director of Andbell, Mr Andenaes sought more detail on the issue of how project finance would be raised for the PDU Business Option, an issue which it was agreed would be dealt with following the meeting.

The May Fundraising

50. In a circular dated 10 May 2013, TMO made an offer of new ordinary shares to raise the proposed £6 million pursuant to the January 2013 Restructuring at 4p per share (the "**May Fundraising**").

51. Unfortunately, however, this initiative proved unsuccessful. At a Board meeting on 29 May 2013, Mr Weaver reported that technically the funding book would close on 31 May 2013, that TMO had £238,000 in the bank and that if the Underwriting Agreement with Sinoside and Mr Carlisle had not been in place "the Company would technically be insolvent". At a further Board meeting held at 4.30pm on 31 May 2013, it was agreed by the Board to issue a notice to call on the Underwriting Agreement whilst at the same time to continue discussions with Sinoside and Mr Carlisle.

52. A notice was duly sent to Sinoside and to Mr Carlisle on the same day, informing them that in circumstances where TMO had received only £253,465.60 pursuant to the fund raising, the shortfall of cash was £2,746,534.40 and they were now each obliged to subscribe for 34,331,680 offer shares, "being such number of Offer Shares as have an aggregate value, at a price of 4p per share, of £1,373,267.20, being the amount required, pro rata between you, to bring the total raised under the Offer to £3,000,000".

53. Unfortunately, Mr Carlisle did not fulfil his obligations under the Underwriting Agreement and, accordingly, Sinoside took the view that the condition precedent to fulfilment of its obligations had not been met and it refused to provide any funding. TMO was left yet again in a parlous financial position; the relatively small amount of money

raised during the May Fundraising had to be held in escrow as the subscriptions were made on the basis that the underwriting commitments of Sinoside and Mr Carlisle would be met.

54. In June, August and again in September 2013, interest on Loan Notes was paid out as shares.

Offers of Funding from Sinoside/Diverso and Mr Edkins

55. From the end of May 2013 onwards, Mr Edkins (through Diverso and/or Sinoside) began to make a series of offers to invest money into TMO which all involved the appointment of Mr Edkins to the Board. By 18 June 2013, Diverso was offering to subscribe for 7,500,000 shares at 4p per share for a subscription of £300,000 on conditions which included the removal of Mr Reeves and the appointment of Mr Edkins as Interim CFO, a proposal which would have ensured that Diverso and Sinoside, the largest shareholders and joint largest Loan Note holders, obtained control of the Board.

56. At a Board meeting held on 19 June 2013, the TMO Board (with Mr Glen abstaining) decided to reject these offers and to accept instead an investment from Mr McBraida and Mr Carlisle in the sum of £460,000 ("**the McBraida Investment**"), which carried with it a condition that Mr McBraida should join the Board. This investment resulted in some Loan Notes being converted into shares.

57. Thus from 19 June 2013, the Board comprised Messrs Yeo, Reeves, Weaver, McBraida, Glen and Andenaes.

58. Throughout July 2013, TMO's funding position continued to cause concern and the Board continued to engage in discussions with Mr Edkins. At a Board meeting on 9 July 2013, the Board discussed Mr Edkins' latest proposal. During the course of the discussion, Mr Glen expressed the view that Mr Weaver was "a fantastic CEO and had got things moving in the right direction". Mr Andenaes stated that he thought the share price should be lowered to 1p "which would help with the conversion of the loan notes". Mr McBraida asked Mr Andenaes if the reason the Loan Note holders were not "putting their hands in their pockets" was that they wanted to pick up shares at 1p. The minute then records that Mr Andenaes said "he was not interested in the Company he just wanted his money back. Mike stated that was not an answer to his question. Kristoffer responded vigorously stating that he had absolutely no interest in the company" (an exchange which was confirmed in an email of the same date with the subject heading "To Non-Conflicted Board Members" from Mr Weaver to Messrs Reeves, Yeo, McBraida and Audley).

59. Also at the 9 July 2013 Board meeting, there was a discussion about a potential restructuring "to create a new entity for the PDU". Mr Glen expressed the view that a decision on this should wait until there had been a proper review of the proposal together with a third party independent review. However, in circumstances where TMO was unable to commit financially to conversion of the PDU, the meeting appears to have concluded that it was not in a position to commission an independent report. Mr Andenaes stated "that he would not allow company assets to be divested as this is the security for his loan notes". Following some further discussion the minutes record that Mr Andenaes again stated that "he was not interested in the company only his position and the PDU represented the only material asset that the company has, he therefore wants it to stay within the company".

60. At a Board meeting on 31 July 2013, attended by Mr Hussain of PwC, it was recorded that TMO had only £150k in cash "that would last 2 weeks". The Board agreed to wait for a further proposal from Mr Edkins before a final decision was taken as to whether it had enough money to continue as a going concern. Mr Hussain advised that if the Board was not comfortable that further money was coming in then it should appoint an administrator.

61. Between 31 July and 6 August 2013, Sinoside and Andbell made a number of joint proposals culminating in a financing proposal dated 6 August 2013 (the "**Sinoside/Andbell Proposal**") whereby Sinoside agreed to subscribe for 9,375,000 ordinary shares at 4p per share in the sum of £375,000 on terms which included (1) a change of Board control; (2) a revised fundraising round of £2 million being pursued (to be underwritten by Mr Andenaes and his family up to £1million at 2p per share) and (3) changes to TMO's articles to prevent further appointments to the Board without Sinoside's express written consent.

62. On 6 August 2013, the Board considered the Sinoside/Andbell Proposal alongside an unconditional investment offer from existing shareholders spearheaded by Mr Reeves to invest £500,000 for shares at 4p ("**the Reeves Offer**"). Mr Hussain was again present at this meeting and provided advice to the Board on the competing offers. In circumstances where Mr Andenaes made clear at the meeting that he was not prepared to waive the conditions attached to the Sinoside/Andbell Proposal, the Board accepted the Reeves Offer albeit agreeing to make it clear to Mr Edkins that this should not cut across his proposal to raise £2million in Brazil. Both Mr Andenaes and Mr Glen voted in favour of the Reeves Offer.

The Appointment of VSA Capital Limited

63. Throughout the summer of 2013, TMO continued its efforts to raise funds. On 9 August 2013, it retained VSA Capital Limited ("**VSA**") as its financial adviser and broker in connection with the ongoing process of raising equity amongst a broader spread of potential investors (the "**VSA Retainer**"). Andrew Edwards of VSA ("**Mr Edwards**") was appointed to manage the project. Pursuant to the VSA Retainer a sales commission was payable to VSA by TMO "on completion of the Transaction (defined in the Agreement as "the proposed equity fundraising") equal to seven per cent of the aggregate value, calculated by reference to the issue price, of any new securities subscribed by investors introduced directly or indirectly by VSA". The sales commission was payable in cash and ordinary shares in TMO on a 50:50 basis.

64. At a Board meeting on 28 August 2013, Mr Weaver reported that the "road show" for the new VSA-led fund raise was due to start on 16 September 2013. He reported that there was a need to raise £8.5 million to take TMO through to 2015 and to trigger the Loan Note conversion.

65. By September 2013, Mr Weaver had entered into financing discussions (following an introduction by Mr Carlisle) with three financial advisers by the names of Henry ('Harry') Kerr ("**Mr Kerr**"), Benjamin Lloyd ("**Mr Lloyd**") and Jason Brain ("**Mr Brain**"). These three advisers appear to have been based in Tetbury, Gloucestershire and were loosely described at the time by Mr Reeves as "the Tetbury Three". Mr Lloyd and Mr Brain purported to represent various high net worth individuals, including Mr Elton John ("**Elton John**"). Mr Kerr was a qualified chartered accountant with an apparently

established reputation as a financial adviser. His companies, Market Place Financial Services Limited ("**Market Place**") and Avalon Investment Services Limited ("**Avalon**") were regulated by the Financial Conduct Authority.

66. There is a dispute between the parties as to the extent to which there was a connection between Messrs Kerr, Lloyd and Brain and thus the extent to which failed attempts at fundraising on the part of the latter two should have caused the Board to approach offers from Mr Kerr with an increased level of suspicion. I shall return to this in due course.

The Requisition

67. I shall need to examine the events occurring in the weeks leading up to the EGM, together with the respective perceptions and motivations of the Director Defendants in detail for the purposes of this judgment (and shall return to this in a later section), but for present purposes I record that the Director Defendants' case is that, during this period, they engaged in strenuous efforts to obtain further funding, that being at all times their main priority in circumstances where TMO continued to be on the brink of insolvency. Amongst other things, this involved them exploring the potential for a substantial investment from Elton John (an investment that ultimately never materialised). Save where the contrary appears, all dates referred to in the remainder of this judgment are dates in 2013.

68. In early September, a dispute arose between the directors of TMO over the wording of a circular (the "**September Circular**") to be sent to shareholders reporting on the development of TMO's business strategy and the intended fundraise. Messrs Glen and Andenaes objected to the wording of certain parts of the September Circular and refused to put their names to it in the form approved by the Director Defendants.

69. On 6 September, Sinoside requisitioned a General Meeting of TMO's shareholders for the purpose of considering resolutions (1) to remove Messrs Yeo and Reeves as directors of TMO and (2) to appoint Mr Edkins as a director ("**the First Requisition Notice**"). The reasons for seeking these changes to the Board, which TMO says were entirely genuine and legitimate, were identified in a document referred to as the "**Sinoside Statement**" as:

> "- mismanagement of the proposed £6 million fundraising round, including a poor choice of both broker and of our co-underwriter with no due diligence as to that underwriter's ability to meet his underwriting commitment; and
>
> - Our understanding that the board intends to launch a further fundraising round without any clear view that the company has sufficient funds to meet its obligations to the end of the offer period for such a round"

70. It is the Defendants' case that Sinoside's true motive in issuing the First Requisition Notice was (i) to interrupt TMO's efforts to raise funds, thereby preventing TMO from securing investment from any source other than Diverso, Sinoside, Andbell and their related entities; and (ii) to allow Diverso, Sinoside, Andbell and their related entities to seize control of TMO and ultimately to take the benefit of the TMO Business and Assets

at low cost, whether by diluting TMO's share capital or by procuring a pre-pack administration to the detriment of TMO and its shareholders and creditors.

71. The First Requisition Notice was accompanied by a proposal for the immediate injection of £300,000 into TMO in the event of the resolutions being passed. The proposal stated that "We will be issued shares in consideration for this sum at a price equal to that at which investors subscribe for shares in the capital of the company in the further £2million fundraising described below. We will procure subscribers for a further £2million worth of shares at a price set by investor demand. These funds will be in the company within 30 days of the passing of the…resolutions". In addition it was proposed that, in conjunction with the proposed changes to the Board of TMO, Mr Andenaes would be appointed as Chairman of the Board.

72. The driving force behind the First Requisition Notice was Mr Edkins, operating in conjunction with Mr Glen and Mr Andenaes. I shall hereafter refer to these three gentlemen together (with no disrespect intended) as the "**Requisitioners**". From the date of the First Requisition Notice, the Board of TMO met through the Director Defendants. In its evidence in these proceedings, TMO referred to this group as the "Inner Board", suggesting that it had begun to function as a separate and distinct group well before the First Requisition Notice, an allegation which does not seem to me to accord with the reality.

73. A meeting minute dated 9 September records that the Director Defendants met to consider the First Requisition Notice. Concern was expressed that requisitioning an EGM in this way without prior warning in the middle of a fundraising on whose successful outcome the future of TMO depended and while sensitive commercial negotiations were in progress in Brazil and elsewhere was not in the interests of the shareholders and likely to prove damaging to the company's future. It was resolved that letters should be sent that same day to Messrs Glen and Andenaes requesting their resignation from the Board. These letters had the effect under TMO's Articles of Association of removing Messrs Glen and Andenaes from the Board. It is TMO's case that the primary or dominant purpose of the Director Defendants in sending these letters was part of a strategy to cause the resolutions to be defeated and so to maintain their own control of the TMO Board.

74. Also on 9 September, the Director Defendants sent out the September Circular to shareholders informing them of an offer of new ordinary shares to raise up to £6 million (described as an extension to the May Fundraising). In a letter to shareholders included within the September Circular, Mr Weaver reported that TMO was "at a very advanced stage towards agreeing the first Joint Venture Agreement with a Brazilian Sugar Mill operator and the decision has been taken to progress with the conversion of its commercial scale testing unit at Dunsfold [the PDU] into a manufacturing unit for the production of Poly Lactic Acid (to make bio-degradable plastics) subject to securing offtake agreements and the necessary finance for the conversion". The September Circular attached a business update document elaborating in more detail on these business opportunities.

75. On 13 September, an amended requisition notice was provided to TMO by the Requisitioners (the "**Second Requisition Notice**" or "**the Requisition**") which now sought to add further additional resolutions as follows (i) to re-appoint Messrs Andenaes and Glen as directors and (ii) to remove any director appointed pursuant to the Articles between the date of the Requisition and the conclusion of the requisitioned general meeting. I shall refer to the full set of resolutions sought by the Requisitioners as the "**EGM Resolutions**".

76. The Sinoside Statement attached to the Second Requisition Notice had been amended to include additional reasons for seeking changes to the Board which were now said to be

> "…principally
>
> Mismanagement of the proposed £6million fundraising round, including a poor choice of both broker and of our co-underwriter with no due diligence as to that underwriter's ability to meet his underwriting commitment;
>
> The board circulating an attempt to extend the offer originally made to shareholders pursuant to the circular dated 10 May 2013 by means of the business update document, sent to shareholders on 9 September 2013, three days after we had originally requisitioned a general meeting requiring board changes;
>
> We do not believe that the Company has sufficient funds to meet its obligations to the end of the offer period for such a round; and
>
> Further evidence that certain of the directors of the Company are not acting in the shareholders' interests but pursuing their own objectives by requiring the resignation of Mr Glen and Mr Andenaes".

77. The Sinoside Statement in the Second Requisition Notice went on to make the same financial proposals as had appeared in the First Requisition Notice.

78. From the date of the First Requisition Notice, it is the Director Defendants' case that efforts were made to find a compromise with the Requisitioners in the best interests of TMO. This is not accepted by TMO and I shall need to return to this in due course.

79. By 26 September, TMO was once again on the brink of entering insolvency. It had only £53,000 in its bank account.

80. On 1 October, VSA provided TMO with a variation to the original VSA Retainer stipulating that VSA would also act as Financial Adviser to TMO "with the specific remit to advise the Company in connection with" the Requisition. VSA had also become involved in trying to mediate between the Requisitioners and the Director Defendants.

The Board's response to the Requisition

81. On 4 October, the Board issued a circular to shareholders ("**the October Circular**") enclosing the Sinoside Statement from the Second Requisition Notice. The October Circular bore the following recommendation from the Director Defendants on its front page:

> "THE DIRECTORS ARE OF THE STRONG BELIEF THAT THE RESOLUTIONS ARE NOT IN THE BEST INTERESTS OF THE COMPANY AND SHAREHOLDERS AND THEREFORE UNANIMOUSLY RECOMMEND THAT SHAREHOLDERS VOTE AGAINST ALL THE RESOLUTIONS" The October Circular gave notice of a

> General Meeting of TMO to be held at the offices of Olswang on Monday 28 October at 10am and enclosed a form of proxy for use in connection with the meeting. TMO alleges that the October Circular was deliberately misleading and prepared in bad faith and for an improper purpose by each of the Director Defendants.

Events leading up to the EGM

82. On 17 October, Messrs Weaver, Reeves, McBraida and Audley attended a meeting in Tetbury at the offices of Mr Kerr together with Messrs Brain and Lloyd, at which various possible funding avenues were discussed.

83. On 22 October, Mr McBraida provided TMO with an unsecured loan up to the amount of £200,000 (the "**McBraida Loan**"). The first £100,000 was advanced immediately. The McBraida Loan was subject to Mr McBraida's right to demand immediate repayment if the TMO Board ceased to comprise the Director Defendants. It was routed to TMO via its subsidiary Adeptt Limited ("**Adeptt**") so as not to prejudice TMO's existing creditors.

84. On 23 October, at a meeting between Mr Weaver, Mr Audley and Mr Kerr at Mr Kerr's offices in Tetbury, TMO entered into a subscription agreement with Market Place for the issue of 75,000,000 ordinary shares at 4p per share for the aggregate price of £3,000,000 ("**the Market Place Subscription**"). The shares would be issued for cash fully paid, pursuant to the Companies Act 2006 ("**CA 2006**") section 583, and Market Place undertook to pay this sum by no later than 23 October 2015. The agreement included an irrevocable undertaking from Market Place to vote against the EGM Resolutions at the EGM. It is the Director Defendants' case that Mr Kerr promised at this meeting that the cash would be forthcoming in the imminent future and that in any event £500,000 would be paid by the end of the month. TMO says that the Market Place Subscription was entered into with the sole or dominant (improper) purpose of ensuring that new shares would be issued which could then be voted to defeat the EGM Resolutions.

85. At the same time, and in satisfaction of a condition precedent to the Market Place Subscription, it was agreed that Mr Kerr would become Finance Director of TMO on a salary of £200,000 per annum. He was duly appointed by the Board of TMO on 25 October. It was TMO's case at trial, unheralded previously in any pleading, that this agreement was a bribe to Mr Kerr designed to ensure that he signed the Market Place Subscription and thus gave the Board the opportunity to defeat the EGM Resolutions.

86. It is common ground that no money was in fact paid under the Market Place Subscription but that the 75,000,000 shares were swiftly issued and registered, thereby enabling Market Place to vote against the EGM Resolutions, which it did.

87. On 24 October, Mr Weaver attended a meeting with Mr Akerman at Charles Stanley's London offices. It is TMO's case that during this meeting, Mr Weaver made what has been referred to as the "**Immediate Investment Representation**" to which I shall return later. TMO says that Mr Weaver knew this representation to be untrue and infers that it was designed to induce Rock Nominees to vote against the EGM Resolutions. Mr Akerman submitted a proxy vote in advance of the EGM, on behalf of Rock Nominees, voting against the EGM Resolutions.

88. On 25 October, TMO issued 2,625,000 ordinary shares to VSA (the "**VSA Share Issue**"), which the Defendants say they believed to be due under the VSA Retainer by reason of TMO's entry into the Market Place Subscription. TMO again asserts that the Director Defendants effected this allotment of shares for the improper purpose of defeating the EGM Resolutions and maintaining control of the Board.

89. On 27 October 2013, Mr Yeo telephoned Mr Parker. It is TMO's case that, during the conversation, Mr Yeo made what has been referred to as the "**First Cash Received Representation**" to which I shall return. TMO says that Mr Yeo knew it to be untrue and infers that this representation was designed to induce Presnow to vote against the EGM Resolutions, which it did.

The EGM of 28 October 2013

90. At the EGM, the EGM Resolutions were defeated by a majority of 79,131,426. It is TMO's case that during the EGM, Mr Yeo made various statements (including in response to questions posed by Mr Edkins) which impliedly represented to shareholders that £3,000,000 had been received in cash in relation to the recent share subscription. This representation, which is denied by the Director Defendants, has been referred to at the hearing and in TMO's pleadings as the "**Second Cash Received Representation**" and is alleged to have been authorised by the Board. TMO asserts that Mr Yeo knew this representation to be untrue and seeks to infer that this representation was again made with the intention of inducing the shareholders present at the EGM to vote against the EGM Resolutions.

91. By a letter from Mr Yeo dated 7 November (the "**7 November Letter**"), the TMO Board informed shareholders for the first time that payment for shares under the Market Place Subscription "is being made over a period of time", noting that TMO was still very short of cash and that the McBraida Loan facility was most welcome.

92. In an agreement dated 14 November 2013 with Golden Valley Paddocks Limited ("**Golden Valley**"), TMO agreed to employ Golden Valley as a Consultant. The services it was to provide included the services of Mr Kerr as Finance Director of TMO. The engagement was to commence on 1 November 2013. Clause 4 dealt with the subject of fees, providing for a payment of £200,000 per annum. Clause 4.2 made it clear that "Notwithstanding the foregoing, the client shall not be obliged to make any payment until such time as the Company shall have received, after 23 October 2013, not less than £3,000,000 in cash into its bank account in respect of subscriptions for shares on or after that date".

The Andbell Loan Offer

93. On 11 November, Andbell offered to make a standing loan facility of £700,000 immediately available to TMO (the "**Andbell Loan Offer**") so as to prevent TMO from becoming insolvent. This was, however, subject to conditions; namely that Messrs Yeo, Weaver and Reeves resign as directors, that Andbell could appoint two directors of its own choosing and that due diligence be carried out into the current financial state of TMO. This proposed loan facility was an on-demand facility and the funds would be advanced on an unsubordinated basis.

Entry into Administration

94. The Andbell Loan Offer was rejected by the TMO Board on 22 November acting (so TMO alleges) contrary to the interests of TMO and in bad faith.

95. On 13 December Andbell, in its capacity as creditor of TMO, issued an application notice seeking an administration order in respect of TMO. On 19 December, Mr Philip Duffy and Mr Benjamin Wiles of Duff & Phelps Ltd were appointed Joint Administrators of TMO ("**the Joint Administrators**"). It is common ground that as at the date of the administration, £5,587,326 remained outstanding in respect of the Loan Notes.

96. In January 2014, the Joint Administrators decided to sell TMO's business and assets as a going concern. Following a marketing exercise, a sale to Rebio was achieved in consideration for the sum of up to £1,235,907.

97. Rebio is part of a group of companies ("**the Rebio Group**") which includes Rebio Technologies Limited, incorporated in Hong Kong ("**Rebio HK**"), apparently the holding company of the Rebio Group, and a Rebio entity incorporated in Finland ("**Rebio Finland**").

98. The board of Rebio comprises Mr Andenaes, Mr Glen and others and, until 3 August 2015, included Mr Edkins.

The Issues

99. Against that factual background, I turn to the issues.

100. Unfortunately, despite requests from me during the course of the trial, the parties were unable to agree on the outstanding issues for my determination. However, having regard to the pleadings, the list of issues identified in TMO's opening skeleton for trial at paragraph 27 and the correspondence I have seen between the parties following the trial in which they discussed the remaining issues, the issues appear to me to be as follows:

Director Liability Issues:

i) The alleged section 171/fiduciary duty breaches (improper purpose): Did any of the Director Defendants exercise the powers conferred on them as directors of TMO for an improper purpose in breach of the CA 2006 section 171 and in breach of their fiduciary/contractual duties to TMO in any of the three respects alleged at paragraph 74 of the Re-Amended Particulars of Claim (Issues 1(i)-(iii))?

ii) The alleged section 172 fiduciary duty breaches (bad faith/contrary to TMO's interests): Did any of the Director Defendants act in bad faith and contrary to the interests of TMO and its shareholders in breach of the CA 2006, section 172 and in breach of their fiduciary/contractual duties to TMO in any of the seven respects alleged at paragraph 75 of the Re-Amended Particulars of Claim (Issues 2(i)-(vii))?

Liability Issues relating to Mr Audley:

iii) Breach of contract claim: Did Mr Audley act in breach of the Consultancy Agreement with TMO in any of the six respects alleged at paragraph 77 of the Re-Amended Particulars of Claim (Issues 3(i)-(vi))?

iv) Breach of fiduciary duty claim: Did Mr Audley owe a fiduciary duty to TMO? If so, what was the extent of that fiduciary duty and did he act in breach of that duty in any of the six respects alleged at paragraph 77 (read with paragraph 78) of the Re-Amended Particulars of Claim (Issues 4(i)-(vi))?

Causation:

v) The "but for" counter-factual: But for the Defendants' breaches of duty (to the extent that they are made out):

a) Would the EGM Resolutions have been passed?

b) Would the Andbell Loan Offer have been accepted?

c) Would TMO have obtained funding?

d) Would TMO have avoided insolvency?

e) Has Rebio "developed" the TMO Business and Assets for the purpose of producing biochemicals and related products (including high value medical devices) and has Rebio been successful?

Loss and Damage issues:

vi) Valuation of TMO: What is the value that the Business and Assets of TMO would have had, but for the Defendants' alleged breaches of duty?

vii) Adjustments to calculate TMO's loss: What additional adjustments, credits and deductions are necessary to calculate TMO's loss?

Other Defences:

viii) D1-D3 "would have done it anyway" defence: If any of Messrs Yeo, Weaver or Reeves was motivated by improper purposes, would he have taken the same decisions had he been predominantly properly motivated?

ix) D1-D4 section 1157 exoneration: Should the Court relieve any of the Director Defendants from liability under the CA 2006, section 1157 on the basis that they acted honestly and reasonably and ought fairly to be excused?

x) D5 limitation: Is Mr Audley's liability contractually limited to £6,000 by reason of the terms of the Consultancy Agreement?

Relief claimed by TMO:

xi) Relief on TMO's claim: what amount (if any) is TMO entitled to be awarded against the Defendants by way of (1) compensation in equity and/or (2) contractual damages?

(It has been agreed that the assessment of any loss and damage in respect of insolvency costs should be adjourned to the Master or ICC Judge.)

Counterclaim by Messrs Yeo, Weaver and Reeves:

xii) D1-3 Counterclaim: Did TMO act in breach of the service contracts of Messrs Yeo, Weaver and Reeves in failing to obtain appropriate D&O insurance cover in June 2014 and, if so, did that cause any loss to Messrs Yeo, Weaver and Reeves in respect of which they are entitled to relief?

xiii) Relief on D1-3's Counterclaim: Are Messrs Yeo, Weaver and Reeves entitled to (1) insolvency set off; (2) a declaration; and/or (3) an indemnity?

The Evidence

Approach to the Evidence

101. The Court heard from a total of 12 witnesses. In general terms, it is worth noting that these witnesses were all dealing with events which occurred more than 7 years ago, primarily in late 2013. Unsurprisingly in the circumstances, many of the witnesses acknowledged when giving their evidence that they often had no recollection of events outside what was set out in contemporaneous documents or that, even where they had some recollection, it was not always clear.

102. In closing, TMO submitted that, accordingly, when making findings of fact as to the honesty of an individual's actions and motivations I should have regard to observations made in various previous cases as to the fallibility of human memory and the importance of focussing on the contemporary documents as a means of getting at the truth.

103. The starting point is the analysis of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm): [15]-[22]. Leggatt J's observations on the fallibility of human recollection included the following:

i) At paragraph [18]: memory is especially unreliable when it comes to recalling past beliefs, which are revised to make them more consistent with our present beliefs;

ii) At paragraph [19]: the process of civil litigation itself subjects the memories of witnesses to powerful biases because witnesses often have a stake in a particular version of events;

iii) At paragraph [20]: considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial: the effect of the process of preparing to give evidence at trial is (1) to establish in the mind of the witness the matters recorded in his or her own statement and other material (whether they be true or false) and (2) to cause the witness's memory of evidence to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

104. These observations caused Leggatt J to conclude in *Gestmin* that:

> "[22] ….the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at

> all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of the witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

105. The Court of Appeal recently made related observations to those of Leggatt J in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] 4 WLR 112. At [48] Males LJ said:

> "[48] In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including e-mails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence."

106. More recently still in *Martin v Kogan* [2020] FSR 3, the Court of Appeal considered the question again. At [88] Floyd LJ said this:

> "[88] *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed….But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon *all* of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."

107. Floyd LJ went on to refer to *Simetra* as a paradigm example of a commercial case in which "a careful examination of the abundant documentation ought to have been at the heart of an inquiry into commercial fraud".

108. I agree with TMO that in this case, which involves a substantial amount of contemporaneous documents (including Board minutes and email communications) recording the Defendants' conduct over the relevant period, together with extensive allegations of dishonesty, I should adopt a similar approach to that taken in *Simetra*. Whilst the credibility of the witnesses is necessarily in issue, and whilst I appreciate that I must make findings of fact based on all of the evidence (as emphasised in *Martin v Kogan*), my primary focus must be on the state of mind and motivations of the witnesses at the relevant time as revealed by the contemporaneous documents. Once this has been identified, I can then consider the extent to which the witnesses' evidence at trial is consistent or inconsistent with the documents, bearing in mind also that (as Waksman J said in *PCP Capital Partners LLP v Barclays Bank Plc* [2021] EWHC 307 (Comm) at [142]) some witnesses may, for whatever reason, have better (or less fallible) recollections than others. Given the passage of time, it is unlikely to be the case that individual witnesses will be consistently reliable or unreliable, a point I also bear in mind in considering their evidence.

109. In analysing the documents, I accept the submissions made by Mr Morgan in closing, that I must have regard to the whole body of available documents, that I must consider that body of documents holistically and that I should only draw inferences from the documents if those inferences can fairly be drawn on the basis of all of the available evidence. In other words, I should not look at individual documents in isolation and draw inferences from those individual documents, but should stand back and look at the overall story as revealed by the documentary evidence as a whole.

110. However, in so doing, I also accept the submission made by Mr Sutcliffe that I may need to exercise care in assessing the probative value of contemporaneous documents where the writers of the documents may have had reason to mis-state the true position, or at least not to describe it fully. Mr Sutcliffe says that this applies particularly to communications to shareholders, communications with Andbell and Sinoside and self-serving communications from the Director Defendants after the Market Place Subscription defending their position. I bear this in mind when looking at these categories of document.

Inferences from the absence of witnesses

111. TMO points out that it is open to the court to draw adverse inferences from the absence of a witness who might be expected to have material evidence to give on an issue, but who is not called by a party who might reasonably have been expected to call that witness, without any adequate reason being given for his or her absence (see *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, per Brooke LJ at 340).

112. TMO identifies two respects in which this principle is relevant in this case; first that Mr McBraida chose not to call three witnesses from whom he had obtained witness statements, and second that the Defendants simply failed to obtain any evidence from Ms Bramwell, an individual who was, TMO says, in the Defendants' inner circle and so bound to have relevant evidence.

113. The Defendants also seek to rely on this principle, identifying that TMO failed to obtain any evidence from Mr Steven Chang ("**Mr Chang**"), a former director of Rebio who prepared the forecasts which have been central to the experts' analysis of quantum in this case.

114. In the case of Mr Chang, efforts were made during cross examination of TMO's witnesses to discover his whereabouts and what, if any, reason there might be for his absence and, as I shall explain in more detail later, I am therefore prepared to draw appropriate inferences from his absence.

115. However, Ms Bramwell's position appears to me to be rather different. As Mr Morgan correctly points out, as the office holder of TMO, Mr Duffy could have interviewed Ms Bramwell as a former employee, either voluntarily or under sections 235 or 236 of the Insolvency Act 1986. She would have been an obvious candidate for such an interview given her attendance at Board meetings. However there is no information one way or the other as to whether Mr Duffy took this step and in circumstances where TMO did not seek to rely upon her absence prior to closing submissions, the Defendants (understandably) did not seek to cross examine Mr Duffy on the subject.

116. As for why Ms Bramwell was not called as a witness by the Defendants, none of the Defendants was questioned about her absence in cross examination and the Court therefore remains in the dark as to what the reason might be.

117. In circumstances where (i) Mr Sutcliffe did not seek to discover from the Defendants the reasons for Ms Bramwell's absence and (ii) there is no reason why Mr Duffy could not himself have obtained relevant evidence from Ms Bramwell (as to which the Court has no information whatever), I do not consider that it would be fair or just to draw any inferences (against either party) from her absence.

118. As for the three witnesses that Mr McBraida decided not to call, namely Mr Carlisle, Mr Cassidy and Mr Beatson-Hird, these witnesses had all been the subject of witness summonses, but TMO made no objection to those summonses being released upon the indication from Mr Morgan part way through the trial that he no longer required them to give evidence. I am satisfied that Mr Morgan did not expressly put matters on which these witnesses would have given evidence to any of TMO's witnesses. Furthermore, I note that Mr Morgan made a clear concession in relation to Mr Carlisle, that unless someone else called him, it would not be open to Mr McBraida to challenge Mr Edkins' account of what was said during a conversation between Mr Edkins and Mr Carlisle at the end of May 2013. In the circumstances, I do not consider it to be appropriate to draw any inferences from Mr McBraida's decision not to call these witnesses, and I certainly do not consider it to be appropriate to draw the very wide ranging inferences that TMO invites me to draw.

119. By way of an overarching point, it is worth noting that both sides to this dispute appear to have viewed the lead up to the EGM in September/October 2013 as open warfare. As I have said, Messrs Edkins, Glen and Andenaes all spoke of the Director Defendants as the Inner Board and complained that even prior to the enforced resignation of Messrs Glen and Andenaes all three had been side-lined and excluded from playing a proper role in the management of TMO. The Director Defendants and Mr Audley on the other hand clearly viewed the conduct of Messrs Edkins, Glen and Andenaes as akin to that of a

"raiding party", designed purely to take control of TMO at a cheap price and then (potentially) to "flip" it with a view to making a profit.

120. These distinct and differing perceptions of the situation at the time inevitably coloured the evidence that the parties gave and the views they all took as to the conduct of the opposite warring faction.

The Claimant's Evidence

121. Subject to the overarching point I make above, generally speaking I formed the view that (with the exception of Mr Glen) TMO's witnesses were doing their best to give honest evidence with a view to assisting the Court, although I have made some specific points in considering each witness in turn below. Having said that, I agree with the submission made by Mr Collings QC, that:

i) Mr Edkins and Mr Andenaes made the same mistakes concerning which of their lawyers attended the EGM.

ii) Mr Glen and Mr Andenaes made the same mistakes as to their first Board meeting and Mr Glen's prior visit to TMO.

iii) Mr Edkins, Mr Glen and Mr Andenaes all sought in their witness statements to bring Mr McBraida into their description of the "Inner Board" notwithstanding that when cross examined on the subject they all accepted that the allegations against the Inner Board did not encompass any specific complaints against Mr McBraida and that none of them had ever specifically sought the removal of Mr McBraida from the TMO Board.

iv) Each of Messrs Glen, Edkins and Andenaes finished his witness statement (in Mr Glen's case his first witness statement) with the heading "Counterfactual" and proceeded to engage in an exactly similar analysis as to what would have happened had the EGM Resolutions been successful (although Mr Andenaes did not appear to understand the term "counterfactual" and certainly did not use it). This feature of TMO's evidence appeared to me to undermine the evidence of these witnesses on the counterfactual – which is in any event something of a speculative and hypothetical exercise. Often their evidence as to what would have taken place in the counterfactual appeared to be significantly influenced by the steps they had in fact each taken in connection with their involvement with Rebio - yet as I shall explain, I am not convinced that this necessarily provides a clear indication of the steps they would have taken in connection with TMO had they gained control of the board in the late Autumn of 2013. In short, I have concluded that I must look very carefully at the evidence of each witness as to what would have taken place in the counterfactual, testing it against the available contemporaneous evidence.

Mr Edkins

122. Mr Edkins is a professional investor who invests in companies and business opportunities across the world with a particular emphasis on early stage technology companies. Mr

Edkins provided one witness statement for the Court and he gave evidence remotely from Madrid.

123. I formed the impression that Mr Edkins was a careful and honest witness, who listened to the questions he was being asked and generally sought to answer them accurately.

Mr Glen

124. Mr Glen is also a professional private investor, whose interest lies in early stage technology companies. Mr Glen gave evidence remotely from Spain.

125. Mr Glen provided four witness statements for the purposes of these proceedings.

126. I did not find Mr Glen's witness statements to be particularly satisfactory in circumstances where they plainly contained inaccuracies (admitted by Mr Glen during the course of his cross examination), the most serious of which related to an inexplicable error over his involvement in what had happened to Mr Weaver's laptop. Mr Glen does not appear to have read his first statement carefully as his name was wrong (and remained wrong on his second statement) and his address was also erroneous.

127. Furthermore, I did not find Mr Glen an entirely helpful or straightforward witness during his oral evidence. From time to time he appeared to me to seek to avoid answering direct questions and, to my mind, he came across as a consummate salesman, keen to create the most optimistic impression possible of the present and future performance of Rebio, including by apparently exaggerating its global importance, how much it was producing, who its competitors might be and the smoothness of the paths to regulatory approval, market share and financial success. I accept the submissions made by Mr Morgan, on behalf of Mr McBraida, that in this regard, at least, I should treat Mr Glen's evidence with considerable care and subject it to appropriate scrutiny insofar as it is relevant to the question of causation and the quantification of TMO's claim.

Mr Andenaes

128. Mr Andenaes is chairman of Andbell, his family's company, which has significant investments in real estate, shipping, equities and bonds and venture capital. He is a professional private investor, investing in companies and business opportunities across the globe. Mr Andenaes provided one witness statement in support of TMO's case.

129. I formed the impression that Mr Andenaes gave credible and honest evidence, consistent with his witness statement. However, in common with Messrs Glen and Edkins, he took a particular view of his interactions with the TMO Board which came across strongly in his evidence.

Mr Akerman

130. Mr Akerman is director of London Investment Management for Charles Stanley. He is also a Chartered Fellow of the Chartered Institute for Securities and Investment. He gave his evidence remotely.

131. Mr Akerman was a transparently honest and credible witness, whose oral evidence (which in the end did not quite come up to proof by reference to his witness statement) I accept. During his cross examination by Mr Weaver he responded with care and

courtesy, exhibiting a clear desire to be as accurate as possible in the evidence he gave to the Court together with a rather charming and gentlemanly reluctance to accuse Mr Weaver of any attempt to mislead him (notwithstanding the terms of his witness statement). I shall return to this in due course.

Mr Parker

132. Mr Parker is an investment adviser and member of Beagle Partners LLP, an investment advisory company. He has spent over 30 years working in investment banking. In 2004, he co-founded Beagle, which specialises in investments with high capital growth potential. His particular area of interest is biotech businesses and Beagle has invested in companies in all stages of development.

133. Mr Parker seemed to me to be a cautious witness, with a patchy recollection of events, something he frankly acknowledged in his witness statement. Nevertheless, I had no reason to suppose that Mr Parker was anything other than an honest witness. It transpired during his evidence that he in fact had contemporaneous notes (the "**Parker Notes**") of some interactions he had been involved in at the relevant time with the Director Defendants (which he referred to as "stream of consciousness" notes) but had not produced them when preparing his witness statement.

134. The Parker Notes were subsequently produced (although Mr Parker was not recalled to address them) and TMO sought to rely on various of the notes in its closing submissions, having had the particular notes on which it relied transcribed for that purpose. Mr Collings also sought to rely on one of the notes. So as not to disadvantage the Defendants, I directed that TMO should provide transcripts of all of the Parker Notes to the Court following the trial and I have read them in full during the preparation of this judgment.

Mr Duffy

135. Mr Duffy is a managing director of Duff & Phelps Limited and a licensed insolvency practitioner. Together with Benjamin Wiles he was Joint Administrator and was, at the time of the trial, Joint Liquidator of the property and affairs of TMO, having been appointed on 8 December 2014 under the provisions of the Insolvency Act 1986.

136. Mr Duffy gave his evidence in person in circumstances where at the outset of the trial he had been under the impression that he was facing a serious allegation from Mr McBraida that he had acted in breach of fiduciary duty in disposing of the Business and Assets of TMO at a substantial undervalue. However, in the event, this allegation was not pursued and Mr Duffy's evidence was considerably shortened. Although his recollection of events was hazy, I had no reason to form the view that Mr Duffy was anything other than an honest witness.

The Defendants' Evidence

137. Before considering the evidence of each of the Defendants in turn I should make some general observations about their collective evidence.

138. The statements of the Director Defendants were clear and consistent in asserting that they had been seeking to raise money at all times for the sole purpose of funding TMO, that

they had not acted with any improper purpose and that they had not sought to mislead anyone. Mr Audley's statement was to the same effect. Many of them continued staunchly to maintain this position under fierce cross examination from Mr Sutcliffe. However, as I shall explain, on a close examination of the documents, their evidence does not ring true in a number of respects and there were moments in the cross examination of each of them when Mr Sutcliffe exposed the flaws in that evidence.

139. I have no doubt that in the Summer and early Autumn of 2013 the Director Defendants were all focussing on the desperate need to raise funds for TMO, albeit a need that ran for some time in parallel with their obvious desire to defeat the EGM Resolutions. However their desire to vanquish the Requisitioners and retain control for themselves appears to have intensified as the date of the EGM drew closer, such that by the time of the Market Place Subscription, it had, in my judgment, come to assume a far greater short term significance. None of the Director Defendants (with the possible exception of Mr Reeves) was truthful about this, perhaps because they had genuinely convinced themselves (and each other) long after the event that they had been acting properly, or perhaps because, as TMO contends, they had all "learned their lines" about the way in which to respond to particular questions.

140. I agree with TMO that the "learned" quality of the Defendants' evidence was particularly striking in the testimony of Messrs Yeo, Weaver, Reeves and Audley that Mr Kerr could credibly be relied upon as a source of funds because he was "FSA registered" (Mr Reeves), "a FCA regulated chartered accountant" (Mr Weaver), "FCA regulated" (Mr Yeo) and subject to "FCA regulation" and "FCA status" (Mr Audley). This appeared to follow to the letter the advice given by Mr Audley to the Board at the meeting on 23 October that in the event of Sinoside suggesting that the Market Place Subscription was a "mere contrivance", the Board could say "they are FSA registered and have a track record of raising money".

141. In summary, I have no doubt that I must treat the Defendants' evidence with considerable caution. However, I now turn to address each of the Defendants in the order in which they gave their evidence.

Mr Reeves

142. Following a successful career in the employee benefit consulting sector, Mr Reeves has been retired for a number of years but remains active as an investor and/or director in a few small private companies. He was first to give evidence and I agree with TMO that he was surprisingly candid about the Director Defendants' actions and motivations, notwithstanding evidence to the contrary given in his witness statement.

143. That Mr Reeves frequently appeared to agree with damaging propositions made by Mr Sutcliffe in cross examination was recognised by Mr Collings in closing when he suggested that Mr Reeves' use of the words "Yes" or "I agree" in response to questions posed in cross examination in fact meant merely that he was following what was being said, rather than that he was agreeing with it. Mr Collings went so far as to produce a schedule identifying Mr Reeves' "apparent admissions" and seeking to contrast them with denials made to further questions and/or seeking to place the "apparent admission" in a wider context. This prompted TMO to produce a supplemental note at the outset of its closing reply submissions (the "**TMO Supplemental Note**") robustly criticising this

approach, submitting that the schedule (i) was itself "highly misleading" in various respects and (ii) effectively invited me to disbelieve the version of events admitted by Mr Reeves in the witness box.

144. For present purposes I do not need to resolve the dispute over whether Mr Collings' schedule was misleading. In considering the evidence of every witness, including Mr Reeves, it is, of course, important that I look at that evidence as a whole and in its proper context, but equally that does not mean that I can simply ignore admissions made by the witness. I note in this context that I warned Mr Reeves on a number of occasions about the need to answer the questions put to him and I also made it clear to him that if he disagreed with Mr Sutcliffe, he should say so.

145. Ultimately I formed the very clear impression at trial that, whilst trying from time to time to stick to the Defendants' case, Mr Reeves was often unable to do so and this resulted in him making a number of significant concessions which gave the lie to various key aspects of that case. A review of the transcript of his evidence for the purposes of preparing this judgment confirms that impression.

146. Examples of these concessions include Mr Reeves' acknowledgement that:

i) the shared objective of the Board was to win the EGM ("Yes, of course");

ii) the reason an investment was needed was to generate votes to defeat the EGM; and

iii) the only purpose for issuing shares to Mr Kerr without taking payment was so that those shares could be voted at the EGM.

Mr Weaver

147. Mr Weaver is a Chartered Engineer. He was awarded Director of the Year by Deloitte in 2013 and has held senior positions with British, American, Indian, Ukrainian, Canadian, Singaporean and Hong Kong companies. He has been Chairman of two international companies and CEO or Managing Director of three international companies. He served as Managing Director (Europe) for BP Gas Power and Renewables prior to joining TMO.

148. Mr Weaver was an unfailingly polite witness but I am afraid that he appeared to me on occasions to wish to avoid answering straightforward questions. I agree with TMO that his evidence was sometimes internally inconsistent and vague and that at times it was not truthful.

149. A particularly important example of this was his oral evidence that Mr Kerr made an oral promise to the Board to obtain £500,000 for TMO, which came to assume critical importance in his assessment of the reasonableness of the Board's reliance on Mr Kerr. Yet, as TMO points out, the reference to the £500,000 figure in his witness statement is not reflected in the Board minutes of the 23 October which immediately followed the signing of the Market Place Subscription and records only the vague assurance that Mr Kerr "seems to be saying he expected to have some of the money flowing in the next couple of weeks".

150. I agree with TMO that it is simply not credible that in circumstances where the Director Defendants' insist that their focus was on fundraising for TMO, a specific promise of this sort would not have been mentioned at that meeting. I also consider that it is not credible that, despite the apparent importance of this promise, Mr Weaver (a very experienced director) apparently accepted without demur or suspicion Mr Kerr's refusal to put his promise in writing: "He didn't want it recorded in the agreement".

151. During his cross examination, Mr Weaver sought to get around the obvious difficulty created by the absence of any mention of the £500,000 promise in the Board minutes by asserting that he had already told the other Director Defendants of the promise from Mr Kerr over the telephone before he left Tetbury and he stated that the "loose wording" in the Board meeting in fact reflected that. However none of the other Director Defendants mentioned this (apparently key) piece of information in his witness statement. Furthermore, if Mr Kerr had genuinely made such a promise, I would have expected Mr Weaver to be chasing him to honour that promise in the days immediately following the EGM. Yet instead, Mr Weaver sent an email to Mr Kerr on 29 October updating him on the outcome of the EGM and saying "We now urgently need to get some money in the bank, is it possible to get at least £500k from the new shares this week?". This appears to be the genesis of the £500,000 figure mentioned in Mr Weaver's statement, but the email does not read as if Mr Weaver is chasing up a promise; on the contrary it reads as if he is suggesting a figure to Mr Kerr which would be sufficient to enable TMO to continue to meet its debts and, as he explains in the email, would enable TMO to show Sinoside that it had money in its account.

152. In this context I note also the contemporaneous email evidence that in the face of pressure from Andbell and Sinoside to show that some money had been received, Mr Weaver sought, in conjunction with Mr Kerr, to arrange a £500,000 loan from a Mr Paul Nixon to Market Place which would then be lent for a short time to TMO in order to create the false impression that Market Place itself had obtained some funds which it had provided to TMO. In email exchanges between Mr Kerr and Mr Weaver on 31 October, Mr Kerr said: "My understanding is that Paul Nixon is arranging to put in £500,000 just for a short time so you can show to Sinoside that some additional cash has come in. You probably know more about this than me. In the meantime I am working to get some more genuine funding in place but to be honest I think that will take a few weeks". Mr Weaver responded that Mr Nixon's attempt at interim funding "didn't work" and that "we are now up against it". Although Mr Weaver asks in his email for a letter from Mr Kerr confirming the Market Place Subscription "and further confirming the payment schedule so that we can show the Chinese that this transaction is real", he nowhere mentions any promise to pay £500,000, or the failure to honour any such promise.

153. Mr Weaver's evidence in relation to the £500,000 is implausible and entirely unsupported by the contemporaneous documents. His conduct in seeking to arrange a short term loan to provide Sinoside with apparent evidence that money had come into the company regrettably appears to have been dishonest.

Mr Yeo

154. Mr Yeo was a Member of Parliament between 1983 and 2015, holding office as a Minister at the Departments of Health and the Environment between 1990 and 1994, a Shadow Cabinet Minister between 1998 and 2005, Chair of the House of Commons Environmental Audit Select Committee between 2005 and 2010 and Chair of the House

of Commons Energy and Climate Change Select Committee between 2010 and 2015. In addition to his involvement with TMO, he has been chairman or director of three fully listed companies, four AIM listed companies and various unlisted companies. He has wide experience of pre-revenue technology companies.

155. As might be expected given his background, Mr Yeo was a confident and articulate witness who had obviously prepared at considerable length for his appearance in the witness box. It seemed to me that he had determined what his "message" to the Court would be and how he would communicate it regardless of the questions that he was asked. Consistent with this, he frequently resorted to very long recitations of his case which avoided giving a straightforward answer to the question he had been asked and appeared designed to take the discussion in a different direction. I agree with TMO's submission in closing that this propensity on the part of Mr Yeo to "speechify" tended to give his evidence a contrived, evasive and rather self-serving quality.

156. On various occasions during his evidence it seemed to me that Mr Yeo was not telling the truth; examples being:

i) his refusal to accept that he was aware that the voting for the EGM was "tight" – his response that "I wasn't that focused on it" and that "My concern at this time and at all times was to get money into the company as quickly as possible" not only appeared simply to repeat the mantra of all of the Director Defendants, but also just did not ring true. As the documents show (and as I shall address later in this judgment) he and the other Director Defendants were continuously and intensely focused on the voting position in the final days leading to the EGM.

ii) his response to a question posed about the conversation with Mr Parker on the Sunday evening prior to the EGM: "Q. Can we agree the context of this conversation: the Presnow vote was potentially decisive wasn't it? A. I don't know". Upon being shown an email he had sent to Mr Caraballo on 22 October at 8.21 in the morning saying in terms that the Presnow votes "may well be decisive in determining the EGM next Monday" he backtracked, acknowledging that "there were lots of votes that were potentially decisive" but then refusing to accept that he was speaking to Mr Parker on the night before the EGM because he thought that securing the Presnow vote was of critical importance. Again this evidence did not ring true, and appeared to me deliberately to underplay the obvious significance of Mr Yeo's conversation with Mr Parker.

iii) his decision to seize on the "£500,000 promise" said by Mr Weaver during his oral evidence to have been made by Mr Kerr, a promise which is not mentioned anywhere in his witness statement, as he was forced to admit in cross examination. He insisted that this sum of money "was a topic of conversation many times" and that he was under "the clear impression that we had an undertaking from Mr Kerr that £500,000 was going to come in straight away" and yet he could not remember when he was informed of it and had no adequate explanation for its omission from his statement.

157. Whilst maintaining his composure for much of his cross-examination, Mr Yeo was on occasions argumentative and he made an extremely intemperate accusation under cross examination that Mr Parker had "lied through his teeth" when giving evidence about the content of his telephone call with Mr Yeo on 27 October, notwithstanding that when

cross examining Mr Parker about this call, Mr Yeo had not challenged his account. I was taken aback by this at the time and consider Mr Yeo's outrage to have been obviously confected. A few questions later he went on to seek at great length to draw the Court's attention to "some rather curious circumstances" which he said clearly evidenced that Mr Parker was "a proven liar" culminating in the following assertion: "So I put it to you, my Lady, that Mr Parker is a proven liar and that these statements have been cooked up by Hewlett Swanson for the purposes of bolstering what was clearly a failing case" - a clear example of the speechifying tendency to which I have already referred, not to mention a tendency to blame others. Mr Collings invited Mr Yeo to soften his evidence about Mr Parker, clearly recognising that his characterisation of Mr Parker's evidence had been overly harsh, only to elicit a yet further allegation from Mr Yeo that Mr Parker had been "lying through his teeth". Regrettably, this came across as extremely ill-judged.

Mr McBraida

158. Mr McBraida is a self-made man who rose from humble beginnings to become Managing Director of McBraida Ltd, originally a small Bristol engineering company which he took into the field of aerospace with very considerable success. He remained a Managing Director of McBraida Plc (formerly McBraida Ltd) until the early 2000s when he became Executive Chairman. His son and grandson work for the business which is now a preferred supplier to Rolls Royce. McBraida Plc is not a listed company and the shareholders are members of Mr McBraida's family. He remains a director.

159. Mr McBraida is 82 years of age, frail and hard of hearing. His recollection of events was extremely hazy and often non-existent and his reading was slow, which affected the scope of the possible cross examination. His answers were occasionally confusing or not responsive to the questions put to him, but I accept that this was largely the product of old age and genuine confusion rather than an attempt to avoid answering specific questions.

160. I formed the view that Mr McBraida was by and large doing his best to assist the Court in his oral evidence in so far as he could, and I agree with TMO that, like Mr Reeves, he appears to have made a number of realistic concessions, including that no reasonable person would have believed in a million years that the Market Place Subscription was legitimate (albeit he continued to maintain that it was).

161. Mr McBraida undoubtedly had a lesser involvement than the other Director Defendants in the fund raising efforts in advance of the EGM and, as an investor, he was plainly genuinely interested in seeking to make a success of TMO. He had not previously been involved in a company with outside shareholders and had no experience of a public style meeting with a lot of independent shareholders. Mr Morgan submitted on his behalf that his lack of any real involvement in the essential events surrounding the EGM exonerated him from any wrongdoing, that his motives were never improper, that he relied (as he was entitled to do) upon the advice of Mr Audley and the insolvency specialist Mr Hussain, and that he certainly did not engage in any dishonest conduct. These submissions will require me to look closely at the contemporaneous evidence in considering each of the allegations against the Director Defendants to determine Mr McBraida's involvement and individual motivations.

162. For present purposes, however, I should say that it would appear from the contemporaneous documents that at the time of the events with which we are concerned,

Mr McBraida was a great deal less frail and far more able to articulate his views and objectives than he is now.

Mr Audley

163. Mr Audley, whose background I have described above, gave the impression of confidence in his recollection and conviction in the correctness and honesty of his views. Unsurprisingly, given his background, he was clearly an extremely intelligent and articulate witness.

164. However, I consider there were various unsatisfactory features to his evidence, which to my mind tended to undermine its credibility.

165. The first, and perhaps most striking, was his continuing insistence right up until closing submissions, in the face of overwhelming documentary evidence to the contrary, that he had never provided legal services, including legal advice, to TMO in his personal capacity. This was an extraordinary, and poorly judged, assertion which was quite plainly wrong. During his evidence, when shown documents which obviously amounted to legal advice, he did not frankly accept the position (as he should have done), but sought to maintain his case, tying himself in knots in the process.

166. Thus by way of example, when shown an email dated 7 September 2013 in which he "set out the law" and referred specifically to sections 304 and 303 of the CA 2006, he said, somewhat bizarrely, "A lawyer's standard response is it depends on your definitions…But I accept that this is what I am telling them about what the law is and if that in itself constitutes legal advice, then yes, but…I would like to explain why I don't think it was legal advice. But I was certainly telling them what the law was".

167. Furthermore, the suggestion that he had been chosen to accompany Mr Weaver to Tetbury on 23 October purely as Mr Weaver's "minder", when in fact he was drafting agreements and arranging for shares to be issued is absurd, and entirely misrepresents his critical role. The proposition made by Mr Audley towards the end of his evidence that legal advice means advice that could be the subject of a significant claim and that would be backed by an insurance policy was extraordinary. I am surprised that a solicitor of Mr Audley's standing saw fit to advance and maintain such an unrealistic case.

168. In a similar category is Mr Audley's inaccurate reference in his original Defence to the note he prepared for Mr Yeo prior to the EGM as "the Olswang Note", an error that wrongly gave the impression that he had not been involved with the preparation of that note and the advice contained in it, but that instead it had been created by Olswang. This was an error he corrected in his witness statement and Re-Amended Defence, albeit he then insisted in cross examination that the Olswang Note (now referred to as the "**Chairman's Script**") did not contain legal advice. Somewhat inexplicably, he sought to blame Mr Yeo for his own error in referring to the document as the Olswang Note.

169. Next, it seemed to me that there were various occasions on which Mr Audley sought to re-interpret and explain contemporaneous documents with a view to ensuring their consistency with the Director Defendants' case, despite his explanations being inconsistent with the plain words of the documents. An example of this was his explanation of an email he sent to the Director Defendants on 24 September 2013 in which he said "It is easy for me to say but someone needs to do the arithmetic and work

out how much is needed to ensure the resolutions are defeated and then encourage angry shareholders who have the money to spend it in subscribing for shares – and/or buying out Andenaes – on the basis that it is better to spend the money on the business than on litigation". When Mr Sutcliffe put to Mr Audley that this was a proposal that shareholders be invited to subscribe for shares for the purpose of ensuring that the EGM Resolutions were defeated, Mr Audley jumped in before the end of the question, insisting that this was wrong and that he had been "proposing that shareholders are invited to subscribe for shares to raise much needed cash for the company on the basis that they would be invested in the company rather than potentially having to fund a roomful of lawyers to argue about it afterwards". This struck me as a contrived and carefully prepared answer which was not credible given the clear terms of the email.

Mr Edwards

170. The Defendants called Mr Edwards to give evidence on their behalf. He is now a director and company secretary of Active Food Systems Limited, but in the Autumn of 2013 he was working for VSA on an informal basis and had also started working as a broker for TMO. He was responsible for introducing VSA to TMO and he was involved in attempting to resolve the discord between the Director Defendants and the Requisitioners in the lead up to the EGM.

171. I found Mr Edwards generally to be endeavouring to assist the Court albeit that his evidence was on occasions somewhat unrealistic.

The Experts

172. By an order dated 7 October 2019, Deputy Master Nurse permitted TMO to adduce expert evidence "in the field of company valuation to address issues relating to the value that the Claimant (including its Business and Assets) would have had but for the Defendants' alleged breaches of duty" (paragraph 11 of the Order). In paragraph 12 of his order, the Deputy Master granted the Defendants permission to adduce oral expert evidence from a single expert (a) in answer to TMO's expert evidence adduced pursuant to paragraph 11 of the CMC order; and (b) to value the Business and Assets of TMO disposed of by others in or around February or March 2014.

Mr Patel

173. Mr Patel is a partner in the Valuation, Modelling and Economics team at Ernst & Young, leading its Technology, Media and Telecoms valuation practice. Upon the instructions of TMO, he produced a report dated 2 October 2020, together with some responses to questions posed by the Defendants pursuant to CPR 35.6 dated 3 December 2020. Together with Mr Hall, the Defendants' expert, he signed a Joint Statement dated 5 February 2021 ("**the Expert Joint Statement**"). At the outset of his oral evidence, Mr Patel made reference to a slide presentation designed to respond to points made by Mr Hall in a supplemental expert report dated 26 February 2021.

174. Mr Patel's instructions dated 3 August 2020 were included in the bundle and recorded that he was to provide his expert opinion on "the value that TMO's Business and Assets would have had but for TMO entering into administration in December 2013". He was to do this on the assumption that TMO would have pursued the business plan which Rebio had in fact pursued since acquiring TMO's business and assets in March 2014 and

on the assumption that the Court would value TMO's Business and Assets at the date of the trial.

Mr Hall

175. Mr Hall is a partner in Forensic Services at Smith & Williamson, a specialist forensic, accounting, investigations and forensic technology team. He produced a report dated 23 December 2020 and he signed the Expert Joint Statement. On 26 February 2021, Mr Hall produced a supplemental expert report designed to address issues raised in Mr Glen's fourth witness statement dated 9 February 2021.

176. Mr Hall's instructions dated 21 December 2020 invited him to address the value TMO (including its Business and Assets) would have had but for the Defendants' alleged breaches of duty, the value of the Business and Assets of TMO disposed of by the Joint Administrators in or around February or March 2014, the value TMO would have had if it had been provided with and pursued the business plan of Rebio relied upon by Mr Patel, and the likelihood that TMO would have entered into administration (and when) had it not been for the Defendants' alleged breaches of duty and in the event that the EGM Resolutions had been passed.

177. I shall return later in this judgment to my views on the expert evidence.

Issue 1: The alleged section 171/fiduciary duty breaches (improper purpose)

178. TMO alleges that the Director Defendants exercised the powers conferred on them as directors of TMO for an improper purpose in breach of duty under section 171 CA 2006 and in breach of fiduciary duty in three respects:

i) first, in exercising their power pursuant to article 33.1.6 of the TMO Articles of Association formally to request the resignation of Mr Andenaes and Mr Glen as directors of TMO in letters dated 9 September 2013;

ii) second, in exercising their power to authorise TMO on 22 October 2013 to issue 75,000,000 ordinary shares to Market Place in the Board resolution of that date; and

iii) third, in exercising their power to authorise TMO on 25 October 2013 to issue 2,625,000 ordinary shares to VSA.

179. TMO says that the primary or dominant purpose of the Director Defendants in each case was to cause the EGM Resolutions to be defeated. It is common ground that if this was the primary or dominant purpose of the actions taken by the Director Defendants, and each of them, then that purpose was indeed improper.

180. In contending that the Director Defendants acted for an improper purpose, TMO alleges that they engaged in a deliberate and dishonest strategy improperly to influence the outcome of the vote at the EGM. It says that they were desperate to keep control of TMO for themselves and to keep it out of control of the Requisitioners and that this ultimately led to each of the Director Defendants losing his sense of objectivity and perspective.

181. TMO accepts that I must consider the position of each of the Director Defendants for the purposes of this judgment, but contends that in this case the Board in the form of the

Director Defendants was in fact acting as a cohesive whole and that there is no basis for distinguishing between the conduct and motivations of individual directors.

The Law

182. The fiduciary obligation on those acting as directors of companies to exercise their powers only for the purposes for which those powers are conferred was an obligation previously imposed by law, but is now expressly enshrined in statute. It substantially corresponds to the equitable rule which had for many years been applied to the exercise of discretionary powers by trustees, namely the doctrine of fraud on a power.

183. CA 2006 section 171 provides:

> "A director of a company must-
>
> (a) act in accordance with the company's constitution, and
>
> (b) only exercise powers for the purposes for which they are conferred".

184. Section 170(4) provides that the general duties are to be "interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding rules and equitable principles in interpreting and applying the general duties".

185. In *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, the company's directors allotted sufficient additional shares to a minority shareholder to constitute it a majority shareholder, thereby promoting the success of its takeover bid, which the directors recommended. The Court set aside the allotment, notwithstanding the fact that the directors had been acting bona fide in what they considered to be the best interests of the company.

186. In the Privy Council, Lord Wilberforce (giving the opinion of the Board) articulated the relevant principle at 835F-835G:

> "…it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls."

187. At 834E-F, Lord Wilberforce recognised that "the majority of cases in which issues of shares are challenged in the courts are cases in which the vitiating element is the self-

interest of the directors, or at least the purpose of the directors to preserve their own control of the management".

188. The question of proper purpose was considered by the Supreme Court in *Eclairs Group Ltd v JKX Oil & Gas Plc* [2016] 1 BCLC 1. The issue that arose was whether the exercise by the directors of JKX of a power under the company's articles to serve restriction notices on certain members in a minority group (Eclairs and Glengary) who had failed to provide information to the directors as required by CA 2006 section 793 was for a proper purpose in circumstances where (i) the effect of the notice was to prevent Eclairs and Glengary from voting their shares; (ii) the directors' purpose was to garner an opportunity to pass special resolutions enabling them to dilute the minority's shareholding, which the directors considered to be in the company's interests; and (iii) the minority held sufficient shares, so long as they could vote them, to block any special resolutions which they opposed.

189. Mann J, Briggs LJ (dissenting on appeal) and the Supreme Court (unanimously) held that the directors' purpose was improper and therefore an abuse of power.

190. In his dissenting judgment in the Court of Appeal, Briggs LJ distinguished between a director's exercise of managerial powers and his exercise of powers capable of affecting the company's constitution at shareholder level:

> "[100] In relation to purely managerial powers, concerned with the planning and conduct of the company's business, the court will be slow to identify bespoke restrictions, and will afford the greatest respect to the directors' skill and judgment …But where the powers are capable of affecting the company's constitution at shareholder level, as is the case in relation to powers to allot or forfeit shares, and powers to deprive shareholders of voting rights, more circumspection is necessary as is in particular demonstrated by the outcome of the *Howard Smith* case. Although the issue and allotment of shares for the purpose of diluting the holdings of those opposed to a takeover bid was adjudged by the directors to serve the company's best interests, it was nonetheless invalidly exercised because dilution of that kind was an unconstitutional interference with shareholders' rights outwith the capital-raising purpose for which the power had been conferred."

191. In the Supreme Court, there was disagreement as to the extent to which the proper purpose test was really a 'but for' test. However, for present purposes, I do not need to go into that disagreement, as it is common ground between the parties that the test to be applied in this case is that articulated in *Howard Smith* and by the majority of the Supreme Court in *Eclairs.*

192. As to the role of the proper purpose rule in the governance of companies, Lord Sumption (with whom the other members of the Court agreed on this point) made the following observations in *Eclairs*:

> "[16] A company director differs from an express trustee in having no title to the company's assets. But he is unquestionably

> a fiduciary and has always been treated as a trustee for the company of his powers. Their exercise is limited to the purpose for which they are conferred. One of the commonest applications of the principle in company law is to prevent the use of directors' powers for the purpose of influencing the outcome of a general meeting. This is not only an abuse of a power for a collateral purpose. It also offends the constitutional distribution of powers between the different organs of the company, because it involves the use of the board's powers to control or influence a decision which the company's constitution assigns to the general body of shareholders";
>
> and
>
> "[37] …[t]he rule that the fiduciary powers of directors may be exercised only for the purpose for which they were conferred is one of the main means by which equity enforces the proper conduct of directors. It is also fundamental to the constitutional distinction between the respective domains of the board and the shareholders. These considerations are particularly important when the company is in play between competing groups seeking to control or influence its affairs".

193. Also in paragraph [37], Lord Sumption went on to point out that in a battle for control of the company, the directors may well wish to disenfranchise "the predators", but said "That is precisely why it is important to confine them to the more limited purpose for which their powers exist. Of all the situations in which directors may be called upon to exercise fiduciary powers with incidental implications for the balance of forces among shareholders, a battle for control of the company is probably the one in which the proper purpose rule has the most valuable part to play".

194. The following principles may be extracted from these two leading authorities:

i) first, the application of the purpose test turns on the ascertainment of, and a comparison between, the purpose for which the power was conferred and the purpose for which it was exercised by the directors.

ii) second, this enquiry encompasses both legal issues (construing the power) and factual issues (the actual purpose for which the power was exercised) in the relevant legal and factual context – see Lord Sumption in *Eclairs* at [31]: "…[t]he purpose of a power conferred by a company's articles is rarely expressed in the instrument itself…But it is usually obvious from its context and effect why a power has been conferred".

iii) third, where powers are exercised for a variety of purposes (only some of which may be improper), the exercise of the power will be tainted if the "substantial or primary" (*Howard Smith*), or "primary or dominant" purpose (*Eclairs* in the Supreme Court) was improper.

iv) fourth, the test is necessarily subjective – see Lord Sumption in *Eclairs* at [15]: "the proper purpose rule is not concerned with the excess of power by doing an

act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective. 'Where the question is one of abuse of powers' said Viscount Finlay in *Hindle v John Cotton Ltd* 1919 SLR 625 at 630, 'the state of mind of those who acted, and the motive on which they acted, are all important'."

v) fifth, the duty is strict in the sense that it does not depend on establishing bad faith (see Lord Sumption in *Eclairs* at [16] and also *Hogg v Cramphorn Ltd* [1967] 1 Ch 254).

195. I shall now consider each of the three allegations of improper purpose in turn. In so doing, I must look with particular care for evidence in the contemporaneous documents of the dishonest strategy for which TMO contends.

The request for the resignation of Messrs Andenaes and Glen (Issue 1(i))

The Power

196. The power to request that existing directors should resign from the Board is contained in Article 33.1.6 of TMO's Articles of Association under the general heading "Disqualification and Removal of Directors". It provides that the "office of a director shall be vacated if: "he is requested to resign in writing by not less than three quarters of the other directors...".

197. I did not understand the purpose of this power to be in dispute: it is to enable the directors to carry out their managerial functions in order to advance the company's interests or improve its governance. Save that three quarters of the directors must agree, the power is not circumscribed in any way; there is no requirement for reasons to be provided and no requirement to identify any grounds (such as misconduct) for seeking resignation. Indeed Mr Collings submitted in closing that this power could be exercised for selfish reasons, i.e. to remove a director with whom the other directors have fallen out. I did not understand TMO to disagree with this proposition although TMO contends (and I accept) that the question of whether such a power has been exercised for an improper purpose is of course highly dependent upon the surrounding factual circumstances as evidenced in the contemporaneous documents.

198. The Director Defendants accept that it would be an improper purpose to seek a resignation in order to manipulate the voting at the EGM or to maintain personal control of the Board. However, they say that their purpose in seeking the resignations is recorded in the minutes of a meeting that took place by telephone on 9 September 2013 and was not improper. Before considering those minutes, I must first consider the factual circumstances on which TMO relies.

TMO's Case

199. In summary, TMO contended at trial (in submissions that went beyond its pleaded case at paragraph 74(1) of the Re-Amended Particulars of Claim) that:

i) there was no proper basis for the Director Defendants to request the resignations; Messrs Glen and Andenaes had already been deliberately excluded from participating in Board decisions prior to 3 September 2013;

ii) the refusal on the part of Messrs Glen and Andenaes to sign the September Circular did not provide a proper basis for requesting their resignations;

iii) the issue of the First Requisition Notice on 6 September 2013 precipitated the Director Defendants' decision to request the resignations. It was at this point that the Director Defendants began to develop a strategy to maximise shareholder support for the existing Board and to prevent the Requisitioners from gaining control;

iv) the grounds for requesting the resignations as set out in the draft Board minute of 9 September 2013 were wholly contrived. There was no objective performance related justification for making such requests.

v) An offer to re-appoint Mr Glen and Mr Andenaes made on 11 September 2013 undermines any suggestion that there was a proper basis for the Resignation Letters.

The Evidence

200. In order to deal with these contentions I shall need to look in detail at the events of late August 2013-11 September 2013. However, before I do so, I should first address the allegation that Messrs Glen and Andenaes were deliberately excluded from participating in Board decisions prior to 3 September 2013, an allegation which I reject.

201. Although there is evidence that the Board did not always involve Mr Andenaes and Mr Glen in day to day issues and that they regarded themselves as "outsiders", nevertheless:

i) The Board minutes show that from the date on which they became directors, Messrs Glen and Andenaes took part in Board meetings on a regular basis, albeit very often by telephone.

ii) Whilst there is evidence of emails being exchanged between (only) the Director Defendants on issues relating to, amongst other things, the funding of TMO and the proposed business proposals, there is no suggestion in the documents that Messrs Andenaes and Glen were deliberately excluded from Board meetings during this period (save where Mr Glen had a conflict of interest arising by reason of the Sinoside underwriting offer).

iii) Whilst I accept Mr Andenaes' evidence that he felt that the information he was receiving was "scant", I note that he gave this evidence in the context of also explaining that the accounting side of TMO was in a bad state, that he had complained about this in emails to Mr Yeo and that the Board had asked TMO's Chief Financial Officer to address his concerns.

iv) In the period June 2013-August 2013, Mr Glen was voluntarily absent from Board meetings (or was conflicted, as occurred during the time of the negotiations over the Underwriting Agreement) on approximately 6 occasions. The explanation for

this appears to be that he was winding down the Diverso offices in Shanghai at the time and was moving his family to the South of China, so he had "lots of family affairs" to deal with.

v) In an email dated 30 July 2013, Mr Weaver informed Mr Edkins that "There is a desire that you replace Jonathan [Glen] on the board. If that is possible it will be well received as he is considered to be too far away and you are more accessible and engaged." Mr Glen accepted in cross examination that it was possible that Mr Weaver might have formed this impression. If the Director Defendants had been seeking deliberately to exclude Mr Andenaes and Mr Glen from the Board, it is unclear why Mr Weaver would have raised the possibility of replacing Mr Glen with their associate in the form of Mr Edkins on the basis that he would be available and able to be more involved. This is particularly so against the background of it being well known by this time that the Requisitioners wanted to take control of TMO (see for example emails of 17 June 2013 timed at 10:54 and 6 August 2013 timed at 11:44).

(vi) Mr Andenaes said in cross examination that "later on gradually I understood that there were things that were discussed between the four of them that me and Mr Glen were not privy to". However, when he was asked to give examples of decisions made by Mr McBraida without his input whilst he was a director, he identified only the September Circular (which I address below) and the decision to seek his resignation. He did not identify any other examples of occasions between 19 June 2013 (when Mr McBraida became a director) and 3 September 2013.

202. I now turn to look at the factual background to TMO's remaining contentions.

203. In early August 2013 members of the TMO Board discussed with VSA the possibility of engaging VSA to carry out a fund raising effort. This led to the VSA Retainer of 9 August 2013 confirming the nature of the role that it would undertake.

204. Thereafter, weekly calls took place between VSA and various of the Director Defendants who also discussed between themselves various issues arising in respect of the proposed VSA fund raising (for example in the email of 19 August 2013 between Messrs Yeo, McBraida and Reeves at 10:45 arranging a meeting for 5pm that same afternoon, albeit that Mr Weaver does not appear to have been involved).

205. In an email dated 16 August 2013 to Messrs Yeo, Reeves, McBraida, Andenaes and Glen (copied to Mr Weaver) and timed at 13:07, Mr Edkins said that he had "requested a call with VSA last Thursday to discuss their fund raising plans". The email recorded that Mr Edkins (who had not been involved in the engagement of VSA) had been told he would receive a proposal outlining, amongst other things, their target investors and timelines, including proposed contact with Avante – an associate of Mr Edkins in Latin America who it was anticipated would act as junior broker. Mr Edkins said he was yet to receive this proposal.

206. Mr Weaver responded on 19 August saying that he was not aware that any formal proposal was outstanding but that VSA had told him that they were awaiting acceptance of their offer. Mr Edkins' response on the same day (copied to all directors) was that the junior broker (i.e. Avante) needed to understand what the lead broker (VSA) was doing.

207. In an email of 19 August 2013 timed at 16:20, Mr McBraida told Mr Yeo, Mr Weaver and Mr Audley that he believed Mr Edkins to be working "on a different agenda to ours" and went on "There is a rumour he is raising/attempting to raise £1.5m to buy TMO!". The following day, Mr McBraida said he had heard this rumour from Mr Beatson-Hird but said that the rumour "would be consistent with the games he and others have been playing to try to take control of the company, for the third time now."

208. On 21 August Mr McBraida went into VSA's offices to meet Mr Edwards and received a copy of a "Teaser" document (as confirmed in an email from Mr Edwards of the following day timed at 9:35 pm). This was essentially a document designed to give prospective investors a preliminary view of the investment opportunity presented by TMO.

209. On 22 August 2013, Mr Edwards emailed Mr Yeo, Mr Weaver, Mr Reeves and Mr McBraida indicating that it was his inclination to talk to Mr Edkins as a means to establish a relationship with Avante on the basis that it would be a good thing to get some Latin American investors. Mr McBraida replied saying:

> "At the risk of sounding paranoid, I think we should be careful in any dealings with anyone connected with Stephen. We know he has had dealings with Avante but do not know if they are good friends. We have learned [Mr Edkins] will use anything to his advantage given the chance. It would be unwise to have a deal in which he could have any influence at all…I would not trust him not to upset a deal. He obviously knows if we can get financial support soon, the [Loan Note Holders] loose (sic) their ambition to gain control of TMO. I hope I am not going over the top but my fear has been that [Mr Edkins] would work to raise funds but cause delays so as to put us in financial strife and put in yet another offer of control".

In light of this email, Mr Edwards indicated to the Director Defendants that he would not progress the investment opportunity in Latin America.

210. On Tuesday 27 August it appears that there was a weekly call between VSA and some of the directors of TMO (as mentioned in an email from Mr Audley of 29 August to which I shall return in a moment).

211. Under cover of an email dated 27 August 2013, Mr Weaver sent to the Board, including Messrs Andenaes and Glen, copies of a CEO Report, a PDU business plan dated 27 August, together with a Technology update. These were documents for the Board meeting that was due to take place the following day. The CEO Report attached the funding "teaser". This was entitled "TMO Renewables – Moving into a Commercial Phase" and set out in detail an overview of the proposed business plan, including information about the proposed PLA Production and the proposal for the production of 2G Bioethanol in Brazil.

212. By way of an email dated 28 August 2013 timed at 06:34, with the subject heading "Fund Raising Teaser", Mr Weaver sent the final version of the VSA "teaser" document to all members of the Board, including Messrs Andenaes and Glen, neither of whom appears to have commented upon it.

213. At a Board meeting attended by both Mr Glen and Mr Andenaes on 28 August 2013, Mr Weaver updated the Board on the funding position. He informed the Board that VSA had been engaged, that Andrew Edwards would be managing the project and that "communications are good with weekly calls". The minute records that he went on to say that "The road show is targeted to start 16th September. A teaser has been produced and we are working on converting it to an IM [Information Memorandum]. …VSA are in contact with Sarum and a structure is in place to manage data flow. We have identified that we need to raise £8.5 million to take the company through to 2015 this will also trigger the loan note conversion."

214. There is no record in the minute of either Mr Glen or Mr Andenaes querying this information or asking to be involved in the weekly calls or otherwise raising any form of complaint about a lack of involvement with VSA.

215. On Thursday 29 August, Mr Audley sent an email to (amongst others) Mr Edwards, Mr Reeves and Mr Weaver saying "As agreed on the Tuesday call I have prepared a short update circular, which I attach. I wasn't sure how widely to circulate this first draft so if you think it needs to go to others, please do forward it". The short update circular was the first draft of the September Circular. Mr Yeo, Mr McBraida, Mr Glen and Mr Andenaes were not copied in to this email. In his evidence, Mr Audley said he assumed that he was sending this email to people who had been on the call.

216. The draft September Circular was entitled "Business Update" and included two draft letters, the first concerned the proposed offer of New Ordinary Shares to raise up to £6 million and was to be signed by Mr Yeo. Amongst other things, this draft letter referred to the May Fundraising and then informed shareholders that "the underwriting commitments have not been fully complied with". The second draft letter was to be signed by Mr Weaver, and it reported on the progress of his work on commercialisation of the business. This draft made it clear that the intention was to include the information in the VSA teaser document in full.

217. Mr Edwards replied to Mr Audley's email, suggesting some additional words for the letter to be sent by Mr Weaver and stating that "I think this is a very useful communication to shareholders such that they are now up to date with the latest information on the Company as potential investors. Essential really if they are to be treated equally and to [be] able to make an informed decision as to whether to invest under the extended offer".

218. Mr Yeo responded to Mr Audley, also on 29 August 2013, saying "I assume that before this letter is sent to shareholders it should be approved by the whole board, not necessarily at a meeting but at least by email". Mr McBraida then asked for a copy of the letter which had not been sent to him originally. Mr Audley responded "Sorry, Mike – my fault. I sent the first draft to very few people with a view to sending the second draft to everyone".

219. On 3 September 2013, following a weekly meeting, Imogen Whiteside of VSA sent out "the latest draft of the information memorandum" which appears to have been the VSA teaser document for prospective investors. Mr Reeves provided his comments on the draft which he said "have not changed much since this morning" in an emailed reply to Mr Edwards also copied to Messrs Yeo, Weaver, McBraida and Audley.

220. On 3 September 2013, under cover of an email copied to all board members, including Mr Andenaes and Mr Glen, Mr Audley circulated the draft September Circular which he said "has now been approved by Messrs Yeo, Weaver, McBraida and Reeves". Mr Audley asked for any further comments to be sent to him by email by 5pm on Thursday 5 September "so that the final version can be sent out to shareholders on Friday".

221. Mr Andenaes responded within an hour and a half as follows:

> "In light of my duties as a board member, I feel that sufficient time should be given in order to review documents, especially ones that are going out to shareholders. I feel that it is important that the whole board has the opportunity to discuss the circular. Unfortunately I am currently traveling and will only be available on Monday the 9th. Can we arrange a suitable time for a call? I should be available most of the morning."

222. Given that Mr Andenaes was aware that the planned commencement of the fundraising roadshow was 16 September, and given that he regularly attended board meetings by phone, this appears to have been a lengthy delay, which may be explicable by reference to the fact that by this stage the Requisitioners were already consulting Pinsent Masons and planning the First Requisition Notice. However, the Director Defendants did not, of course, know that at the time.

223. Mr Glen also responded quickly, asking first why he had not been asked to approve the draft September Circular at the same time as the other Board members, to which Mr Audley responded "I don't know", and then asking "when was the circular circulated to the board?", to which Mr Audley responded "Earlier today, at the same time I sent it to you. The other directors, who are actively involved in the fundraising, have individually provided input into the drafting. You are invited to do the same should you wish."

224. On 4 September, Mr Glen emailed Mr Audley saying that he would "take a look and revert", whilst Mr Andenaes (in the same chain) repeated that he needed time to review and had asked for a Board meeting. Mr Audley responded to Mr Glen that "Unless all the directors can agree over email that they approve the document, I think that a telephone board conference call some time later this week may be convened – but I defer to Tim [Yeo]".

225. In a separate email chain of 4 September (which did not involve Messrs Andenaes and Glen) relating to the draft information memorandum issued by VSA, Mr McBraida expressed the view that "we should crack on and finalise the fund raising docs as soon as possible. We should not agree to Kris' request to discuss am on the 9th Sept. I for one will not be available on that morning. Just another delaying tactic!". Mr Edwards replied that he agreed, that the letter to Shareholders needed to "go out now" and that "We need to push on aggressively to do all we can to secure the company's funding requirements. Delay in my view will get us nowhere".

226. On 5 September, Mr Yeo wrote to Mr Andenaes in the following terms:

> "The issues in this letter were discussed at the board meeting last week, given the urgency of the fund raising process I do not want any delay in sending it out. I do not believe this letter raises any

> difficult or complex matters which need protracted consideration. The text is already acceptable to four of the directors and I have not yet received any objections from Jonathan [Glen]."

Mr Yeo went on to say that he would, however, be happy to discuss any concerns that Mr Andenaes may have with him on the phone "or alternatively to arrange a board call for tomorrow morning", but that he was unwilling for the decision to be delayed beyond that.

227. Mr Andenaes responded on the same day making it clear that "it is not positive that me and Jonathan Glen was not privy to the letter and the discussions that the rest of the board has had before it was sent to us by Max Audley. The consequence being that we have had less time to review it". He went on to set out three areas of concern, namely (i) that Andbell had already made it clear that it was not prepared to give its permission for debt financing in respect of the PDU project; (ii) that "the company is proposing to raise money, whilst at the same time it does not have sufficient cash resources to meet its obligations through the proposed new offer period"; and (iii) that he required confirmation that the Loan Note holders had "extended their equitation offer" for this extension of the May Fundraising. Mr Andenaes finished the email by saying that "We need to make sure these concerns are met, or my approval is not given". The objection as to debt financing for the PDU was a reference to a sentence in the Teaser document that stated that TMO was "In advanced discussions with three major financial institutions to obtain approximately £3.0m debt financing" for PLA production.

228. Pausing there, I note that these were not concerns that appear to have been raised for discussion at the 28 August 2013 Board meeting, notwithstanding that they went to the heart of the new fundraising effort that VSA had been engaged to undertake.

229. Mr Glen also responded to Mr Yeo in an email of 5 September with his comments as follows:

> "With regards to statement in chairman's letter 'unfortunately the underwriting commitments have not been fully complied with' is inaccurate, as certain conditions of the underwrite were not met by the company.
>
> Furthermore, as stated on numerous occasions, without 3rd party verification I am not confident that the proposal put forward regarding the PDU is viable. I do not agree that this should be put forward to Shareholders without a thorough evaluation and statement of the risks".

230. In an email to Mr Audley on 5 September 2013, copied to Messrs Yeo, Weaver and McBraida, Mr Reeves commented that "it looks from Kris's response that he has taken legal advice as we suspected he might. He is clearly conflicted so should probably be excluded from voting on the Letters. It may be a conflict so deep he has to resign?". In the same chain of emails, Mr Audley remarked that he had been thinking the same thing. Mr Audley suggested that he could draft some words to be included in an email from Mr Yeo, amongst other things, stating that there is no need for noteholder consent to the extension of the current fundraising and urging Mr Andenaes to adhere to his duties as a

director of TMO and behave constructively. Mr Audley went on "Depending on the nature and tenor of his response, the rest of the directors, apart presumably from Jonathan, could then decide that Kris's position as a director is untenable and remove him by a letter that I could draft". In response, Mr McBraida expressed the view that neither Mr Andenaes nor Mr Glen had acted impartially and in the interests of all members of TMO and that "therefore any board member changes should not be singular". However he went on to say that "As the non-conflicted board members have majority, I would favour leaving the board as it is for the time being". Mr Weaver expressed his agreement with Mr Audley, saying in his email response that "If we do not carry out the conversion of the PDU the company loses the most valuable growth story that we have…To universally block this is most definitely in breach of his fiduciary duty. He has broken the principle [sic] rule for a director to protect value for all shareholders and work in the best interests of the company. I do not see how he can continue as a director if he refuses Tim's approaches for him to act responsibly".

231. Mr Audley sent an email to Mr Yeo on 5 September at 23:19 in which he confirmed that "as agreed on the conference call this afternoon" he had sought to address Mr Glen's first comment by changing the drafting so as to sidestep the question of who was at fault for the failure of the underwriting. As to Mr Glen's second comment, Mr Audley said that "there isn't much I can do about his second point – if the four directors to whom I am sending this email reasonably believe the PDU project is viable, then the document reflects that belief and I can't see how I can amend it to accommodate Jonathan Glen's contrary view". Mr Audley attached a mark-up of the amendments for despatch on the following day if Mr Yeo agreed, noting that these amendments were not material enough to require re-confirmation of approval from Messrs Weaver, Reeves and McBraida, but that if such approval could be given "so much the better".

232. Mr Yeo responded to Mr Audley on 6 September at 6.30 am, copying in Messrs Weaver, Reeves and McBraida, saying that he was happy with the revised wording and that Mr Weaver had confirmed the management team's confidence in the PDU project (which he had done by email late on 5 September). He said that the letter could go out absent objections from Mr Reeves or Mr McBraida. Clearly recognising that Mr Andenaes' concerns had not been addressed, Mr Yeo asked Mr Audley if he was going "to suggest a form of words I can use for Kris [Andenaes]". In fact, Mr Audley had already done so on the previous afternoon, but he re-sent his proposal to Mr Yeo.

233. Mr Yeo therefore sent a reply to Mr Andenaes at 10:45 am in which he said this:

> "The document in question is a short shareholder update that does not require board approval. I asked for it to be sent to you as a matter of courtesy, after the management and those members of the board who are actively engaged in the fundraising had collaborated on it. The letter, apart from the "teaser" which is now a matter of record, is two short pages long. It is entirely reasonable to expect you to consider it and revert with comment within four days.
>
> The management is considering various methods of financing the PDU for the benefit of the company and its stakeholders, some of which would require the consent of Andbell and some of which would not. You have not, in fact, made it "abundantly

> clear" that Andbell would not give its permission to a financing - my recollection is that you simply expressed the view that Andbell's consent would be required.
>
> For you now to announce now that whatever financing proposal is put forward to the Board will be rejected by Andbell, without even any consideration of its merits by you as its representative, is not only short-sighted but may well constitute a breach by you of your fiduciary duties to TMO under the Companies Act.
>
> Turning to your point about working capital, you were on the Board call last week when this was discussed and made no mention of the concern you now express. What has changed since then?
>
> You then talk about "equitation". As already agreed by the Board the Fundraising is being extended. There is no requirement to seek noteholders' consent for this and there is no need to state exactly when the closing date will be, although I anticipate that this will be stated in the information memorandum which is currently being drafted and which will shortly be put before the Board for approval.
>
> I have instructed Gaye to send the letter out later today".

234. Shortly after this email was sent, Mr Glen emailed all of the directors saying that he had reservations about the shareholder update and was not prepared to approve it. He asked for his name to be removed from the list of directors on the document.

235. On the same day (6 September 2013) Mr Yeo responded to Mr Glen's email giving him two choices: "Either you remain a director of TMO and your name will appear as such on the letter. A clear majority of the board have confirmed that they wish this to be done. Or you resign as a director now". Mr Yeo asked for immediate confirmation as to Mr Glen's position. Mr Glen replied saying that he would not resign and asking either that it be made clear in the circular that he had not approved it or that his name be removed. He ended by saying that "If the majority still wants to send the letter with my name on it, at least I have made my objections clear to the board".

236. Mr Yeo sent a similar email to Mr Andenaes, also on 6 September, saying "If you want your name to be removed from the letter which will shortly be sent to shareholders you must notify me formally that you wish to resign as a director". In an email sent later the same day to Mr Yeo and copied to all directors, Mr Andenaes also asked for his name to be removed from the list of directors in the document. He said this: "I am very much surprised that as a chairman of the board you think that the correct course of action is to circulate a document to shareholders which purports to come from the board with full agreement when a director (or two) has raised valid questions and concerns about its contents which has not been addressed to my satisfaction".

237. Before the September Circular could be sent to shareholders on 6 September as planned, the First Requisition Notice arrived under cover of an email from Sean Page of Pinsent Masons acting on behalf of Sinoside, in the terms already set out above. It appears that

having failed to contact anyone on the phone about the First Requisition Notice, Ms Bramwell then emailed Mr Audley. Under the subject title "Every Day a Surprise" she said that she was scrapping sending out the September Circular and that in light of the receipt of the First Requisition Notice her thoughts had turned to "issuing shares". She noted that she still had shares for Mr Reeves and Mr McBraida (and others) to issue and she asked if she should go ahead. Mr Audley responded "yes please" and then asked "Can you tell me what percentage of the enlarged share capital the £6m noteholders would have if they converted all their notes and no other ordinary shares were issued?". In her reply, Ms Bramwell confirmed she would issue the shares and said that "If I issue the shares from the email below and all the £6m loan note holders converted they would hold 56.41% of the company". Mr Audley responded "Oh dear. Thanks a lot, Gaye".

238. It is clear from an email dated 6 September from Mr Edwards to the Director Defendants that he met with Mr Edkins on that very day to discuss the fundraising. The meeting appears to have been constructive. Mr Edwards reported that Mr Edkins wanted a "longer runway" for the fund raising (i.e. more time), that he was considering investing £2 million and that he had not mentioned any attached conditions. At point 3 in his email, Mr Edwards records that Mr Edkins "felt that he had investors lined up for the last GBP 2.0m, i.e. investors who wanted to invest but not to lead the process, so if we could get to GBP6.5 million then he could finish off the placing". Mr Edkins also indicated that he would now put Mr Edwards in touch with Adolfo, the Latin American broker.

239. Pausing there, the discussions at this meeting appear to have been inconsistent with the reasons given for the First Requisition Notice. The email does not suggest any criticism of VSA or of the principle of engaging in a further fund raising round.

240. In the early hours of 7 September, Mr Yeo emailed the Director Defendants and Mr Audley with the subject title "Need for urgent board call this weekend". Mr Yeo identified the need to discuss, amongst other things (i) a response to the First Requisition Notice which Mr Yeo described as "an open declaration of war which we need to resist in a manner which minimises the inevitable damage to the fund raise we are engaged on and reveals beyond doubt their intentions which are not designed to benefit shareholders generally"; and (ii) the September Circular which Mr Yeo had asked Ms Bramwell not to send out pending resolution of the issue of whether to include the names of all directors.

241. The Board call went ahead at 1.30 pm on Saturday 7 September. Mr Weaver did not attend as he was on holiday in the United States, but Mr Yeo updated him on the actions that had been unanimously agreed. These included (i) that the September Circular would be sent out to shareholders on Monday without the names of TMO directors being included; (ii) "We will email/write to Jonathan and Kris on Monday requesting their resignation from the board. Max advises that under our Articles if 3/4 of the other directors request the resignation of a director that request has the effect of dismissing them…As 3/4 of the other directors were present on the call we were able to take this decision although I assume it has your full support as well"; (iii) "We have 21 days from receipt of the Pinsent Masons letter in which to circulate a notice of the EGM. The EGM does not need to be held until 21 days after the notice is circulated [Max or is this another 28 days?]. That means we do not need to disclose the fact we are calling an EGM until 27th September and the meeting itself does not need to be held until late October"; (iv) that Max had advised on the need to show that the Board had considered the First Requisition Notice carefully, that the directors needed to "agree a board minute" and that

Mr Yeo was drafting some suggestions for the Board minute addressing the resolutions and the Sinoside Statement; and (v) "Mike will contact Gary Carlisle and David Parker bearing in mind the importance of maximising shareholder support for the existing board and our current fund raise and commercial approach and of the need to prevent Jonathan/Kris/Edkins gaining control of the company for their own ends and against the interests of shareholders generally".

242. Mr Audley responded to this email on 7 September 2013 confirming that the general meeting must take place on a date not more than 28 days after the date of the notice of meeting and stating that it was necessary for each of Messrs Yeo, Weaver, Reeves and McBraida to sign the letters requesting resignation as, in relation to each of them "there are five 'other directors' and three-fifths is less than three quarters but four fifths is more than three".

243. Mr Weaver also responded to this email on 7 September 2013 confirming that he had had a long and detailed call with Mr Audley and was up to date. He said he was in support of everything that had been said in the email save that the EGM needed to be held within 28 days and the reference to David Parker should have been to Anthony Parker (i.e. Mr Parker). Mr Weaver went on to say that "It is possible that Sinoside could win a vote at an EGM if it were to take place before we raise any additional money. To do the best that we can to reduce that risk I must get on an intensive roadshow, as planned immediately I get back starting 26th September, this speed is important to act before much damage is done by the knowledge of an EGM requisition".

244. In addition to corresponding with the other Defendants, on 7 September 2013 Mr Weaver also emailed Mr Andenaes on a one to one basis asking to be brought up to date on the issues "so I can see if I can help to sort it out". Mr Andenaes responded that it would be best to see each other face to face, but noting that he had "disagreements about how the board has been functioning" and had no confidence in either Mr Reeves or Mr Yeo, although he expressed the view that good progress had been made in Brazil. He indicated that he supported the First Requisition Notice.

245. On Sunday 8 September, Mr Audley provided drafts of the letters removing Messrs Glen and Andenaes from the Board to the Director Defendants, confirming that Mr Weaver had authorised Mr Audley to add his signature to the letters. Mr Yeo provided a "first stab" at a draft minute of meeting "held by phone on Monday 9th September 2013". He invited amendments from the other Director Defendants together with legal input from Mr Audley.

246. Mr Weaver responded to Mr Yeo's draft Board minute on the same day, suggesting that it needed to include reference to Mr Andenaes' unsuitability to act as chairman given his opposition to the commercial strategy, a point with which Mr Yeo expressed his agreement. Mr Reeves also responded on the same day providing his suggested amendments. Mr Audley then produced a clean draft of the proposed minute incorporating some additional wording.

247. On Monday 9 September, the Resignation Letters were signed by the Director Defendants and sent to Mr Glen and to Mr Andenaes. On the same day the September Circular was sent to shareholders with the names of the directors removed.

248. At a Board meeting on 9 September, as Mr Reeves describes in an unchallenged section of his statement (at paragraphs 87-89), there was a full and frank discussion of the First Requisition Notice and its implications based around the draft minute circulated before the meeting. In particular, Mr Reeves says "All the directors present at that meeting expressed concern about the timing of the Sinoside EGM Requisition (i.e. in the middle of a vital fundraising round that Sinoside were fully aware of and whilst important negotiations were ongoing in Brazil…)…and the impact this would have on that fundraising which was essential to TMO's survival. It was felt that the Sinoside EGM would seriously undermine the fundraising that was being led by VSA Capital, as no investor would wish to invest in a company where the Board is so clearly split, and would have a negative effect on the various negotiations concerning TMO's future activities for the same reason".

249. Mr Audley circulated the meeting minutes dated 9 September 2013. In these minutes, the decision to send the resignation letters was justified by reference to:

i) the damaging timing of the First Requisition Notice, sent without prior notice during the middle of a fundraise and while sensitive commercial negotiations were taking place in Brazil and elsewhere;

ii) the inference that the First Requisition Notice was a deliberate attempt to impede and prevent the successful conclusion of the fundraising;

iii) the failure on the part of Messrs Glen and Andenaes to take any pro-active steps in the last few months to further the interests of TMO, to assist the fundraising or to help the commercial negotiations;

iv) the fact that the offer from Mr Edkins to raise funds of £2 million and the offer to provide £300,000 by way of short term funding did not mention the price per share, thereby creating uncertainty and raising the possibility that if the price was below 4p per share there would be no automatic conversion of the loan notes;

v) the inconsistent communications that Mr Edkins had had with Mr Edwards on the same day that the First Requisition Notice was served;

vi) recent statements and actions on the part of Messrs Glen and Andenaes which had been contrary to the interests of TMO, out of line with good governance procedures and not in compliance with company law;

vii) Mr Andenaes' lack of relevant experience as a company chairman, his statements to the Board on 9 July 2013 that he was not interested in TMO, but only in getting his loans repaid and his email of 5 September 2013 in which he indicated that whatever finance proposal was put forward by the Board for debt financing of the PDU would be rejected by Andbell without any consideration of its merits. In the circumstances it would be highly detrimental for Mr Andenaes to be appointed Chairman and for Messrs Andenaes, Glen and Edkins to have control of the Board.

250. On 10 September 2013, Mr Reeves met with the head of litigation at Olswang to discuss the First Requisition Notice. His email of the same date to the Director Defendants and Mr Audley records that he had been advised that there was no recourse to law that would

stop the Requisitioners' ambitions to take control: "at the end of the day, if they can prove control however they achieve that (converting bonds) they can do what they like". Mr Reeves described this as "a good and realistic assessment of our situation".

251. On the same day, Mr Yeo emailed Mr Andenaes and Mr Glen separately, asking to talk to each of them about the First Requisition Notice "at the earliest possible time". Mr Yeo pointed out that "As an EGM would be a disclosable event, we have also discussed with VSA the detrimental effect that an EGM would have on the current fundraising". Mr Andenaes responded that it would be better if Mr Yeo spoke to Mr Edkins.

252. On 11 September 2013, Mr Yeo circulated a "draft letter to Edkins & Co" to Mr Reeves and Mr Audley. In this draft, Mr Yeo had written "As soon as the EGM requisition notice is withdrawn by Sinoside we will reappoint Kris [Andenaes] and Jonathan [Glen] to the board". It appears from the email traffic that Messrs Yeo, Reeves and Audley discussed the content of this draft letter and agreed on some changes, because a revised version with the subject title "EGM Requisition" was sent to Messrs Andenaes, Glen and Edkins later that same day by Mr Yeo.

253. The final version of the 11 September letter stated that holding an EGM would be extremely damaging to TMO and would "seriously impede the achievement of a successful outcome to the planned fundraise" and that "It is impossible not to conclude that you fully understand these consequences and have chosen this course of action for purposes of your own, regardless of the damage you are thereby doing to TMO". Mr Yeo said that unless the First Requisition Notice was withdrawn by Sinoside, a notice of general meeting would have to be sent out by no later than 27 September 2013 and that the Board would recommend that shareholders vote against the resolutions. The Board would have to disclose to shareholders "breaches of corporate governance and company law by the dismissed directors" and "failures by Stephen Edkins to honour promises to invest money". However Mr Yeo stated that the directors would prefer not to do this and that they were convinced that enormous damage would be inflicted on TMO if an EGM were to be called.

254. In order to "avoid this damage" Mr Yeo put forward a proposal that:

> "provided the EGM requisition notice is withdrawn and you support publicly and privately the current fundraise, in the event that investments or irrevocable pledges of investment amounting to at least £4 million have not been received by 15 November 2013, Desmond and I will, if then requested by you, concur in the immediate reappointment of Kris and Jonathan and the appointment of Stephen Edkins to the board and will tender our resignations as Directors".

255. In an email from Andrew Monk of VSA to Messrs Edkins and Andenaes dated 12 September 2013, Mr Monk stated that he was doubtful that VSA could raise the funds TMO required "whilst there is a Board dispute and EGM requisition". In an email to the Director Defendants and Mr Audley dated 13 September 2013, Mr Edwards of VSA pointed out that while VSA would proceed with the fundraising roadshow as planned, the Board needed to be aware "the [Sinoside EGM Resolution] really does make our task considerably more difficult" and that "it will be impossible to close the fundraising until this situation is resolved".

Discussion

256. Against the background set forth in the preceding section, I turn to consider TMO's case that the only purpose for making the decision to seek resignation was to enable the Director Defendants to pursue a strategy to defeat the EGM Resolutions in order to remain in control of TMO.

257. Drawing the strands together, in my judgment, the contemporaneous documents to which I have referred show that:

258. By the end of August 2013, Mr Glen and Mr Andenaes knew about the engagement of VSA, the appointment of Mr Edwards to manage the fundraising project and the existence of weekly calls with VSA (to which they were not a party). They knew that the target start date for the road show was 16 September and that the Board had identified a need to raise £8.5 million. They did not raise any concerns as to any of these matters at the Board meeting on 28 August, which they both attended by telephone.

259. The draft September Circular in the form of the Business Update document was originally provided only to the members of the Board who had attended the 27 August weekly update meeting with VSA. This did not include Mr Andenaes and Mr Glen, but it also did not include Mr Yeo and Mr McBraida. Whilst there had been no discussion at the 28 August Board meeting of the fact that there were plans to send the September Circular to shareholders, the information that was to be included in that document (in the form of the Teaser document that VSA was proposing to send to prospective investors) had been provided to Messrs Andenaes and Glen in advance of that meeting and had elicited no objections or comments.

260. Once he saw the draft September Circular, Mr Yeo as chairman was well aware that it needed to be approved by the whole Board and he made that clear. It was then provided to Mr McBraida when he asked to see it and later to Messrs Andenaes and Glen with an express invitation for them to provide their comments. Mr Yeo said in evidence "…these two directors had two days to consider a document relating to issues which had been discussed in some detail at a board meeting only six days before, and anyone capable of being a non-executive director should be able to turn round a document on familiar issues within that timetable". I do not regard it as particularly unusual or inappropriate (given the discussions as the Board meeting on 28 August 2013 and the urgency of the fundraising effort) that Mr Glen and Mr Andenaes were only given 2 days in which to approve the draft document.

261. Whilst Mr Andenaes and Mr Glen were aggrieved at what they saw as a deliberate failure to "keep them in the loop", I reject the suggestion that they were not provided with the draft September Circular at the outset because the Director Defendants and Mr Audley had deliberately decided to marginalise and exclude them from approving it and had "sidelined" them as Mr Sutcliffe suggested in cross examination of Mr Yeo. Perhaps unsurprisingly, the draft September Circular had, in the first instance, been sent to members of the Board who were actively engaged in the fund raising (and I note Mr Yeo's evidence that it is routine practice for drafts to be circulated amongst some members of the Board, which strikes me as likely to be accurate). Whilst Mr Audley's comment that he did not know why they had not been provided with the draft document appears potentially disingenuous in circumstances where he had made the initial decision as to which members of the Board that document would be sent to, I do not consider that

there is anything particularly suspicious about it. Mr Audley had made it clear in his email of 29 August that if the document needed to go to others it should be forwarded to them, but none of the directors to whom it had been sent had taken that step. I do not consider that Mr Audley lied about this, as TMO alleges. Indeed I cannot see why he would have done so. In any event, I do not believe that this is evidence of a deliberate attempt to keep Mr Andenaes and Mr Glen in the dark about Board decisions.

262. Given the information provided at the 28 August Board meeting, I regard it as peculiar that the concerns raised by Messrs Andenaes and Glen in their comments on the draft September Circular were not issues they had raised at that time. Whilst some of their concerns reflected issues that they had raised before (albeit, certainly in relation to Mr Andenaes' comment about borrowing in relation to the PDU, not in such trenchant terms), others did not and I find that (not least because of the history I have set out above) the Director Defendants therefore regarded Mr Andenaes' and Mr Glen's concerns as delaying tactics which were designed to get in the way of the much needed fundraise. I accept Mr Yeo's evidence that concern about the potential for the funding arrangements for the PDU to require approval from Loan Note holders (which funding arrangements were dealt with in the September Circular in terms only of there being discussions ongoing with three major financial institutions) was not in his mind a "reason for not sending out a quite blandly worded circular".

263. Furthermore, the Director Defendants genuinely considered that (at least) Mr Andenaes and (also perhaps) Mr Glen was conflicted by reason of their position as Loan Note holders through their individual companies (something on which Mr Audley agreed). As had been pointed out at the 28 August 2013 Board meeting, the planned fund raise would involve conversion of the Loan Notes into shares, but Mr Andenaes had in the past made it clear that he only wanted to have his money back (at the meeting on 9 July 2013).

264. In the circumstances, I find that there were genuine reasons for the Director Defendants to be frustrated at the refusal on the part of Messrs Andenaes and Glen to put their names to the September Circular and it is therefore perhaps unsurprising that this refusal provoked discussion about seeking their resignation and, on 6 September 2013, caused Mr Yeo to inform them that if they wanted their names removed from the document "you must notify me formally that you wish to resign as a director". The Director Defendants were receiving advice from VSA that the fundraising needed to be commenced without delay and a majority of the directors wanted to send out the letter immediately. Mr Yeo had expressly offered to discuss Mr Glen and Mr Andenaes' concerns about the draft September Circular on 5 September, an offer that Mr Yeo said they did not take up. Mr Yeo's evidence, which I accept on this point, was that he thought the September Circular should be unanimous and that in circumstances where Mr Andenaes did not take up his offer to discuss the matter, he thought that Mr Andenaes would have to resign. I reject any suggestion, however, that there was a deliberate plan or "scheme" to get rid of Mr Andenaes and Mr Glen on 5 and 6 September for an improper purpose, as was suggested to Mr Yeo in cross examination.

265. When the First Requisition Notice arrived, I find that the Director Defendants regarded it as a declaration of war (Mr Yeo described it in his evidence as a "nuclear bomb") and were genuinely and understandably concerned at the impact it was likely to have on the fundraising. The fact of the EGM would have to be disclosed to prospective investors once notice of it was given and this would also disclose the deep rift in the Board and the potential for control of the Board to change hands.

266. In the circumstances, I find that the First Requisition Notice did indeed precipitate the Resignation Letters. However, given the timing of the First Requisition Notice, the Director Defendants inferred (as is recorded in both the meeting minute of 9 September and the October Circular) that it was designed to damage the fundraising efforts and to precipitate a change in control of the Board. That the First Requisition Notice damaged TMO's interests in that it undermined the fund raise was certainly VSA's view, as TMO's independent and experienced fundraising adviser. It is perhaps understandable in the circumstances that the Director Defendants decided to remove Messrs Glen and Andenaes in order to minimise further distractions from the fund raising; I note that Mr Weaver had attempted to engage with Mr Andenaes on the issue on 7 September without success.

267. The meeting minute of 9 September 2013 was certainly carefully drafted and involved the input of all of the Director Defendants together with Mr Audley. In my judgment it went too far in alleging unspecified breaches of company law, but I do not need to determine whether the Director Defendants were correct in the views they took and nor do I need to resolve the conflicts between the Requisitioners and the Director Defendants on the evidence as to the Requisitioners' conduct. I find that insofar as the meeting minute identified pre-existing grievances against Messrs Andenaes and Glen, those grievances were genuinely held and were not "wholly contrived" as TMO alleges. In this context I note in particular an email that Mr Parker sent to Mr McBraida on 6 September 2013 recording his understanding following a lunch with Mr Reeves "last Thursday" and a call with Mr Edkins that morning that "opposing positions have become so entrenched and distrust so deep".

268. There is ample evidence in the documents that the Director Defendants perceived that Messrs Glen and Andenaes had not acted impartially and in the interests of all members of TMO, that the Board was concerned with the statement made by Mr Andenaes on 9 July 2013 that he was not interested in the company and just wanted his money back and that there was also a genuinely held view that whilst Mr Edkins had made offers of funding they had never come to anything because of the conditions he had sought to impose. There is also evidence that Mr Audley was advising the Director Defendants that Messrs Glen and Andenaes had acted improperly.

269. Further and in any event, I reject the suggestion that in order to exercise their power to seek the resignation of a director, the Board was required to identify a performance related justification. There is nothing in the power in the Articles at 33.1.6 which limits the exercise of the Board's discretion in this way. Similarly (and contrary to TMO's case at 174(1)(ii)(a) of the Re-Amended Particulars of Claim) the fact that the Resignation Letters were silent as to the grounds for seeking resignation does not support TMO's case of an improper purpose.

270. As for the suggestion in paragraph 174(1)(ii)(b) of the Re-Amended Particulars of Claim that the removal of Messrs Andenaes and Glen was in breach of the terms of the January 2013 Restructuring, I did not understand this to be a point that was pursued at trial and I cannot see how, even if true, it would necessarily be indicative of an improper purpose.

271. I therefore reject the suggestion that as at 9 September when the Resignation Letters were sent, the Director Defendants had already begun to develop a strategy to maximise shareholder support for the existing Board and to prevent the Requisitioners from gaining

control, and that this strategy outweighed their general concerns over funding and the other genuine concerns they had about the conduct of the Requisitioners.

272. In particular I note that Mr Yeo's immediate reaction to the First Requisition Notice was to say in his email of 7 September 2013 that "we need to resist in a manner which minimises the inevitable damage to the fund raise we are engaged on". It is true that in his subsequent email later that same day to Mr Weaver recording discussions with other Board members, Mr Yeo emphasised "the importance of maximising shareholder support for the existing board and our current fund raise and commercial approach and of the need to prevent Jonathan/Kris/Edkins gaining control of the company for their own ends and against the interests of shareholders generally", but he spoke at this stage of the need to prevent the Requisitioners from gaining control in the same breath as he spoke about the importance of the current fund raise and commercial approach. Having regard to the way in which this email was framed, I therefore accept Mr Yeo's oral evidence that he regarded the First Requisition Notice as "a deliberate attempt by two directors…collaborating with an outside party to deliberately obstruct a planned fundraise at the time when the company needed money" and that what he was proposing in this email to Mr Weaver was "a strategy to try and minimise the damage caused and to preserve the prospects of raising money for the company".

273. Mr Reeves and Mr McBraida attended the call on 7 September and received a copy of Mr Yeo's email to Mr Weaver of the same day. In the circumstances I infer that they agreed on the strategy set out in that email (as did Mr Weaver by his response) but I have found that it was not a strategy with the predominant purpose of preventing Messrs Glen and Andenaes from taking control. Neither Mr Reeves nor Mr McBraida was specifically cross examined about this. Mr McBraida's evidence as to his perceptions at the time as set out in his witness statement was also unchallenged. There is, in my judgment, no evidence on which I can find that (as pleaded by TMO at paragraph 74(1)(ii) of its Re-Amended Particulars of Claim): "the removal of Mr Andenaes and Mr Glen as directors was an expedient to give the First to Fourth Defendants the freedom to pursue without independent scrutiny or restraint a business strategy whose primary or predominant purpose in the short term was to defeat the EGM Resolutions and so to maintain their control of TMO".

274. Furthermore, I disagree with TMO that the offer made by Mr Yeo on 11 September 2013 undermines the Director Defendants' case that they had a proper basis to seek the resignation of Messrs Andenaes and Glen. On the contrary, in my judgment, it is clear from that offer that Mr Yeo was focussing to a significant extent on the damage than an EGM would do to the fund raising efforts. The offer was put forward with a view to avoiding that damage and indeed the way in which the offer was revised between the first draft and the final version made it clear that the emphasis was on raising money. Given the documents, I accept Mr Yeo's evidence that "My concern was also the chances of raising money would be vastly greater if we could avoid having to publicise a split on the board, and that's why I wanted us to use that time to try and reach a compromise and the whole board, the whole former board, could work together rather than against each other".

275. I note that in an email dated 15 September 2013 to Mr Monk (in the context of negotiations with the Requisitioners), Mr Yeo made it clear that "we cannot pretend that we relish the prospect of having these characters on the board, and, given their past record, we are very sceptical about the promised £2 million investment…However,

ensuring TMO's survival and progress towards profitability is of course paramount so we are ready to compromise in order to promote the success of the fund raise".

Conclusion on Issue 1(i)

276. For all the above reasons, I reject TMO's case that in requesting the resignations of Mr Andenaes and Mr Glen, the Director Defendants were exercising their power pursuant to Article 33.1.6 of TMO's Articles of Association (1) for the purposes of influencing the outcome of the EGM and (2) in pursuit of their own personal interests in remaining in control of the TMO Board. I find that the Director Defendants did not exercise their power for an improper purpose; on the contrary they believed that Messrs Andenaes and Glen were unsuitable to act as directors and they exercised their powers in seeking resignation in order to further TMO's interests and to maximise its chances of a successful fundraise.

277. Further and in any event, this allegation can have no causative effect: Mr Andenaes and Mr Glen were always in the minority on the Board and, accordingly, had they remained on the Board, their votes would not have affected any subsequent decision. Further, the Second Requisition Notice sought a decision on the composition of the Board notwithstanding their removal. I did not understand TMO's closing submissions to suggest otherwise.

The Market Place Subscription (Issue 1(ii))

The Power

278. It is not in dispute that directors have a power to issue shares and that the purpose for which that power is conferred is to raise funds. It is accepted by the Director Defendants that it would be an improper purpose to issue shares with a view to manipulating voting at an EGM or to maintaining personal control of the Board. As Peterson J made clear in *Piercy v S Mills & Co Ltd* [1920] 1 Ch 77 at 84, directors are prohibited from exercising their power to issue shares "…merely for the purpose of maintaining their control…over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders".

TMO's Case

279. In paragraph 74(2) of the Re-Amended Particulars of Claim, TMO seeks to draw the inference from twelve specific events that the primary or dominant purpose for which the Director Defendants exercised their power to authorise TMO to issue 75,000,000 ordinary shares to Market Place on 22 October 2013 was to cause the EGM Resolutions to be defeated and so maintain their own control of the TMO Board.

280. In closing, TMO made submissions by reference to eight categories which it said supported its case. These were (i) Motivation; (ii) Strategy; (iii) Immediate Context: (iv) Events of October 2013; (v) Transaction Features; (vi) Board Agreement; (vii) Speed of Share Issue; and (viii) Subsequent Conduct. I shall need to consider each of these categories in turn.

281. For present purposes I note however that TMO says that the Market Place Subscription was part of a dishonest scheme to defeat the EGM Resolutions, in circumstances where

the Defendants had no genuine belief that Market Place would come up with the promised cash. TMO puts this case very high: Mr Duffy gave evidence that he considered the Market Place Subscription to be nothing more than "a sham" to get votes through at the EGM. The inevitable corollary of this is that the subscription price of £3 million was no more than a fig leaf. During the trial, this case on dishonesty was bolstered by the previously unheralded allegation of bribery, to which I have already referred.

282. The Director Defendants invite me to reject this case, arguing that the purpose of the Market Place Subscription was raising funds to keep TMO alive. In his skeleton argument for Mr Reeves and Mr Audley, Mr Collings said this "At the time the Board honestly believed that Market Place would pay for the shares in cash within a reasonable time. With hindsight, the Board's assessment of Market Place's credibility turned out to be wrong. But it was an honest and reasonable one at the time, and the Court should not second guess the Board's legitimate business decision". Each of the Director Defendants was adamant in his statement and orally that his primary or dominant purpose was investment, although Mr Reeves was not always able to stick to this line over the course of his lengthy cross examination, as I have already mentioned.

Motivation

283. I accept TMO's submission that following the First Requisition Notice, the Defendants had a deep suspicion of the Requisitioners' own motives in what they saw as an illegitimate attempt to seize control of TMO (an "open declaration of war"), that they resented the challenge to their authority that this represented and that they were angry at the timing of the requisition, inferring that it was deliberately designed to damage the fundraising.

284. This is clear from the documents to which I have already referred and is also evidenced by the following documents:

i) An email from Mr McBraida to Mr Parker dated 16 September 2013 pointing out that the "nub of the problem is control" and going on to say "This opinion has hardened because of the actions of the [Loan Note Holders]. Promises of money, none of which has materialised; offers of funds (not large) are always conditional on board changes which give them control. I and others have tried to get from them why they are paranoid in this aim. In the absence of a reasoned and reasonable explanation we are concerned what the motive is. We fear it is not what the shareholders would wish, which is the reason why this has been the "red line" for us".

ii) A handwritten note created by Mr Parker of what appears to be a conversation with Mr Reeves. The note records "Believes v strongly 'stealing company' from existing shareholders'. As to the Requisitioners' motives, the note reads "Assumption – Get control…- cut price to 2p or 1p – convert all debt – owning company".

iii) Various emails describing the Requisitioners in pejorative terms: for example, an email from Mr Yeo to the other Defendants dated 24 September 2013 referring to the Requisitioners as "these three shysters"; an email from Mr Reeves to the other Defendants stating that information should not be shared with the Requisitioners

as "they will use it in whatever way that suits their story"; an email from Mr Yeo dated 7 October 2013 referring to the Requisitioners' agenda of seizing control of the business "for their own malign purpose"; and an email from Mr Weaver to the other Defendants dated 31 October 2013 describing the Requisitioners as "a bunch of sneaky clueless highwaymen who have offered nothing but cheap greed and self-centred back stabbing".

iv) Mr Audley wrote to the Board by email on 24 September 2013 describing the Requisitioners as "the Boarding Party" and pointing out that "if they get control then they will do what they like". In his oral evidence (and consistent with this email) he described them as "pirates" and "vandals".

v) At a Board meeting on 11 October, Mr Reeves expressed his feeling that the Requisitioners were "financially engineering a position for them to make money". Mr Weaver agreed, saying he thought it was reasonable to assume that the Requisitioners "would reduce the share price to 1p and flip the Company".

285. The Board's views of the Requisitioners were not enhanced by information from Mr Carlisle, given to Mr McBraida, that in May 2013, when the Underwriting Agreement failed, he (Mr Carlisle), Mr Glen and Mr Edkins had had a conversation during which the latter had said that if Mr Carlisle put in his £1.5 million, then they would shut the company down for 6 months, after which a final fund raise could be carried out at 12p per share in order to sell the company to the Chinese military (see the confirmatory email from Mr Carlisle dated 30 September 2013). I have not heard evidence from Mr Carlisle and this incident has been denied by TMO's witnesses. I do not in any event need to determine whether it happened, but I find that Mr McBraida was told it had happened and that this information was also shared with other Board members, adding to their sense of grievance against the Requisitioners.

286. In the weeks following the Requisition, there is evidence of expressions of desire on the part of various of the Director Defendants to win the vote and defeat the EGM Resolutions, no doubt motivated by the strength of feeling engendered by the circumstances surrounding the Requisition (see for example Mr Weaver's reference in his email of 13 September to his determination to win, Mr Yeo's reference in his email of 28 September to a "fighting chance of winning the vote" and Mr Reeves' reference on 23 October to "further ideas on how we can win the vote").

287. TMO says that these "high emotions" combined to "produce a powerful cocktail" which drove the Director Defendants' desire to defeat the EGM Resolutions. Whilst this is very emotive language, I find that the Director Defendants' anger and frustration at what they perceived to be deliberately disruptive conduct on the part of the Requisitioners is a relevant backdrop to the events surrounding the Market Place Subscription.

Strategy

288. The Director Defendants' anger and frustration did not however, in my judgment, lead them immediately to identify a single dishonest strategy for dealing with the fall-out from the Requisition, as TMO suggests.

289. In the weeks following the Requisition, I find that the desire to win at the EGM was but one of a number of ambitions and objectives held by the Director Defendants, which

included urgent fund raising efforts, investigating options in relation to insolvency, trying to negotiate with Sinoside to secure a withdrawal of the Requisition (including trying to obtain evidence as to the availability of the money offered by Sinoside) and investigating the possibility of raising money by borrowing using the PDU as security.

290. In particular the latter three of these various ambitions appear to me to be evidenced by the following documents:

i) As to consideration of the possibility of administration, (i) an email from Mr Audley to Mr Monk of VSA dated 16 September: "The directors must of course be mindful of the insolvency laws and have been taking regular advice from an insolvency practitioner since the beginning of this year and acting on it"; (ii) an email dated 26 September 2013 from Mr Weaver to Mr Hussain seeking his advice in circumstances where "We have £50k in the bank as of today and another £63k coming in from VAT rebate on 7th October…We would like to ask your advice on what we should do and as an aside, is a pre-pack an option if we can get financial support"; (iii) an email dated 29 September 2013 from Mr Yeo to Mr Audley ("I know Desmond said he wasn't very interested in the Administration route but Mike clearly is and I certainly wouldn't rule it out so maybe we should have a further discussion about that in the next day or two"); (iv) an email dated 30 September from Mr Yeo to the other Director Defendants setting out various options including administration; and (v) the discussions that took place with Mr Hussain at Board meetings on 26 September 2013, 1 October 2013 and 9 October 2013.

ii) As to negotiations with Sinoside: I note the reference in the Board minute of 26 September 2013 to "an attempt at a compromise" together with emails dated (i) 10 September 2013 from Mr Monk of VSA to Messrs Reeves, Yeo and Audley offering to help with negotiations; (ii) 10 and 11 September between Mr Yeo and Mr Edkins in respect of an "invitation to talk"; (iii) 11 September 2013 from Mr Yeo to the Requisitioners setting out a proposal to avoid an EGM; (iv) 12 September 2013 from Mr Monk to Messrs Edkins and Andenaes seeking to act as an "honest broker"; (v) 16 September 2013 from Mr McBraida to the other Director Defendants reporting on a call with Mr Edkins ("I said that if he produced proof of funds and had them positively committed to TMO I was sure the board members would be interested in having meaningful discussions"); (vi) 16 September 2013 from Mr Audley to Mr Monk: "Whenever Edkins comes up with his offer of £300,000 with all its various strings attached, the board considers whether it is better in the interests of creditors to take it, to pursue other funding sources with no strings or to call it a day…If the board forms the reasonable view that there is a reasonable prospect of alternative funding being available that would maintain its solvency and be better for creditors and, after they are taken care of, shareholders, then it could properly reject Edkins' offer. I'm not sure what negotiation could be successful – your valiant attempt was scorned by him. Of course the crucial question is whether he does, indeed, have majority support for the resolutions he has requisitioned – perhaps he could be asked to prove it and also to provide proof of the availability of the £2 million? If he can, then that must surely affect the directors' decisions more than waffle about the law"; (vii) 18 September 2013 from Mr Weaver to Mr Edkins setting out a proposal to avoid the EGM (which Mr Yeo described in an email of 24 September as "a genuine

attempt to help TMO" albeit that it was not a proposal with which Mr Yeo was comfortable); (viii) 18 October 2013 from Ms Bramwell (on behalf of Mr Yeo) to Mr Edkins inviting a formal offer of finance and proof that the money would be available by Monday 21 October (which I return to later).

iii) As to debt financing for the PDU: an email from Mr Carlisle to Mr Weaver dated 13 September 2013.

291. Insofar as fundraising was concerned, the documents show that there was a great deal of interaction in September and early October between Board members over the efforts that Mr Weaver was making to obtain an investment of funds from Elton John and that during the course of the Board meetings of 26 September and 1 October there was a considerable focus on these fund raising efforts.

292. I note, however, that there is also evidence that fundraising was discussed by members of the Board during this period in the context of facilitating the defeat of the Resolutions. Mr Yeo's email of 7 September to Mr Weaver to which I have already referred is one example. Others include:

i) Mr Reeves' email to Mr Weaver dated 24 September 2013 responding to an email from Mr Weaver of the same day in which Mr Weaver expressed the view that "…we will fail if we do not secure commitment before disclosing the requisition". Mr Reeves commented "We must as you say keep our attention on the objective of securing new funding which hopefully will support the existing Board and Management in its endeavours". Mr Weaver's reply on 25 September that "As we both agree what appears to be the only solution available to us to overturn this situation is to secure a significant financial investment before the end of next week, or achieve withdrawal of the requisition". In an email of the same date to Mr Yeo (copied to the other Defendants) Mr Weaver said that it was his view that the Requisitioners "have a sale pass through arranged and the only way to head this off is to call their bluff and secure a significant financial commitment before the end of next week. We are absolutely flat out attempting to achieve this".

ii) An email from Mr Yeo to Mr Weaver dated 7 October stating that "For the next few weeks we need to be absolutely focussed on raising the money and seeing off Edkins and co whose agenda as we all know is to seize control of the business for their own malign purposes".

iii) An email exchange between Mr Weaver and Mr Yeo on 9 October 2013 in which Mr Weaver expressed the view that "Right now it is a choice of Diverso taking control for £300k or EJ [Elton John] becoming our high profile benefactor and majority shareholder…enabling us to put all the distractions behind us". Mr Yeo replied, "I realise that the overwhelming priority is to secure funding and I'm not suggesting that anything is done which jeopardises the successful conclusion of our negotiations with EJ".

293. As to the approach that the Board would take to the EGM, I agree with TMO that there are clear indications in the documents that the Defendants and VSA quickly began to turn their minds to what may be required if they got to the EGM, and that the documents reflecting this appear to have set the tone for the Board's dealings with Market Place in the sense that, by the date of the Market Place Subscription, the Director Defendants

were already alive to the potential advantages of persuading a substantial investor to subscribe for shares at the last minute. In particular, I have regard to:

i) The "Every Day a surprise" email from Ms Bramwell of 6 September referred to above and Mr Audley's response. I agree with TMO that, despite Mr Audley's protests to the contrary in his evidence, the clear inference from this exchange is that Mr Audley agreed with Ms Bramwell that steps should be taken with a view to increasing the shares capable of voting against the EGM Resolutions by issuing shares to shareholders friendly to the Board and that he was also immediately concerned with considering whether the Requisitioners would have a sufficient number of shares to win the vote in the event of a conversion of the Loan Notes.

ii) An email from Mr Edwards of 16 September to Mr Audley, copied to Mr Weaver and Mr Reeves attaching an analysis of "how the shareholdings would work on a worse case [sic] scenario" of conversion of Loan Notes, assuming the EGM goes ahead, showing that "the Diverso consortium" would have 48% of the enlarged group and that it would be necessary for the Board "to approach an awful lot of other shareholders further down the register to counter this and if I was on the Board I would not want to rely on doing so successfully". Mr Edwards went on to say that "the only solution I can come up with to counter this threat is to issue more shares for cash, that would be pledged against the resolution OR Andenaes is approached to buy out his interest for cash, including loan notes (amounts to the same thing) or a combination of both". Under cross examination Mr Edwards denied that he was recommending in this email that shares be issued for the express purpose of voting those shares against the EGM Resolutions. However, I find that is the obvious reading of this email and I note that Mr Edwards went on to explain that "we were mandated by all the board members to raise money for cash to get the company through to the promised land. All our efforts, all our focus, was designed to achieve those objectives. The EGM we just saw as one of those problems, and a big problem, that we had to get over".

iii) Email exchanges between Messrs Yeo, McBraida, Reeves and Audley on 17 September seeking to set up a call to discuss "Andrew's idea" as set out in the 16 September email above. Mr Reeves said he would miss the call but said his thoughts on the email were "to buy time until the last minute and subject to interest and commitments from prospective investors negotiate with those parties on investing immediately explaining the position of the dissident shareholders". Under cross examination, the following exchange took place between Mr Sutcliffe and Mr Reeves:

> "Q.What are you suggesting?
> A. What I'm suggesting is that we found investors and at the last minute, those investors were identified on the basis that we could restrict the time available for the loan note holders to convert their notes, which they always had an opportunity to do, but didn't do.
> Q. I'm coming on to that, but I also want to suggest to you that the benefit of delay is that it would give you and the rest of the board and VSA the maximum amount of time to negotiate commitments with prospective investors, wouldn't it?
> A. Of course.

> Q. Then the plan was, your plan was, or the suggestion, was to persuade those investors not to buy their shares, get them on to the share register until shortly before the EGM, so it was too late for the dissident shareholders to convert their loan notes into shares.
> A. That's what I have just said, yes."

iv) An email from Mr Audley dated 23 September to Mr Weaver (copied to the other Director Defendants) referring to the letter to go to shareholders and saying "I do think it's important that everyone realises that the battle is unlikely to be won on the strength of the letter alone – far more important is to use it as a fund of information to support one to one discussions with potentially wavering shareholders".

v) An email from Mr Audley to the Director Defendants dated 24 September expressing his personal views that what he referred to as "a policy of appeasement with no deadline" (i.e. the efforts being made by Mr Weaver and VSA to broker a compromise with the Requisitioners) was going to destroy TMO. Mr Audley expressed the view that if the Requisitioners "get control then they will do what they like, with the confidence that shareholders who haven't dipped into their pockets for the new equity to ensure the defeat of the resolutions are unlikely to dip into their pockets to fund injunctions and costly damages claims" and going on "It is easy for me to say, but someone needs to do the arithmetic and work out how much is needed to ensure the resolutions are defeated and then encourage angry shareholders who have the money to spend it in subscribing for shares – and/or buying out Andenaes – on the basis that it is better to spend the money on the business than on litigation…We need to tell prospective investors, and Edkins, that we are certain that the resolutions will be defeated. If we can't, then it is TMO that will be defeated" (emphasis added). I agree with TMO that this echoed the suggestion made by Mr Edwards in his email of 16 September and that Mr Audley appears here to be focussing on the primary objective of encouraging shareholders to subscribe for shares so as to defeat the EGM Resolutions. I reject Mr Audley's evidence that he was merely proposing that shareholders be invited to subscribe for shares "to raise much needed cash for the company", which does not reflect the words used in the email.

vi) An email exchange between Mr Yeo and Mr Weaver on 26 and 27 September referring to a share analysis provided by Ms Bramwell. Mr Yeo remarks that "This shows that it would not be impossible for us to win an EGM vote even though it would clearly be very tight. However we need some cash to survive even to the likely EGM date". Mr Weaver replies "To win is possible if a very large proportion of non Sinoside shareholders voted against the resolution…The only way to win is to secure enough money within the next week…".

vii) The emails between Board members, Mr Audley and Mr Edwards over the period between the Requisition and the EGM circulating share spreadsheets providing analysis of the voting position. Mr Sutcliffe put it to Mr Audley that these demonstrated "an increasing obsession with shareholder arithmetic around the board's prospects of defeating the EGM resolutions as the EGM draws nearer", to which Mr Audley replied "Well, there always is in a contested requisition. There always is that. These things run in parallel". I understood his latter

comment to indicate that the issue of funding was running in parallel with the desire to defeat the resolutions at the EGM, although for reasons I shall return to in a moment, I do not consider that this was the case by the time of the Market Place Subscription.

294. In summary, therefore, whilst I reject the suggestion that the Board was operating in the first few weeks after the Requisition on the basis of a fixed, deliberate and dishonest strategy to defeat the EGM Resolutions, I accept that the Director Defendants (and their advisers) were beginning to articulate ideas about how the EGM Resolutions might be defeated, in the context of also addressing a number of other ways in which the issues that TMO was facing might be resolved. There was certainly an awareness that there was likely to be a need to maximise shares that would vote in the Board's favour, although at this stage this appears to have gone hand in hand with the funding drive. In cross examination Mr Reeves acknowledged that the short term objective was "to keep control of the board and raise money to develop the business as we had intended". That these two objectives progressed in parallel is hardly surprising in circumstances where the Director Defendants were already involved in a critical fundraise at the time of the Requisition and were then obliged by the Requisition to focus on its content and to make recommendations to shareholders.

295. However, I am of the view (for reasons I set out below) that the need to tip the scales on the voting came to assume predominance as the EGM drew closer and the situation became more desperate.

Immediate Context: Events of October 2013

296. In the summer of 2013, the Board had been introduced to Mr Lloyd by Mr Carlisle with a view to assisting in the fund raise. By early August 2013, he was receiving instructions from Mr Reeves to provide a financing proposal in relation to the PDU and also appeared to be investigating the possibility of raising a £2.5 million investment in TMO. However, to the disappointment of the Board this all came to nothing.

297. On 28 August 2013, Mr Lloyd is described by Mr Edwards in an email to Mr Weaver and Mr Reeves as "Fund manager to the pop stars", an apparent reference to his claimed connections with Elton John. In the weeks following this email, (i) Mr Weaver made arrangements which he believed would result in contact with Elton John; (ii) VSA appears to have held a number of roadshow meetings; and (iii) Mr Yeo explored the possibility of obtaining funding from Roman Abramovich (as he recorded in his email to Mr Miller of 28 September).

298. By the date of the Board meeting of 28 September, Mr Weaver was reporting that there had been discussions about an investment of £2.5 million from Elton John but that he was waiting for a meeting to be confirmed. I am satisfied that at this Board meeting, the Board appears to have been focussing on the need to raise money. Thus in the context of a discussion with Mr Hussain about the fact that TMO was running out of cash, the minutes record: "The Board has to consider: if the £2.5 million investment does not come in, can the company get enough money to buy it the time until an investment comes in. David stated the cash may not come in by the end of next week, just the confirmation; he was confident that once the cornerstone investor is in place by the end of October the

fundraising would be completed". I am equally satisfied that this was the case at the time of the next Board meeting on 1 October 2013.

299. In an email dated 3 October 2013, sent by Mr Yeo to Mr Weaver, Mr Yeo expressed the view that "everything" was now riding on Mr Weaver's trip to Los Angeles to see Elton John. He went on "With EJ as a cornerstone investor I am sure we can attract the rest of the money needed. Without him we are really close to the end".

300. However, by the Board meeting on 9 October, in circumstances where the planned trip to Los Angeles had been cancelled and a Letter of Intent had not materialised from Elton John, various of the Director Defendants were becoming sceptical about whether there was indeed a real prospect of his getting involved as an investor. Mr Weaver had continued in his efforts to capture an investment from Elton John, clearly believing that there was a prospect of those efforts bearing fruit. However, at the same time, Mr Edwards had carried out investigations into Mr Lloyd, the results of which he provided to Mr Reeves and Mr Weaver in an email of 7 October. In addition to noting that Mr Lloyd's address and car appeared "very average", Mr Edwards said that he was "pretty confident" that Mr Lloyd was not FCA registered.

301. At the meeting on 9 October, Mr Weaver remained positive about the prospects of an investment from Elton John, saying he would be coming to inspect the PDU and sign the documents the following Tuesday. Mr Audley expressed surprise that there had not yet been any lawyer to lawyer negotiations and Mr Yeo said "we are looking for comfort that these people are real". Following a remark from Mr Yeo that even if things went well with Elton John, the money needed to be received by the following week, the minutes record the following exchange between Mr Yeo and Mr Audley (an exchange which Mr McBraida appears to have missed as he dropped off the call):

> "Tim stated that as the general meeting was to be held on 28 October, the board needed to get something out to shareholders next week (w/c 14 October). Unless we have the investment in before the 28 October the board would not necessarily have the vote it needed to fend off the requisitionists. Max stated that essentially we need to tell them we need a commitment in before then. It is possible to issue shares nil paid and take payment later. Provided shares are not in arrears they can be voted at a general meeting. Tim stated that reassured him a lot" (emphasis added).

302. I agree with TMO that this is a significant exchange. On the face of the minute, Mr Yeo now appears to be concerned with receipt of funding primarily as a means of issuing sufficient shares to defeat the challenge of the Requisitioners at the EGM. Mr Audley apparently seeks to reassure Mr Yeo that there is an alternative option to the receipt of cash and that the mere receipt of a commitment to purchase shares is sufficient for shares to be issued that may be voted at the EGM. To my mind this alternative option has nothing whatever to do with obtaining cash for the purposes of funding and everything to do with facilitating the defeat of the EGM Resolutions.

303. Mr Yeo accepted in cross examination that he had understood Mr Audley to be advising as to the legal entitlement of a company to issue shares that could be voted at a general meeting without receiving payment for the shares before the EGM at which they were voted. However, he denied that he linked investment with the prospect of defeating the

EGM Resolutions during the course of this meeting, emphasising that "the principal purpose of raising the funds was to establish itself commercially" that "my interest was getting the money in" and that he regarded a promise to provide funds as valuable in that it would help to encourage other investors to put their cash into the company. However, in light of the wording of the meeting minute, I reject that evidence. Although Mr Yeo denied it, I accept TMO's case that Mr Yeo was reassured by the advice he had received because it took the immediate pressure to obtain cash off the company, whilst still holding out the prospect of defeating the EGM Resolutions.

304. In Board meetings on 10, 11, 14 and 16 of October, the chorus of doubts about the credibility of the potential Elton John investment became louder. By the 16 October meeting, the Board appears to have formed the view that they had been given wrong information about Elton John. The minutes record that Mr Yeo stated "…we are in cloud cuckoo land. We have no idea where the principal is, we have no emails. I do not think we can reliably rely on their responses. So far we have a series of statements that are not true and I cannot believe them", he went on "…it is irresponsible of us to rely on these people for money with a lawyer whose name we do not know". Mr Weaver confirmed he had no evidence of any money.

305. However, during the course of the meeting, Mr Weaver informed the Board that he had "agreed a face to face meeting with Ben Lloyd, Harry Kerr, Jason Bryne, Gary Carlisle and Tim the lawyer to get an explanation to sort this out". He went on to say that "Harry Kerr has also offered to bring in two of his existing investors who could possibly invest quickly". The meeting was to take place the following day and it was agreed that Mr Reeves and Mr McBraida would also attend the meeting. Mr Audley advised that they would want "reassurance that this is not pie in the sky and you have not been talking to the groom's wife's sister's boyfriend so they can provide the finance".

306. Pausing there, it is TMO's case that by this stage there was no sensible basis for exploring these avenues any further. Mr Carlisle had disappointed in his dealings with the Board on previous occasions and information that had been received from Mr Lloyd about Elton John had been inaccurate. TMO says that the reason that the Board persisted was because of "the ulterior purpose of needing to find a counterparty to provide the necessary commitment, regardless of that party's ability to honour that commitment". I consider that at this stage, TMO's case goes too far:

    i) Whilst I have no doubt that the Board was sceptical about the prospects of obtaining funding from "the Tetbury three", nevertheless they were in dire straits: TMO was on the brink of insolvency and had been taking frequent advice from Mr Hussain. The general tenor of the minutes of these Board meetings is that the Board was anxious to raise money (including short term cash to meet its overheads) and I do not believe that they were now in a position where they did not care whether money could be raised or not. They may perhaps have been naïve in continuing to hope that funding would be forthcoming from Elton John, Mr Lloyd or Mr Carlisle, but I find that they did genuinely hold that hope at this stage, albeit that different members of the Board were more or less confident about the position.

    ii) Mr Weaver seems originally to have identified the possibility of an investment involving Mr Kerr on or around 7 October 2013, when he sent an email to Mr Edwards asking him to "please check out Harry Kerr (sp?) of Avalon

Investments?" If he had really been wholly unconcerned about the possibility of Mr Kerr honouring any commitments he might make, there would have been no reason to do this. Mr Edwards replied on the same day confirming that Mr Kerr was founder and CEO of Avalon, that Avalon provides the platform to allow IFAs to operate and that "it sounds like Avalon may also provide a settlement/dealing platform through which IFAs invest on behalf of their clients. Currently over 30 IFAs use the Avalon platform and collectively they manage funds in excess of GBP280m". Mr Edwards went on to say that Mr Kerr's profile had been raised recently because he headed a consortium to bid for Portsmouth FC. He noted that Avalon's reported profits were small and surmised that it was "not a mega successful but steady business". He also noted that Mr Kerr was a Chartered Accountant.

iii) Mr Audley's advice at the time (given in an email of 16 October 2013 to Mr Weaver) was that "These people (Ben and co) have proved unreliable and I think we're past a stage when you need to worry about spooking them, and at a stage when we have to show both them and potential claimants in an insolvency that TMO is taking this very seriously indeed". This chimes with Mr Reeves' oral evidence that "we were exploring every, every opportunity to raise that money, and…if it included a fickle pop star and his advisors, we had a duty to do so". In his oral evidence, Mr Audley said "I believe the directors were right to carry on pursuing that as one of a number of, at the time, very limited options…There are some flaky people in showbiz, but…sometimes they come up with money where normal people wouldn't…so it's worth a try".

iv) In an email sent on the evening of 16 October, Mr Weaver provided the details for the meeting the following day, saying "Harry Kerr manages funds for the clients in question, approx. £20 million each. If we convince Harry of the viability of the investment, as fund manager of client's funds under his management he has offered to transfer amounts of money into investment in TMO as part of his client's portfolio". Mr Weaver said that he anticipated hearing an explanation for the "EJ fiasco" and that he wished to "convince and negotiate Harry into investing his client's money, which he can do quickly". Mr Reeves responded he had understood the meeting to have a dual purpose: first to determine how it might be possible to get closer to Elton John for a firmer commitment of his intention to invest and second to make presentation to possible investors. Mr Reeves recognised that efforts to date in relation to Elton John had been a "disaster" but said he would feel more comfortable if "we could get an explanation of why nothing seems to have come to fruition and that there exists a firm intention to invest substantially together with evidence to that effect".

307. The meeting took place on 17 October 2013, attended by Mr Weaver, Mr McBraida, Mr Reeves, Mr Audley and Mr Bennett on behalf of TMO. Mr Weaver reported on the meeting in an email of the following day, saying that Messrs Brain, Kerr and Lloyd had (i) remained confident that Elton John would invest and would sign a share subscription the following week and (ii) expressed their belief "that they can achieve a signed share subscription for £2.5 million by Tuesday of next week (22nd)". I note this was not a reference to the receipt of any cash and, indeed, that Mr Weaver expressed the view that if these objectives could be achieved "we should seek short term support to cover salaries next Wednesday to keep the business intact". Mr Weaver went on to say "…we will

need a minimum subscription and share issue plus the support of other 'friendly' shareholders to vote against the Sinoside requisition on 28th".

308. I accept TMO's submissions that the meeting seems to have produced no evidence in support of any firm investment. Furthermore, it seems to me that Mr Weaver appears from this email now to be thinking in terms of obtaining a commitment to invest, rather than an immediate injection of cash.

309. On 18 October, Mr Audley sent an email to Mr Yeo informing him that the Requisitioners had lodged the necessary documents to comply with the requirements of the Articles for the appointment of directors at a general meeting. Mr Yeo replied "Well that means we just have to get a majority of the votes". On the following day (19 October), Mr Yeo emailed the other Director Defendants saying that he thought it would be a good idea for every shareholder to be contacted directly by a director in the context of the forthcoming EGM, a proposal with which Mr Reeves agreed.

310. In the early evening of 18 October there was another Board meeting, again attended by Mr Hussain. Mr Weaver reported on the meeting in Tetbury and the question for the Board to consider is recorded as whether "we are confident of the Avalon Investment and EJ". Mr Reeves said that he believed there was "a 50/50 shot of finding the money", an assessment with which Messrs McBraida and Audley agreed. The Board discussed the fact that it still had the offer from Mr Edkins (as set out in the Requisition) and sought advice from Mr Hussain as to whether this offer should be explored. Mr Hussain said that if the Board was to go into administration and the Board had not got back to Mr Edkins "there could be criticism". The Board discussed a draft letter to Mr Edkins prepared by Mr Audley and agreed it. Mr McBraida indicated that he might wish to make an offer to the Board himself.

311. Later that same day Ms Bramwell sent an email to Mr Edkins in the form agreed by the Board inviting a formal offer of finance from him to enable the Board to choose between the various alternatives available to it. Given the detailed discussions about this letter at the Board meeting on 18 October, I do not consider that this letter was merely "window dressing" as submitted by TMO and nor do I accept that it was deliberately sent to the wrong address (as was suggested by Mr Sutcliffe in cross examination of Mr Yeo); the email was sent to an address for Mr Edkins which had been used previously by Ms Bramwell and was again used by her in November 2013. The address appears to have been completed using the autofill function. Unfortunately, Mr Edkins does not appear to have seen the email until after the EGM, but I find that the Board was still considering its options and genuinely wished to see whether the money offered by Mr Edkins was available.

312. Over the weekend of 19/20 October, Mr McBraida and Mr Audley exchanged emails on the subject of an offer of funding that Mr McBraida wished to make to TMO. The draft wording, as tidied up by Mr Audley, began with the statement that "in recent months" Mr McBraida had "put in two significant sums of money into TMO in order to avoid the loss of our company to Diverso/Sinoside" (emphasis added). Having set out the substance of the proposal for a loan of £200,000 to be provided in two tranches, it went on to say that "Because of the general meeting to be held on 28 October, the first tranche will be split in two, the first being an immediate payment of a sum to cover the strictly necessary costs of the company up to the 28 October and the second immediately following and conditional upon, a successful defeat of the motions to be voted on at that

meeting". The offer concluded: "I accept that if the vote is lost or TMO goes into administration, I could lose this and monies already put into TMO in order to retain its independence" (emphasis added).

313. The Board met again by phone at 9.30 am on 21 October. The Board discussed Mr McBraida's loan offer and Mr Weaver provided an update on funding, including a report on a message he had received from Mr Kerr who had "not decided yet but is saying up to £2.5 million and we should hear this afternoon". Mr Weaver explained that no names had been given for investors as they "are paranoid about secrecy", although Mr Audley pointed out that they would need to give their details when they became shareholders. Towards the end of the call, Mr Weaver left and Mr Edwards joined. The final paragraph of the Board minute records that:

> "Tim welcomed Andrew and explained that the Board were still hopeful of bringing in a sizeable investment in the next 24 hours. So the focus of this call is how to bring in votes for next Mondays meeting. Andrew was updated on funding progress and then it was discussed with Andrew who would be contacting which existing investors and whom Andrew should contact."

314. I agree with TMO that the language now being adopted by the Board ("bring in votes") is inconsistent with the evidence of the Director Defendants that their overriding and predominant concern was always and only to raise cash. TMO's short term funding issues had been resolved by Mr McBraida's offer and I agree that it is a reasonable inference that the terms of his offer only served to strengthen the Board's resolve to win the vote.

315. A further Board meeting was held by phone at 5.30pm on 21 October, at which Mr Hussain again provided advice following an update from Mr Weaver on the funding position. Mr Weaver said that the McBraida Loan had been agreed that morning and that in circumstances where there was £36k in the bank and a need for £72k for salaries and direct debits, Mr McBraida would be asked to transfer £100,000 (which he agreed to do the following morning). Amongst other things, Mr Weaver reported that "Harry Kerr is following a lead in the oil industry and is talking in terms of £2.5 million" (information he had set out earlier that afternoon in an email to the Defendants noting that the person to whom Mr Kerr was speaking had "apparently agreed in principle to invest" and that Mr Kerr was "now trying to achieve confirmation and signature of approx…£2.5 million"). Mr Hussain advised that in light of Mr McBraida's loan he considered that TMO now had comfort that it had money until "next Monday" (i.e. the date of the EGM) and that it was fine for the company to continue to that point. Mr Yeo stated that would give TMO time to complete "some of these deals".

316. Pausing here, I accept that by this stage, the possible initiatives that were still under discussion with Messrs Lloyd, Brain and Carlisle were being considered separately from Mr Kerr's "lead in the oil industry", although Mr Weaver was continuing to meet with the former individuals to discuss possible syndicates of investors.

317. Late that same evening, Mr Yeo sent an email to Messrs Reeves and Audley saying that the lack of progress did not reassure him and that he did not have the sense that "someone is about to sign a subscription letter for £2.5 m in the next few days". He noted that "If

that is the case, we cannot be sure, in the absence of attracting a new investor, of winning the vote next Monday".

318. At 9.45 am on 22 October, the Board held another meeting by phone. Mr Weaver reported that there had been no new developments overnight. The minutes record that Mr Reeves said that he had been through the share register this morning and "it is very clear we need Presnow's vote". Mr Yeo said "we are right up against the wire". In cross examination, Mr Reeves confirmed that "the wire" for this purpose was "the date a few days before the EGM by which it would be necessary to issue shares that would be voted at the EGM". At the same meeting, Mr Yeo also stated in the context of a planned call with Mr Caraballo on behalf of Presnow that it was important to "be frank and say we need investment and need votes".

319. In cross examination, Mr Sutcliffe asked Mr Reeves about this:

> "Q. He was making a link between investment and votes?
>
> A. Yes
>
> Q The reason investment was needed was to generate votes to defeat the EGM wasn't it?
>
> A To generate votes, yes
>
> Q And to defeat the EGM.
>
> A - - hopefully sympathetic to us, yes".

320. On 22 October 2013 at approximately 3.45 pm, Ms Bramwell sent to Mr Weaver a spreadsheet identifying all of the votes for (136,281,423) and votes against (139,199,101) the EGM Resolutions. It assumed that "2.5 Million of New Money" (comprising 62,500,000 shares) would be voted against the EGM Resolutions. By virtue of this hypothetical injection of funds, the EGM Resolutions would be narrowly defeated (having regard to the available information about votes received to date). The largest shareholder shown as still undecided on the Schedule was Presnow, which held 27,900,000 shares or 7.15% of the vote. Mr Caraballo was identified in red next to Presnow's name on the list as the relevant contact.

321. Mr Sutcliffe put to Mr Weaver in cross examination that the purpose of this spreadsheet was to inform the Board as to "how many shares they need to issue in order to win the vote". Mr Weaver said that he could not say what its purpose was, an answer that I did not find convincing, given the (by this stage) intense focus on bringing in votes so as to defeat the Resolutions. To my mind it was clear to the Board from Ms Bramwell's shareholder analysis that £2.5 million of "new money" was required if the EGM Resolutions were to be defeated.

322. Shortly after Ms Bramwell had sent out the spreadsheet, Mr Edwards contacted her asking which "camp" a particular shareholder was in and also inviting her to "take me through the relative share percentage if we reach say GBP 3.0m sometime tomorrow?". Ms Bramwell responded that the shareholder Mr Edwards had asked about was "the enemy". Mr Edwards asked "Are you sure that the GBP 2,500,000 is enough to swing

the vote our way?". Ms Bramwell responded "Can never be 100% sure of anything" and said she would call to take Mr Edwards through it.

323. At approximately 5.20pm, Mr Reeves sent an email to a shareholder contact asking him to return his completed proxy form voting against the six resolutions and commenting "We need all the votes we can get".

324. A further Board meeting was held by telephone at 6.30 pm on 22 October. The minutes record that Mr Weaver was "putting together a syndicate of £2.5 million which will be put in immediately. Max and David are going to Tetbury tomorrow for a 9am meeting to sign application and proxy forms. One condition to this is that Harry becomes Finance Director". This latter proposal was approved by the Board on no more information than that Mr Kerr was "FSA registered". Mr Yeo asked for a text to be sent "when the document is signed tomorrow". In relation to another possible £1 million investment that had been in the pipeline, the minutes record that it "might just still come in on time" (a reference that Mr Reeves said in cross examination he assumed was "the deadline a few days before the EGM which would allow shares to be issued to be voted at the EGM on 28 October").

325. On the subject of the proposed transaction involving Mr Kerr, Mr Audley returned to the advice he had first given to the Board on 9 October (which he accepted in evidence now had Mr Kerr as a specific candidate) saying "provided he does sign the form as provided, if he does that, then if you as a Board approve for £2.5 million shares at 4p to be issued it is possible to issue fully paid shares with no cash. All shares issued can vote".

326. Although the minute records that the funds from Mr Kerr's syndicate would be injected "immediately", none of the Defendants suggested that they expected the whole sum to be put in straight away. Mr Reeves said in cross examination "…we realised we had no prospect of getting the full 2.5 million because it was a syndicate that was being put together" and went on to speculate as to the amount that might be forthcoming: "Could be 500,000, £300,000. Your guess would be as good as mine on the basis of the facts". He also said he had "no idea" who was in the syndicate and no information as to how many members of the syndicate there might be "frankly, it didn't matter to me. All I wanted was the £2.5 million for the company".

327. As for Mr Audley's advice, only Mr Reeves accepted in cross examination that its impact was that "the urgency to get cash in before the EGM fell away". To my mind, on the evidence of the documents, Mr Reeves was right about this. TMO relies upon an answer Mr Reeves then made in cross examination as follows:

> "Q With the EGM only four business days away, the only purpose for issuing shares to Mr Kerr without taking payment was so that the Harry Kerr shares could be voted at the EGM?
>
> A Yes."

328. In my judgment and in light of the other documents to which I have already referred, this answer was truthful, although I note that seen in context in the transcript it is clear that Mr Reeves was giving inconsistent answers on this subject, one minute accepting the proposition that had been put to him and the next minute denying it. It would be too simplistic to say that the Board had forgotten about funding altogether (after all, Mr Yeo

had spoken of funding and votes in the same breath at the meeting on 22 October in relation to contact with Presnow) but in my judgment by the time of the Market Place Subscription, the urgent need for votes had come very significantly to outweigh any other purpose.

329. In addition to the long minutes of the meeting in the evening of 22 October, some short minutes were prepared in a more formal format recording that it was resolved that "any two directors be and they are hereby appointed a committee of the Board to accept applications for up to £2,500,000.00 worth of ordinary shares in the Company at 4p per share as part of the May funding round and to authorise the allotment and issue of the shares and their entry in the register of members".

330. At just before 6am on 23 October 2013, Mr Reeves sent an email to the Defendants with the subject heading "Finance Director", saying that he had been giving further thought to Mr Kerr's appointment as finance director and asking about the implications. Mr Reeves says that he is in favour of appointing Mr Kerr but that his appointment "does bring into sharp focus the need to win the vote next Monday". The email concludes "I don't have any further ideas on how we can win the vote other than those discussed last night but one sure way would be to have the "Tetbury Three" find another £1m if possible before the weeks out".

331. The reference in Mr Reeves' email to the "ideas" for winning the vote "discussed last night" is clearly a reference to the Board meeting of the previous evening at which the Board had agreed that Messrs Weaver and Audley would go to Tetbury to obtain signatures on application and proxy forms (and had authorised the allotment and issue of up to £2.5 million of ordinary shares) against the background of Mr Audley's confirmation that all that was needed for the issue of shares was Mr Kerr's signature and the Board's approval.

332. In a reply sent at approximately 7.30 am (copied to each of the Director Defendants and to Mr Audley), Mr Yeo wrote "My instinct is that as soon as they have signed the subscription letter we should be completely open with them about the knife edge nature of the vote". He went on to say that he thought a contract could be offered to Mr Kerr "right away" which would give him 3 months' notice "so that if the worst comes to the worst and we lose the vote he gets some protection". Mr Yeo finished the email by telling the Defendants that he had received an email from Mr Caraballo who was available to speak that evening.

333. I accept TMO's submissions that obtaining Mr Kerr's signature on the necessary documents was now regarded as the route to victory at the EGM and that this was the motive behind the Board's decision to send Messrs Weaver and Audley to Tetbury. Indeed the clear inference from Mr Yeo's email of the following day (albeit denied by Mr Yeo in his oral evidence) is that the truth about the "knife edge" nature of the vote at the EGM was going to be held back until the agreement with Mr Kerr had been signed, presumably so as to avoid alerting him to the fact that the vote might still be lost and so discouraging him from entering into the agreement. In addition, it seems to me to be important that everyone on the Board knew that Mr Yeo was due to have a conversation later that day with Mr Caraballo on behalf of Presnow; the shareholder that had been identified by Mr Reeves at the Board meeting on the morning of 22 October as "key".

334. The meeting in Tetbury took place on 23 October and lasted for several hours, although by early afternoon Mr Kerr was anxious to get away because he was travelling to Venice for a holiday that same day and would not be back until the following Wednesday. It would appear from the evidence that during the course of the meeting, Mr Audley worked on a draft agreement on Mr Weaver's laptop. Although Mr Weaver and Mr Audley had originally anticipated that the counterparty to the agreement would be Avalon, Mr Kerr asked for this to be changed to Market Place Financial Services Ltd. The draft agreement was amended accordingly.

335. During the course of the meeting Mr Kerr agreed to increase his offer of funding to £3,000,000. Mr Weaver said in cross examination that he and Mr Audley had asked Mr Kerr whether £2.5 million was "the ceiling…the maximum amount that was available" and Mr Kerr had made some calls and then agreed to increase the figure to £3,000,000. Mr Weaver sent an email to Ms Bramwell while still at the meeting saying simply "What will £3 million do for us?" Under cross examination, Mr Weaver sought to suggest that he wanted to know "several things" in response to this email; first what £3 million would do for TMO in terms of its outstanding bills and targets for expenditure and second "I was interested about the vote". In my judgment Mr Weaver was really only motivated by the latter concern – he had been reporting on the company's funding position on an extremely regular basis for weeks and the idea that he needed to know what difference a figure of £3 million might make in the context of overheads and expenses is not credible. The McBraida Loan had addressed those in the very short term. I find that Mr Weaver was anxious to know simply what impact an increased number of shares would have on the margin of voting and in my judgment this fits with the explanation that Mr Audley gave in cross examination for the increase of £500,000, from £2.5 million to £3 million, namely that whilst he thought Mr Weaver wanted to swell the TMO coffers in due course, there was no expectation of receiving the additional £500,000 before the EGM and Mr Kerr was very anxious to keep the same Board after the EGM "and so Mr Weaver said 'Well if that's the way you feel, why don't you subscribe for some more shares?'".

336. This increase was hastily addressed by Ms Bramwell who, at about 2pm on 23 October, amended the formal resolution made at the meeting on 22 October to reflect the increased sum without changing the date. She then certified it as a true copy and it was signed by Mr Yeo. In cross examination, Mr Sutcliffe suggested to Mr Audley for the first time that the original date was deliberately retained in order to conceal the fact that the authorisation obtained the day before was insufficient; however, on balance I do not consider the explanation to be so sinister. Mr Audley's response was that this was "far-fetched conspiracy" and that the approach taken by Ms Bramwell was a "clerical error". He pointed out, and I accept, that it would have been unnecessary to seek to cover up the position when Ms Bramwell could simply have asked the Board for an updated authority or ratification.

337. The agreement that Mr Kerr signed at the end of the meeting in Tetbury was in the form of a letter to TMO on the headed paper of Market Place and was in the following terms:

> "Dear Sirs,
>
> Subscription for Ordinary shares in TMO Renewables Limited ("TMO")

> We are delivering with this letter a subscription letter and application from for 75,000,000 ordinary shares of 1p each in TMO at 4p per share, for an aggregate subscription price of £3,000,000. Our subscription is being made on the following terms:
>
> The shares will be issued for cash fully paid, in accordance with section 583 of the Companies Act 2006, and we hereby undertake to pay the cash sum of £3,000,000 at a future date being no later than 23 October 2015, whilst using all reasonable endeavours to pay it as soon as practicable after the date of this letter.
>
> TMO confirms that it is continuing to pursue a fundraising at 4p per ordinary share and that in the event that it finds investors willing to acquire further shares it will, before issuing new shares to such investors, use all reasonable endeavours to allow us the opportunity of placing our shares with such investors at 4p per share.
>
> Immediately following the issue of the shares to us, Mr Harry Kerr will be appointed Finance Director of the Company on the terms of the draft consultancy agreement initialled by David Weaver and Harry Kerr for the purposes of identification.
>
> We irrevocably undertake to vote against all the resolutions to be proposed at the general meeting of TMO to be held on 28 October 2013 and any adjournment thereof and are delivering to you with this letter a form of proxy and a letter of corporate representation for that purpose".

338. Mr Weaver countersigned the letter on behalf of TMO and steps appear to have been taken to inform the Board of the good news.

339. By 11.23 that morning, Mr Yeo had sent an email to Mr Caraballo saying "We are in advanced discussions with an investor who is prepared to subscribe £3,000,000 for shares in TMO at 4p per share, immediately that investor is satisfied that, if it subscribes, there will be sufficient votes to defeat the resolutions to be proposed at the general meeting next Monday". Mr Yeo went on to say that it was therefore in TMO's interests to show the prospective investor that Presnow had undertaken irrevocably to vote against the Resolutions.

340. The Board reconvened by phone at 7pm on 23 October. Mr Yeo reported on a conversation he had just finished with Mr Caraballo. The minute records that "Tim also explained to Gonzalo that…there would be a massive dilution of shares if Sinoside gained control of the Board and that not only had we got £3 million come in but we were absolutely certain we could raise the £8.5 we set out to raise" (emphasis added).

341. Mr Audley then reported to the Board on the outcome of the meeting in Tetbury. The minute records that he said:

"Max stated the cornerstone investor has signed and the shares are issued. Harry Kerr would not have signed if he did not think he could raise the funds. The major consequence if Avalon does not come up with the money is no money. Sinoside could say the Board behaved badly as it was a mere contrivance. The Board can say they are FSA registered and have a track record of raising money. I believe it is not unreasonable for the board to accept this offer. David stated Harry Kerr is a sensible person and confident money will come in quickly. He seems to be saying he expected to have some of the money flowing in the next couple of weeks".

342. Mr Reeves pointed out that "we could still find ourselves in a position of no money" but agreed that it was necessary to keep going with the fundraising efforts "till we find money to be put in. The caution about this is if the £3 million is signed and people know but we could find ourselves technically being insolvent in the next month".

343. It is clear from these minutes that:

i) There was no expectation of receipt of any money from Market Place in advance of the EGM, although it was hoped (on the strength of assurances from Mr Kerr) that "some money" would be available in the next few weeks;

ii) There was an acknowledgment that the Market Place Subscription would not necessarily result in the receipt of any money or assist in avoiding insolvency;

iii) There is no suggestion of any due diligence having been undertaken in respect of the receipt of money – on the contrary, Mr Audley appears to be careful to say that Mr Kerr would not have signed "if he did not think he could raise the funds". There is no comment from Mr Audley or anyone else as to their views on this.

iv) There was discussion about the fact that the Market Place Subscription might be viewed as a "contrivance" and Mr Audley expressed his views as to the justification that might be given in such circumstances.

344. To my mind the minute of this meeting provides yet further strong evidence that the Director Defendants' motive in entering into the Market Place Subscription was improper in that the primary focus was now on the need to win at the EGM. Any sense of caution around the credibility of Mr Kerr and his underlying investors, the terms of the Market Place Subscription and whether it would genuinely result in the receipt of any money appears to have been thrown to the winds.

Transaction Features

345. Various features of the Market Place Subscription, to which I shall turn next, also support this improper predominant purpose.

346. First, as I have already alluded to, the Director Defendants failed to conduct any proper due diligence in respect of the Market Place Subscription. Aside from (i) the email of 7 October from Mr Edwards to Mr Weaver, setting out some basic information about Avalon, and (ii) the fact that Messrs McBraida, Reeves, Weaver and Audley had visited Mr Kerr's "well-appointed premises" in Tetbury, there is no contemporaneous evidence of the Board carrying out any other investigations into Mr Kerr or his companies. Mr Weaver said in cross examination that "the chances are" that some internet searches and

telephone calls had been undertaken, but acknowledged that he was guessing. He also said that he had seen copies of Market Place's latest accounts in the office in Tetbury, but, if he did, these would have given no comfort that Market Place itself was good for the money.

347. There is no evidence of any information being sought from or provided by Mr Kerr in relation to his syndicate. In cross examination Mr Yeo said that he "thought quite possibly Mr Kerr had identified quite a lot of investors by that time. I had no means of knowing". Mr Yeo also said that he had understood that Market Place had "over half a billion pounds of client money under its own administration" and there is evidence in the form of an email dated 29 November 2013 to Mr Kerr that Mr Yeo had got this information from Mr Kerr's website, but there was no contemporaneous documentation to support this and nor does it appear that the press reports to which I was referred at trial in relation to the bid for Portsmouth FC came to the attention of any of the Defendants at the time. Primarily, the Director Defendants' evidence was simply that they had relied upon Mr Kerr's qualification as a Chartered Accountant and his "FCA regulated" status (as Mr Audley advised that they should).

348. The proposed counterparty for the transaction changed from Avalon to Market Place during the meeting in Tetbury on 23 October without either Mr Weaver or Mr Audley asking any questions about the sudden change. Mr Weaver said in cross examination that he was "not really" concerned about the change. Mr Audley appears to have been so casual about the identity of the counterparty that he referred to it by the wrong name during the Board meeting on the evening of 23 October (he accepted in cross examination that he viewed the two entities "interchangeably").

349. I agree with TMO that by the time of the Market Place Subscription, the Board was simply focussed on obtaining a written commitment from Mr Kerr which could be instantly translated into shares to vote against the EGM Resolutions. His "FCA" status was useful in that it could be relied upon to justify the decision to enter into the Market Place Subscription, but there was no imperative to carry out any checks that went beyond that. I note that Mr Parker provided support for this in his witness statement when he described a call he had received from Mr Kerr on 8 November during which Mr Kerr explained that he had entered into the Market Place Subscription "in order to keep the company in the existing board's hands". Mr Parker describes the shock he felt at what he considered to be "an act of collective madness" on the part of the Board.

350. Second, I accept TMO's submissions to the effect that the Market Place Subscription letter is a highly unusual document, whose terms are really only explicable when seen in the context of the Director Defendants' overwhelming desire to win the vote at the EGM. In closing, Mr Collings accepted that it contained "admittedly unusual terms". This was something of an understatement.

351. The Market Place Subscription certainly made little commercial sense for a company on the verge of insolvency for a number of reasons.

352. First, the issue of shares in return for a promise to pay £3 million was inconsistent with the approach taken to the fundraise to date which had operated on the basis that shares could only be issued for cash (thus the Offer of New Ordinary Shares dated 10 May 2013 made it clear that to apply for shares, Qualifying Shareholders and Qualifying Employees

needed to complete the application form and "make payment in full of the subscription money").

353. Second, a promise to pay had no impact on the Loan Notes, whereas the receipt of cash would automatically convert the loan notes into shares under the terms of the 3 March 2013 loan note variation, thereby reducing sums owed by TMO to its creditors.

354. Third, the entry into an agreement with a previously unknown counterparty in respect of whom no due diligence had been undertaken could provide no genuine comfort that any of the funds that had been promised would be forthcoming. As Mr Audley acknowledged at the Board meeting on 23 October, the Board was entirely dependent upon Mr Kerr's belief that he could raise the money. I note that contrary to his oral evidence that dealing with an FCA/FSA regulated entity would be "enough for a lawyer", Mr Audley did not seek to make this point to the Board. Given the terms of the agreement, I reject Mr Audley's evidence about this, which I consider to be unrealistic.

355. Fourth, the agreement to pay the money by the long stop date of 23 October 2015 made no sense where TMO was urgently in need of money and had been teetering on the edge of insolvency for many months. It provided no comfort that funding would materialise in the near future and indeed, as Mr Reeves pointed out at the Board meeting on 23 October, the spectre of insolvency remained. Mr Weaver's explanation in cross examination that the £3 million would immediately go on the balance sheet and become a company asset ignored the fact that there was no enforceable debt for 24 months and no proof that Market Place would be good for the money.

356. Fifth, it was Mr Weaver's evidence that Mr Kerr had confirmed at the Tetbury meeting that £500,000 could be obtained "by the end of the month", and yet (as I have already mentioned) the agreement did not refer to any such payment in circumstances where (according to Mr Weaver) Mr Kerr did not want to be pinned down to a date. If the Director Defendants had really been keen to raise funds, at the very least they would surely have required an express contractually binding commitment in relation to any sum that Mr Kerr was prepared to commit immediately. In any event, I do not consider that Mr Weaver was truthful in the evidence he gave about this £500,000.

357. Sixth, the agreement imposed no obligation on Market Place to find investors itself, an extremely odd omission in circumstances where Mr Kerr had apparently assured Mr Weaver that the money would be coming from a syndicate that he was putting together.

358. Seventh, instead, the agreement imposed a "reasonable endeavours" placing obligation on TMO which, I accept, on its face, exacerbated the absence of any obligation on Market Place to find investors because it meant that Market Place could wait for TMO to source funds safe in the knowledge that it would not be pursued for those funds for 2 years. Several of the Defendants were asked about this and gave similar answers. They said that they agreed to this term because Mr Kerr was demanding it, and because they honestly believed it was unlikely to have a material effect. Mr Audley said it was a "give the baby its rattle paragraph". As he described it this is because prospective investors would always prefer to subscribe for new shares directly from the company rather than buying them from Market Place, due to (i) the absence of stamp duty; (ii) potential EIS (Enterprise Investment Scheme) tax relief on the issue of shares; and (iii) the natural desire of any investor to see his money actually injected into the company's coffers rather than the hands of a third party. I am bound to say that I think it highly unlikely that the

Director Defendants analysed matters in this way at the time and I find it difficult to believe that Mr Audley did either.

359. Eighth, the agreement involved the appointment of Mr Kerr as Finance Director on an annual salary of £200,000. In cross examination Mr Sutcliffe made the serious allegation that this was a "bribe" and in closing he pointed to a draft of the agreement which unconditionally obliged TMO to pay Mr Kerr an annual salary of £200,000 payable on presentation of an invoice, arguing that this is likely to have been in the same form as the initialled copy referred to in the agreement. Mr Sutcliffe submits that no due diligence was done in relation to this role, there was no discussion with Mr Kerr over the finance function until after the EGM and the agreement was only executed on 11 November 2013 after Andbell had requested sight of it. Only at that stage, says Mr Sutcliffe, was an element of conditionality introduced into the salary conditions. Accordingly he says that it is a promise of a financial advantage to Mr Kerr intending it to be for the improper performance of an activity connected with business (Bribery Act 2010, section 1(2)). I agree that Mr Kerr's appointment as Finance Director looks odd for all the reasons Mr Sutcliffe gives, but on balance I reject the suggestion that it was a bribe. The available documentary evidence suggests that Mr Kerr had insisted on being appointed as Finance Director (perhaps to look after his own interests or those of his syndicate) and I infer that the Director Defendants were happy to oblige if that helped to encourage him to enter into the Market Place Subscription. The original version of the initialled copy of the draft consultancy agreement referred to in the letter has never been found and so I cannot say whether it made the receipt of salary conditional upon receipt of the £3 million from Market Place (as the final agreement of 14 November 2013 with Golden Valley did). Further I note that Mr Weaver's and Mr Audley's evidence was that the element of conditionality was agreed at the meeting on 23 October, evidence which appears to be supported by an email from Mr Kerr to Mr Audley on 12 November saying "I agree that I did not expect to be paid until the company had raised funding". Mr Kerr agreed to execution of the Golden Valley agreement on 14 November 2013 with receipt of £3 million as a precondition of payment under clause 4.2.

360. Two other points are worth noting about the Market Place Subscription which to my mind support the proposition that by the time of its finalisation, the Director Defendants were predominantly focussed on defeating the EGM Resolutions. First, the increase in the figure in the Market Place Subscription from £2.5 million to £3 million gave the Board more headroom in respect of the vote, whilst at the same time removing some of the pressure to persuade Presnow to vote against the EGM Resolutions (pressure which was plainly very much in the minds of the Director Defendants on 22/23 October 2013).

361. Second, the "irrevocable undertaking" to vote against the EGM Resolutions was quite unnecessary in circumstances where, at the meeting on 23 October, Mr Kerr provided a signed proxy and letter of corporate representation appointing Mr Yeo as his representative at the EGM and instructing him to "vote against" the EGM Resolutions. This much was accepted by Mr Audley in his evidence and acknowledged by Mr Collings in closing submissions. However, Mr Audley went on to deny that the provision only made sense if it was a requirement of TMO, giving an explanation which, to my mind, rang hollow:

> "I accept that this appears to be something that the company might have insisted upon. That is absolutely not the case. It was certainly ––it suited the company, of course, for it to be there.

> There was no sort of ringing objection when Mr Kerr asked for it.
>
> Now, what he asked for is comfort that he would be able to vote the shares if he committed to subscribe for them. He was almost neurotic about the prospect of subscribing for shares in this company and then seeing a different board in place, people whom he hadn't met. And he was off to Venice and he was really very, very anxious indeed that his departure for Venice was going to mean that he wouldn't be able to vote the shares.
>
> …
>
> Now, the word "irrevocably", I'm afraid it's just a legal tic . You know, there are lawyers who, when they see the word "undertake", just can't help putting "irrevocably" in front it , and I'm afraid that is what I did and I regret having put "irrevocably" because it wasn't ––he could have changed his mind. I accept that."

I agree with TMO that the only sensible explanation for the insertion of the irrevocable undertaking is that Mr Audley and/or Mr Weaver insisted upon it, anxious for a cast iron guarantee that the Market Place shares would be voted against the EGM Resolutions. I do not accept that Mr Kerr was behind this provision, as the Defendants' contend or that he presented himself as desperate to vote against resolutions to the point of being "neurotic". I cannot see why he would have taken this approach. I reject the Defendants' evidence to that effect.

362. I also reject the explanation given by Mr Weaver in his oral evidence and by Mr Reeves in an email of 6 November 2013 that Market Place was the "only game in town" in the sense that Mr Kerr was in a position to dictate the terms of the agreement simply because TMO "needed the money". The fact is that the Market Place Subscription as drafted gave no comfort whatever that any money would be forthcoming any time soon. Save that it was a "game changer" in relation to the EGM (as Mr Weaver said on 26 October 2013 in an email to the Board "we pulled one out of the bag with Harry Kerr"), its value in the context of fundraising was at best unknown, although that is not to say that the Director Defendants did not continue to hope that money might eventually be forthcoming – in my judgment they did. However, at the time of entering into the transaction itself the fundraising was not at the forefront of their minds. Their predominant purpose was defeating the EGM Resolutions.

Board Agreement

363. At approximately 2pm on 23 October, Mr Audley emailed a copy of the Market Place Subscription to the Board noting that Messrs Yeo, Reeves and Weaver had already approved it and that the shares had now been issued. The email goes on to address Mr McBraida directly saying "Mike I have been trying to contact you". TMO accepts that Mr McBraida did not approve the agreement before signature but I am satisfied that he must have done so by the time of the Board meeting that evening, when no issue was

raised by him about its content. Mr McBraida realistically accepted in his oral evidence that he is very likely to have read the agreement at the time it was sent to him.

364. For the sake of completeness I should add that I consider that each of the Director Defendants had the improper purpose I have identified. Each had been present at the Board meetings I have referred to and, although Mr McBraida seems to have dropped off the call at the 9 October meeting when Mr Audley gave his first round of advice about the possibility of issuing shares nil paid and taking payment later, nonetheless he attended the later Board meeting at which the advice was repeated. Whilst it is clear that Mr McBraida had no hand in determining the terms of the Market Place Subscription, he accepts that it is very likely he read it and he did not object to it at the Board meeting on the evening of 23 October. It is clear from a close analysis of the documents that Mr McBraida was often copied in to relevant email traffic, or taking an active part in it. Furthermore, he had approved the words used in his offer of funding to the Board which expressly articulated a desire to maintain the Board's independence. Accordingly, I reject Mr Morgan's submissions that Mr McBraida is to be treated as being in a separate category from the rest of the Director Defendants.

Speed of Share Issue

365. I accept TMO's submissions that the speed with which the shares were issued to Market Place indicates just how important it was to get voting shares on the register in time for the EGM. Within a short time of the Tetbury meeting concluding, Mr Audley emailed the letter of agreement, the corporate representation letter and the proxy form to Ms Bramwell for onward transmission to the registrars commenting "belt and braces". Ms Bramwell sent the necessary documents (including the amended minutes of the meeting on 22 October authorising the allotment and issue of up to £3 million worth of shares) on to Margaret Nowlan at Equiniti who emailed her at 3.37pm advising that "the 75,000,000 ordinary shares have been registered in the name of Market Place Financial Services Ltd". Ms Nowlan noted that (presumably at the request of Ms Bramwell) "our team pulled out all stops to get these registered".

366. In this context I note that the timing of the issue of the Market Place shares had the effect of depriving the Requisitioners of the time necessary to counter the share issue by converting their own loan notes into shares which could be voted at the EGM. However, I do not accept TMO's submissions that this was a deliberate strategy, agreed as far back as 17 September, with a view to giving the Board the best chance of winning the EGM vote. Whilst this possibility had been identified early on, I do not find that it was a strategy that had been agreed upon and I note that there is no evidence that the Board could have obtained the necessary signatures from Mr Kerr any earlier than they in fact did. On the contrary, the Market Place Subscription only emerged as a possible solution to the Board's immediate difficulties on 21 October.

Subsequent Conduct

367. TMO accepts that the purpose of the Director Defendants in issuing shares to Market Place should principally be assessed by reference to the facts and matters known at the time and I have made findings on that basis. However, it submits, and I agree, that its case on improper purpose is also supported by the Director Defendants' subsequent conduct. For present purposes I note in particular that following the issue of the Market Place shares, no steps were taken by the Board to ensure that £3.75 million of Loan Notes

were converted into shares, a step which would have reduced TMO's debt burden and improved the position of other creditors. Mr Yeo could not explain this in cross examination.

368. I also note three emails in the period after the EGM which appear to me to be important:

i) Mr Weaver's email to Mr Yeo dated 30 October 2013 in which he described the Market Place Subscription as having been "done out of necessity rather than choice".

ii) Mr McBraida's email to Mr Parker of 8 November 2013 stating that the transaction was "not contrived" but that he doubted Diverso/Sinoside "would believe that in a million years. I don't think I would"; and

iii) An email from Mr Reeves to Mr Yeo dated 6 November 2013 following an email from Mr Monk of VSA complaining that he had been assured "100% by David Weaver that the £3mn was committed" but that "It appears from what I have heard that the £3mn is a long way from committed but actually is just an option for them to have should the company survive and get funding elsewhere". Mr Reeves comments to Mr Yeo "I'm afraid that I do think its Andrew who has spilt the beans…How else would that information have been passed on from someone not in the know?"

369. I infer from these emails (against the background of the contemporaneous evidence that I have already examined in detail) that the Director Defendants appreciated that they had acted improperly and that third parties would consider that they had acted improperly, but were seeking to cover up their conduct. The "necessity" to which Mr Weaver was referring was the need to win at the EGM so as to maintain control. The words "spilt the beans" are redolent of a cover up.

370. Finally, TMO submits that the Board's deliberate concealment of the terms of the Market Place Subscription from shareholders is a "badge of impropriety and fraud". I shall return to this submission in a later section of this judgment.

371. Notwithstanding my findings above, however, and having considered all of the evidence with great care, I am not persuaded that the Market Place Subscription was a complete sham. The meeting in Tetbury appears to have gone on for several hours and does not seem to have been a rubber stamping exercise of the sort one might expect if it was simply designed (as TMO contends) to hoodwink all existing and potential shareholders. A number of the Defendants said Mr Kerr had a powerful negotiating position, and that seems more than likely given the terms of the agreement (although it still does not to my mind explain the irrevocable undertaking). Further, there seem to me to be far too many contemporaneous documents treating the Market Place Subscription as a genuine agreement for me to decide that it was purely a sham, even bearing in mind Mr Sutcliffe's submission that I should treat self-serving documents with care.

Conclusion on Issue 1(ii)

372. I reject the Director Defendants' case that the Market Place Subscription was primarily or predominantly to secure investment and that they did not enter into the arrangement

with Mr Kerr with a view to securing votes. This case does not sit comfortably with the contemporaneous documents.

373. In my judgment, by the time the Market Place Subscription came into view, the Director Defendants were all desperate to find an investor because they saw this as the only way to defeat the Requisitioners at the EGM. They grasped at the possibility offered by Mr Kerr, no doubt hoping that they would eventually raise money from it, but entertaining its peculiar and apparently uncommercial terms primarily because of the very fact that it would enable the voting to swing in their favour at the EGM and thus ensure their continuing control of the Board. It was not open to the Director Defendants, for the purpose of converting a minority into a majority, to issue shares to Market Place pursuant to the Market Place Subscription. This was plainly an improper purpose and in breach of their fiduciary duties. Furthermore, on a close analysis of the evidence, I consider that it was an improper purpose that was shared by each of the Director Defendants.

374. As I shall explain in more detail later, I also consider that Mr Audley was well aware of this improper purpose having been closely involved throughout with the decisions taken by the Board.

VSA Share Issue (Issue 1(iii))

TMO's Case

375. In paragraph 74(3) of the Re-Amended Particulars of Claim, TMO seeks to draw the inference from two specific events that the primary or dominant purpose for which the Director Defendants exercised their power to authorise TMO to issue 2,625,000 ordinary shares to VSA on 25 October 2013 was to cause the EGM Resolutions to be defeated and so maintain their own control of the TMO Board.

376. The two events upon which TMO relies are:

i) first, the fact that pursuant to the VSA Retainer, VSA was entitled to sales commission payable in cash and ordinary shares in TMO on a 50:50 basis, but only on completion of the equity fundraising with which VSA had been engaged to assist TMO and that therefore as at 25 October VSA had no contractual entitlement to be issued shares in TMO (which shares were forfeited by TMO acting by its Joint Liquidators on or about 14 January 2016); and

ii) second Mr Edwards' email of 25 October 2013 which I set out below. It is alleged that this email prompted a Board meeting at which the issue of such shares was approved.

377. In closing, Mr Collings took a very light touch with this allegation, acknowledging that "I could hardly fault your Ladyship if you resolved that, or determined that temptation had been put in the way of the directors, and it was a temptation that they couldn't and didn't resist…And if that's the position, that it was a temptation…that was put in the way of the directors that they couldn't and didn't resist, then that's an improper purpose".

378. I consider it to be unsurprising that Mr Collings took this approach. In my judgment, the issue of the VSA shares was plainly for an improper purpose. The key events are as follows:

i) At a Board meeting attended by all of the Director Defendants on 24 October at 6.30pm, Mr Audley asked "Has anyone raised the issue of issuing VSA's shares, this was Andrew's idea". The minutes then record that Mr Yeo asked how much they were entitled to and Mr Reeves responded that "they were entitled to 7% of the £3 million, 3.5% of that is taken in shares."

ii) In an email of approximately 9.30 am on 25 October sent to Mr Yeo, Mr Weaver and Mr Audley, Mr Edwards said this:

> "If we are still concerned about the proxy vote being too close to call then you might like to consider issuing the shares to your advisers, totalling 2,625,000 under the terms of their engagement. Clearly there is a logistical issue in order for those shares to be placed on the register in time to vote against the resolution. I have copied in Max to that he can advise on the legal aspects of the proposal".

> Mr Yeo suggested "a quick call" on this with Mr Audley and Mr Weaver in an email sent approximately one minute later. Under cross examination, Mr Yeo confirmed that there was no doubt that Mr Edwards was proposing the issue of the shares so that they could be registered against the EGM Resolutions, while Mr Edwards said that "What I was trying to achieve was to get over the problem that the EGM requisition posed for the company, which was just so damaging".

iii) At 9.46 am, Mr Audley replied to Mr Edwards' email saying that he would wait for Mr Yeo to reply before providing his thoughts on the legal aspects "except to say that it's getting close to the wire when it comes to getting the registrars to issue the shares to VSA and register them in time for them to be voted on Monday".

iv) Mr Weaver responded to Mr Yeo's email saying "Issuing commission shares should be advantageous and low risk. I would be in favour. Unfortunately I can't get on a call for a couple of hours due to back to back meetings" (emphasis added). It is unclear owing to changing times on the email chains whether this email was sent at 9.44 or 10.44 am.

v) At 9.59, Mr Audley emailed Ms Bramwell asking her to phone him and saying "It seems we may want to be issuing some shares to VSA today and get them on the register before Monday, so your charms may be required with the registrars."

vi) A Board minute recording a meeting of the directors by phone at 10am on 25 October and signed by Mr Yeo, evidences a resolution that any two directors be appointed a committee of the Board to accept applications for up to £105,000 worth of ordinary shares in the Company at 4p per share as part of the May Fundraising and to authorise the allotment and issue of the shares and their entry in the register of members. Minutes of a further meeting of the committee in the form of Mr Yeo and Mr Weaver held by phone at 10.30 am record that "David Weaver reported that the Company was obliged under the engagement letter with

VSA" to issue 2,625,000 at 4p per share, namely a subscription price of £105,000. It was resolved that the shares "be issued immediately and that the allottee be entered in the register of members and issued a share certificate in respect of the shares".

vii) In an email from Mr Yeo to the other directors (including Mr McBraida) and Mr Audley timed at 11.01 am attaching a copy of Mr Edwards' email of 9.30am, Mr Yeo confirmed that he was in favour of taking the necessary steps in relation to the VSA shares "(notwithstanding the reservations I expressed about VSA last night on the call)". He went on "Because time is now so short I propose to action this in 30 minutes from now. Sorry to rush you but an extra 7 million votes might be very useful" (emphasis added). Mr Yeo admitted in cross examination that the 7 million votes included the VSA votes. Mr Weaver responded to this email saying he supported "this initiative". In cross examination, Mr Weaver accepted that it was "quite possible" that the rush that was being referred to by Mr Yeo was "because 7 million shares needed to be issued or registered so that they could be voted at the EGM". Mr Reeves also confirmed "That's fine with me".

viii) At 11.57am, Mr Weaver sent to Ms Bramwell, the other Director Defendants and Mr Audley an email inviting her to "Please consider this email as board approval to issue 6,250,000 shares to VSA as agreed commission payment, approved by a board meeting by phone at 10-00 hours today. Subsequently actioned by the authorised committee of Chairman and CEO at a subsequent meeting held at 10-30 hours today". Ms Bramwell responded pointing out that Mr Weaver had transposed the numbers and that the figure should be 2,625,000 shares. Mr McBraida responded "That was the number agreed at last night's meeting".

ix) At 12.45 pm, Ms Bramwell sent a copy of the minutes of the Board meeting of 25 October to Margaret Nowlan of Equiniti, asking for the issue of shares to "be dated today, 25 October 2013". At 1.05pm, Ms Bramwell emailed Mr Edwards, Mr Audley and Mr Weaver saying that she had given instructions for the shares to be issued and attaching a proxy form and letter of representation.

x) At 1.39pm, Ms Bramwell emailed Mr Edwards, Mr Audley and Mr Weaver informing them that "The shares are on the register" and that she was updating the figures now.

xi) At approximately 2pm, Mr Berger of VSA sent to Mr Weaver three invoices raised in accordance with the letter of variation dated 1 October 2013. His covering email recorded that "…the balance of the success fee of 3.5% will be settled by the issue of 2,625,000 shares in TMO (£105,000 = 2,625,000x£0.04) to VSA". Just over an hour later, Mr Berger emailed Equiniti saying that he understood that 2,625,000 shares had been issued to VSA and had now been recorded in TMO's register. He attached VSA's completed proxy form indicating VSA's vote against the Resolutions.

xii) At approximately 3.50pm Ms Bramwell sent to Mr Edwards an updated proxy list which included the VSA votes.

Discussion

379. Notwithstanding TMO's submissions to the contrary, I find that the issue of shares to VSA was Mr Edwards' idea (as recorded in the minutes of the Board meeting on 24 October and set out in his email the following day). Mr Edwards confirmed as much in his evidence:

> "Q. Around this time, you raised the possibility of issuing shares to VSA Capital which could be voted against the EGM resolutions, didn't you?
>
> Yes I did"

Mr Edwards went on to confirm that the Board minute of 24 October accurately recorded that this was his own idea.

380. Mr Edwards' email of 25 October is illuminating because the use of the word "still" plainly suggests that there was a continuing concern that the steps already taken by the Board to bolster share numbers (namely the Market Place Subscription) may not be sufficient in light of the continuing uncertainty over the Presnow vote ("It would be nice to know where Presnow sit because they have a decisive role in the proxy battle"). In my judgment this is the backdrop to the Director Defendants' decision to authorise the issue of the VSA shares.

381. On my reading of the VSA Retainer, VSA had no immediate contractual entitlement to receive a sales commission; this being payable only "on completion of the Transaction". The Transaction is defined in the VSA Retainer as "a proposed equity fundraising…for TMO", i.e. the fund raise of up to £8.5 million – which had not yet completed (indeed TMO might have argued that the Market Place Subscription had nothing whatever to do with this fund raising effort). When it was put to Mr Edwards in cross examination that there was no entitlement for VSA to be paid by TMO he responded "All my actions were driven by the motivation to get this problem out of the way to get us back to the road to raise money for a company that was bleeding cash fast. That was the sole focus of my actions", from which I can only infer that he agreed.

382. Notwithstanding this, I accept that the Board minute of 24 October evidences a discussion around what VSA was "entitled" to under the terms of the VSA Retainer and I also note that during their evidence, the Defendants (including Mr Audley) all maintained that they believed VSA was entitled to receipt of the shares for work done on their Retainer, although there is no evidence that anyone (other than perhaps Mr Reeves) considered the detail of the VSA Retainer.

383. However even assuming that the Director Defendants (or some of them) genuinely thought that VSA was entitled to the shares, that does not to my mind assist them on this issue, for the following reasons:

i) The shares were issued with extraordinary alacrity once Mr Edwards' idea (expressly raised in the context of winning the vote) had been articulated;

ii) It appears that Mr Yeo had raised reservations about the idea (which are not recorded anywhere and which he said in evidence he could not recall) and yet he nevertheless sought to rush the rest of the Board into making a decision in

circumstances where he viewed the VSA votes as "very useful". This can only have been in the context of defeating the EGM Resolutions. When questioned about this, Mr Yeo maintained that VSA had done a great deal of work and that TMO owed them money, but went on to say this: "we could take advantage of the fact that as like a gesture of goodwill, we could issue them shares, some shares, which we would have to do anyway eventually, but by the way of commission for the funds coming in". This appeared to me to be an admission that it was not necessary to issue the VSA shares immediately in order to satisfy any contractual obligations that might exist and thus also a tacit admission that their issue was not for a proper purpose, but rather to achieve the ends suggested by Mr Edwards. In closing Mr Collings appeared to accept this logical consequence of Mr Yeo's evidence.

iii) When it was put to him that the purpose of the VSA Share Issue had been "to bolster the numbers voting against the EGM Resolutions on the Monday", Mr Weaver replied "I can't deny that's how it looks, but I can't be sure". Mr Weaver's suggested lack of certainty appears to me to be misplaced. His remark in his email of 25 October that issuing shares to VSA would be "advantageous and low risk" is only explicable on the basis that he recognised that the shares would assist in defeating the Requisitioners at the EGM and that their issue would be capable of an apparently credible explanation.

iv) Mr Audley's evidence on the subject was that "I have to say, if the board had raised it or I had raised it, I would have said it was probably best not to do this because I think that would have been for the purpose…of skewing the vote…But it was Mr Edwards who asked and so VSA had an entitlement to the shares. The board could have refused, but it didn't". In my judgment, Mr Audley's instincts were correct but the fact that Mr Edwards raised the matter did not make any difference. Indeed the second part of this answer showed extremely woolly thinking (at best) on Mr Audley's part: first, his apparent assumption that the fact that Mr Edwards had raised the matter must mean that VSA had an entitlement to the shares did not follow in any event from the terms of Mr Edwards' email or indeed the terms of the VSA Retainer, and second his acknowledgement that the Board could have refused rather gave the lie to his assertion that VSA had any immediate entitlement to the shares. Later in his evidence, he agreed that he knew that the issue of the VSA shares was being actioned as soon as possible so they could be registered in time for the shares to be voted at the EGM and he also admitted that "we knew…the only reason VSA would want those shares is in order to vote them".

v) In this context I note that VSA only provided its invoices, including an invoice identifying its percentage sales commission, after the shares had been registered.

vi) In my judgment, each of the Director Defendants was aware of the suggestion by Mr Edwards (they were all present at the Board meeting on 24 October when the matter was plainly discussed in more detail than the minute records). Furthermore, each of the Director Defendants was involved in discussing and approving the urgent issue of shares to VSA the following day, albeit they were not all copied in to every email. I cannot see any basis for absolving Mr McBraida.

Conclusion on Issue 1(iii)

384. In all the circumstances I find that the issue of shares to VSA was in breach of the Director Defendants' fiduciary powers in that it was made for an improper purpose; I also find that each of the Director Defendants was motivated by this improper purpose. There was in fact no immediate obligation under the VSA Retainer to pay VSA and, even assuming the Director Defendants (or some of them) thought that there was, their predominant purpose in issuing the VSA Shares was in fact to influence the voting at the EGM pursuant to the suggestion that had been made by Mr Edwards. That explains the rush to get their views on his suggestion, together with Mr Yeo's statement that the shares would be "very useful".

385. Albeit that the issue of these shares was suggested by Mr Edwards, it does seem to me that it is to be seen in the context of the Director Defendants' overwhelming desire by this stage to defeat the EGM Resolutions; the Director Defendants saw Mr Edwards' suggestion as a means of further bolstering their position going into the EGM.

386. TMO also points to the VSA Share Issue as being "probative of a pattern of behaviour which is relevant to the Court's overall assessment of the probabilities when determining the purpose for which the shares were issued to Market Place". I agree that the conduct of the Director Defendants in relation to the VSA Share Issue is a useful cross check as to their conduct and motivations in relation to the Market Place Subscription and strengthens my conclusion as to improper purpose behind that transaction.

Issue 2: The alleged section 172 fiduciary duty breaches (bad faith/contrary to TMO's interests)

387. TMO alleges breach of section 172/breach of fiduciary duty in seven respects:

(1) That the TMO Board EGM Recommendation of 4 October 2013 was made in terms which did not fairly or accurately present to shareholders the precariousness of TMO's financial position and the imminent threat to its survival if funds were not obtained.

(2) That the Director Defendants authorised TMO to issue shares to Market Place and VSA recklessly, not caring whether Market Place would be able to pay for such shares or whether VSA was contractually entitled to such shares, at a time when they knew that TMO was in dire need of funds in order to avoid administration.

(3) Mr Weaver made the Immediate Investment Representation to Mr Akerman on 24 October 2013 knowing that it was untrue (because he knew there was no immediate obligation on the part of Market Place to invest) or recklessly, not caring whether Market Place would be able to invest immediately, but motivated instead by the improper purpose of defeating the EGM Resolutions.

(4) Mr Yeo made the First Cash Received Representation to Mr Parker on or about 27 October 2013 knowing that it was untrue (and it is to be inferred that he was

authorised to make this representation by the Board in order to induce Presnow to vote against the EGM Resolutions).

(5) Mr Yeo made the Second Cash Received Representation to shareholders at the EGM on 28 October 2013 knowing that it was untrue (and it is to be inferred that he was authorised to make this representation by the Board in order to induce the shareholders present at the EGM to vote against the EGM Resolutions).

(6) The Director Defendants withheld from shareholders at the EGM on 28 October 2013 the terms of the Market Place Subscription (and it is to be inferred that this was done deliberately in order to deceive shareholders, knowing there was a serious risk of shareholders voting in favour of the EGM resolutions if they learned the truth about the Market Place Subscription).

(7) The Director Defendants' rejection of the Andbell Loan Offer on 22 November 2013 was contrary to the interests of TMO and made in bad faith.

The Law

388. The CA 2006 s172(1) provides:

> "(1) A director of a company must act in the way he considers, in good faith,
> would be most likely to promote the success of the company for the
> benefit of its members as a whole, and in doing so have regard (amongst
> other matters) to-
> (a) the likely consequences of any decision in the long term,
> (b) the interests of the company's employees,
> (c) the need to foster the company's business relationships with suppliers, customers and others,
> (d) the impact of the company's operations on the community and the
> environment,
> (e) the desirability of the company maintaining a reputation for high
> standards of business conduct, and
> (f) the need to act fairly as between members of the company".

389. The core principle is that directors must make decisions in good faith with a view to promoting the success of the company for the benefit of the members as a whole. As Lord Greene MR put it in *Re Smith & Fawcett Ltd* [1942] Ch 304 at 306:

> "The principles to be applied in cases where the articles of association of a company confer a discretion on directors … are, for present purposes, free from doubt. They must exercise their discretion bona fide in what they consider – not what a court may

> consider – is in the interests of the company, and not for any collateral purpose."

390. In *Regentcrest plc v Cohen* [2001] 2 BCLC 80, the nature of a director's duty was described in the following way by Jonathan Parker J at [120]:

> "The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law para 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."

391. However, as TMO pointed out, and I did not understand to be controversial, this general principle of subjectivity is subject to five qualifications (see *Re PV Solar Solutions Ltd* [2018] 1 BCLC 58 (Registrar Barber at [75]-[78] and *Item Software (UK) Ltd v Fassihi* [2005] 2 BCLC 91 (Arden LJ at [41]-[44]):

i) where a company is insolvent or verging on insolvency, the duty extends to consider the interests of creditors, whose interests are "paramount".

ii) Where there is no evidence that the directors have actually considered the best interests of the company, the court will apply an objective test: namely whether an intelligent and honest man in the position of the directors of the company could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company.

iii) If, in a company which is insolvent or of doubtful solvency, the interest of a large creditor is without objective justification overlooked and not taken into account, the objective test must be applied.

iv) If there is no basis on which a director could reasonably have come to the conclusion that the action taken was in the interests of the company, a court is likely to find the director in breach of duty.

v) There is a positive duty on a director to disclose his own and other directors' wrongdoing if to do so is consistent with the duty to act bona fide in the interests of the company.

392. In this case, TMO contends that it is not appropriate for the Court to apply a purely subjective test, because (as is common ground) TMO was at all times a company verging on insolvency. Accordingly, an objective approach to the assessment of 'good faith' is necessary (having particular regard to the interests of the Loan Note holders, including Andbell and Diverso, which were the largest creditor group).

393. The requirements of a claim in deceit were comprehensively summarised by Hamblen J (as he then was) in *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm) [210]-[233] and are not in dispute. TMO highlighted the following principles:

i) the tort of deceit involves a "perfectly general principle" which is engaged where (1) a defendant makes a false representation (a) knowing it to be untrue or being reckless as to whether it is true (b) intending the claimant to act in reliance on it and (2) the claimant relies on the representation, suffering loss [210];

ii) a representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true. In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee [215];

iii) where the facts are not equally well known to both sides, a statement of opinion by one who knows the facts best may carry with it a further implication of fact that the representor believes that facts exist which reasonably justify it [217];

iv) a statement of fact which is literally true may nevertheless involve a misrepresentation because of matters which the representor omits to mention [219]. In its written closing reply submissions, TMO drew my attention further to the specific authority relied upon by Hamblen J for this proposition, namely *Oakes v Turguand* (1867) LR 2 HL 325, which concerned the failure to mention information in a company prospectus, which was in itself "literally true". The House of Lords held that the purchaser of the shares was in principle entitled to avoid the contract for fraud because the directors were bound to furnish information which they possessed themselves (although the claim failed on other grounds). Lord Chelmsford observed that "the objection to [the prospectus] is, not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been acquainted, the very concealment of which gives to the truth which is told the character of falsehood";

v) in relation to an implied representation, the court has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct [220]; and

vi) in a deceit case it is necessary that the representor should understand (1) that he is making the implied representation and (2) that it had the misleading sense alleged. A person cannot make a fraudulent statement unless he is aware that he is making that statement. To establish liability in deceit it is necessary to show that the representor intended his statement to be understood by the representee in the sense in which it was false [221].

The 4 October 2013 Board Recommendation (the October Circular) (Issue 2(i))

394. This was the Board's notice to shareholders of the Requisition and General Meeting. It was drafted by Mr Audley in collaboration with Mr Yeo (who signed it as Chairman).

395. TMO alleges in its pleading that it was misleading in that it failed to set out:

i) Any particulars of the alleged failures of Mr Andenaes, Mr Edkins and/or Mr Glen;

ii) Any grounds for doubting that a further £2 million of funding would be provided by Sinoside;

iii) The absence of any firm or serious offers of funding from any entity other than Sinoside;

iv) A realistic assessment of the likelihood of substantial funds being obtained before the EGM other than from Sinoside; and

v) The serious risk of TMO entering administration if funds were not obtained by TMO.

TMO invites the court to infer from these omissions that the Director Defendants deliberately intended the TMO Board to mislead shareholders in order to induce them to vote against the EGM Resolutions. In cross examination and in oral submissions on behalf of TMO, these failures by omission were significantly finessed, as I shall come on to explain.

396. In considering whether a notice of a general meeting is misleading, it is common ground that the key principles are to be found in *Kaye v Croydon Tramways Co* [1898] 1 Ch 358. Rigby LJ identified the key question as "was the purpose of this meeting fairly and in language that could be understood by ordinary people disclosed?" (372-373). He went on to say "I do not mean to say that it is necessary by notice to give full information as to the nature of the business to be transacted; but you must give, at any rate, a fair and candid and reasonable explanation of the purpose or purposes, whatever they may be, for which the meeting is summoned" (373). Lindley MR expressed the view that the notice in that case was "a tricky notice" because it was "not a notice disclosing [the purpose for which the meeting was convened] fairly, and in a sense not to mislead those to whom it is addressed".

397. In similar vein, Cozens-Hardy MR said this in *Baillie v Oriental Telephone and Electric Company* [1915] 1 Ch 503: "I feel no difficulty in saying that special resolutions obtained by means of a notice which did not substantially put the shareholders in the position to know what they were voting about cannot be supported, and in so far as these special resolutions were passed on the faith and footing of such a notice the defendants cannot act upon them." The mischief in *Baillie* was that the directors had sought ratification of resolutions passed in relation to their own remuneration without providing the shareholders with particulars as to the very substantial amount of remuneration that they had in fact received.

Discussion

398. The October Circular summarised the various business initiatives that TMO had been exploring throughout 2013, and informed shareholders that:

> "The funds raised by the current directors have kept the Company going while it developed a credible business plan, on the basis of which further funds are now being raised to enable it to move forward to becoming a profitable operation. In the past five weeks, with the help of VSA Capital…we have started to present the Company's business plan to prospective new investors".

399. The October Circular then dealt with VSA's involvement and mentioned in passing that Mr Glen and Mr Andenaes had been members of the Board until 10 September 2013. In a section headed "Requisition", the circular referred to the receipt of the First Requisition Notice on 6 September 2013, the shock felt by the current directors and then went on to set out the steps taken in the following terms:

> > "the non-conflicted directors discussed the position among themselves, consulted VSA Capital and took legal advice…It was universally agreed that holding an EGM in these circumstances would be extremely damaging to the company and would seriously impede the achievement of a successful outcome to the planned fundraising.
> >
> > It was further agreed that the timing and manner of the requisition had clearly been deliberately designed by Mr Edkins, acting in concert with and fully supported by Mr Glen and Mr Andenaes, to inflict the maximum harm. The actions taken and proposed by all three are against the interests of TMO shareholders, loan note holders, creditors, employees and customers: they will also seriously unsettle TMO's management team and staff. It is impossible not to conclude that these consequences were understood by Messrs Edkins, Glen and Andenaes. Regrettably they have chosen this course of action for purposes of their own, regardless of the damage they are thereby doing to TMO".

400. The October Circular explained that in view of these actions, the Director Defendants "had no alternative" but to seek the resignation of Messrs Glen and Andenaes from the Board. It went on to say that repeated attempts had been made to reach agreement with Mr Edkins so as to avoid the need to hold a general meeting and that "Although the current directors have serious reservations about the suitability of all three directors…we were prepared to set these concerns aside for the purpose of preventing a general meeting, whose disruptive impact on TMO is likely to be very considerable". The circular then referred to receipt of the Second Requisition Notice, noting that it would, if passed, "give control of the board to Sinoside and its associates".

401. Under the heading "Reasons for rejecting the Resolutions", the October Circular explained that the Director Defendants were unanimously recommending that the EGM Resolutions be rejected and pointed out that "Approval of these resolutions would have the effect of transferring control of the board to people whose actions have damaged TMO and who repeatedly failed to cooperate with the current directors in maintaining good standards of corporate governance".

402. The October Circular enclosed the Sinoside Statement, which set out the detail of the points that the Requisitioners wanted to draw to the shareholders' attention, including

their four reasons for wanting to seek changes to the Board, their ambitions for the future of the company and their plans (upon the EGM Resolutions being passed) to inject £300,000 into TMO and to procure subscribers for a new £2million fundraise at a price set by investor demand. The circular pointed out that the Sinoside Statement did not make it clear at what price further shares would be issued, warning that the Director Defendants believed this to be an indication that the price could be below 4p and that approval of the EGM Resolutions therefore risked a reduction in the value of shareholder investment in TMO and a dilution in shareholdings. The circular also said that the Director Defendants had very strong reasons for doubting that the £2million would be forthcoming.

403. Under the heading "Further Information", the October Circular said that it was intended to write to the shareholders again in the next ten days or so to provide an update.

404. TMO's pleaded case does not identify any positively false or misleading statements in the October Circular. Instead it complains that various matters were not drawn to the attention of the shareholders. However, no allegations of bad faith in this regard were put to Mr Reeves, Mr Weaver or Mr McBraida. Mr Reeves' confirmation in his witness statement at paragraph 97 that the contents of the October Circular were accurate, and Mr McBraida's description of the Circular as "accurately" noting the Board's main concerns in his witness statement at paragraph 82, were not challenged.

405. The complaints on which TMO relied in closing were fivefold, and I deal with each in the following paragraphs.

406. First, TMO says that the October Circular invited shareholders to choose between the fundraising capability of the existing Board and the Requisitioners without providing any accurate update as to the Board's failure to raise funds. TMO thus contends that there was no meaningful point of comparison and that this failure was compounded by the failure to provide any promised update. This appears to draw together the alleged omissions in paragraphs 75(1)(iii) and (iv) of the Re-Amended Particulars of Claim, which are concerned with the omission to provide information about offers of funding and the likelihood of funds being raised in advance of the EGM.

407. I reject this criticism. None of the Director Defendants was cross examined on this point and insofar as the point was raised with Mr Audley, it was on the basis that the reference to further funds being raised in the circular was itself a misleading statement because there was no imminent prospect of further funds being raised as at 4 October, to which he responded "I construe that as meaning there's a fundraising going on, not that the money's come in or committed, and I certainly didn't intend to be misleading". Mr Sutcliffe did not put to Mr Audley the point now raised in closing submissions as to the lack of any meaningful point of comparison.

408. In any event, the October Circular informs shareholders of the new VSA fundraising efforts and of the fact that, together with VSA "we have started to present the Company's business plan to prospective new investors". This was an accurate statement and as at 4 October, I find that each of the Director Defendants believed that funding might be forthcoming; the Board minute of 1 October records Mr Yeo's statement that "at this point the Board has reasonable belief that there will be money coming in to the Company". I do not accept that the circular contained insufficient information for shareholders "to know what they were voting about" in this regard. The comparison was

between the efforts of the Director Defendants, who had engaged VSA and were actively seeking to raise funds in good faith at this point, and the proposal put forward by Sinoside.

409. Second, TMO says that the description of the Requisitioners' motives "grossly misrepresented the reality of the position as known to the directors" and that the allegation that any of these individuals was acting deliberately to damage TMO was without foundation. This allegation is not foreshadowed in paragraph 75(1) of the Re-Amended Particulars of Claim and it was not put to any of the Director Defendants. Far from relying on an omission, it amounts to an allegation of a positively misleading statement, which allegation is not pleaded.

410. Mr Sutcliffe did explore the statement that the Requisitioners were acting deliberately with a view to damaging TMO with Mr Audley who said that the words were Mr Yeo's, but that he agreed with them. Mr Audley went on to explain that Mr Andenaes had never subscribed for shares in TMO and that "the Sinoside people" had not invested in the company. He did not accept that the Requisitioners had TMO's best interests at heart saying that at no time was there a meeting of minds about the future of the company, or the dynamics, because the Loan Note holders had a different agenda from the equity holders. Furthermore, insofar as the Sinoside/Andbell Proposal of August 2013 was concerned, he expressed the view that this was "intended to take control of the company on the cheap". Finally he confirmed that the nature and timing of the Requisition supported the Board's view that Mr Glen and Mr Andenaes were not acting as responsible directors.

411. As I have already made clear, in my judgment, the Director Defendants genuinely believed that the timing of the Requisition was designed to cause harm and their independent advisers, in the form of VSA, were plainly of the view that the Requisition was harmful to the fundraising efforts (see for example the email sent by Mr Yeo to Mr Edkins on 11 September 2013). Accordingly I reject the case now put by TMO on the grounds that (i) it is not pleaded; and (ii) I am satisfied that the Director Defendants genuinely believed that what was said in the October Circular about the motives of the Requisitioners was true.

412. Third, TMO says that the statement that the Director Defendants had no alternative other than to seek the resignation of Messrs Glen and Andenaes owing to their actions in requisitioning a general meeting "which are clearly damaging to the company" was untrue and the Director Defendants knew it to be untrue. Once again, this is an entirely unpleaded allegation. The Re-Amended Particulars of Claim does not raise any issue specifically in respect of the motivations for seeking the resignation of Mr Glen and Mr Andenaes (instead there is an allegation in paragraph 75(1)(i) that the October Circular omits to provide particulars of the alleged failures of Messrs Andenaes, Edkins and Glen).

413. Mr Sutcliffe put this point to Mr Yeo in cross examination who responded "it was a very accurate characterisation and I stand by every word of it". In light of the analysis that I have already undertaken into the circumstances surrounding the request for the resignation of Messrs Glen and Andenaes, I accept Mr Yeo's evidence on this, which appears to me to be consistent with the contemporaneous documents. I reject the new TMO case both on the grounds that (i) it is unpleaded; and (ii) I am satisfied that the October Circular reflects the Director Defendants' genuinely held views in this respect.

414. Fourth, TMO says that the October Circular inaccurately describes the terms of the compromise offer set out in Mr Yeo's email to Mr Edkins of 11 September 2013. The October Circular records that the Board had made "repeated attempts to reach agreement with Mr Edkins" and that "these attempts included offering to appoint Mr Edkins to the board and the reappointment of Mr Glen and Mr Andenaes". TMO says this is misleading because the offer made on 11 September was in fact conditional upon the Board failing to raise "at least £4 million" by 15 November 2013, a fact which, if properly disclosed, TMO argues would have caused the EGM to become a confidence vote on the Board, which Mr Yeo knew the Director Defendants were certain to lose unless substantial funds had been received, which was highly unlikely.

415. This is another unpleaded and unheralded allegation. However, it was put to Mr Yeo in cross examination on the basis that he and the Board made a calculated and dishonest decision to withhold the true nature of the offer made to Mr Edkins from shareholders "as that was a better means of preserving the board's chances of defeating the EGM". Mr Yeo denied that the October Circular was misleading in this respect or that the Board deliberately withheld information from shareholders to manipulate the EGM. Mr Yeo pointed out that the date of the EGM was prior to the expiry date of the offer of 15 November and that therefore (in the context of the suggestion that this would have given rise to a vote of confidence) said "I don't think any conclusions could have been drawn on 28 October as to whether we were going to succeed in raising £4 million".

416. Again, I reject TMO's criticism on the grounds that (i) it is unpleaded; and (ii) the October Circular was not required to provide full information about what had transpired to date, and I reject the suggestion that this element of the October Circular was "tricky". I accept Mr Audley's evidence that the relevant paragraph refers to a series of approaches to the Requisitioners (without providing the detail) and I find that the information about the conditional nature of the offer was not deliberately withheld in bad faith by the Board.

417. Fifth, TMO says that the October Circular omitted to explain the "strong reasons" for doubting the Sinoside offer and that the lack of explanation left shareholders in ignorance as to the relative merits of the rival boards' fundraising abilities. TMO says that there was "no basis for this comment" (i.e. that there were strong reasons for doubting the Sinoside offer). This criticism is reflected in paragraph 75(1)(ii) of the Re-Amended Particulars of Claim which asserts that the October Circular failed to set out any grounds for doubting that a further £2 million of funding would be provided by Sinoside.

418. This point was not put to any of the Director Defendants in cross examination. It was put briefly to Mr Audley who said that he thought the matter was really one "for the directors", but who said "my understanding was that there had been a carrot of a million or two being dangled for many months and…then withdrawn at the right moment…". Mr Sutcliffe went on to put the point that if Mr Edkins had not succeeded in his efforts to raise the £2 million, "the offer was underwritten by Mr Andenaes". However, as was explored in cross examination of TMO's witnesses, there was nothing in the express terms of the offer made in the Sinoside Statement to the effect that it was to be underwritten by Mr Andenaes.

419. The real question on this issue is whether the October Circular provided shareholders with a sufficiently fair and candid explanation which would inform them of the competing arguments on the Requisition and whether the Director Defendants deliberately withheld their reasons for doubting the ability of Sinoside to raise £2 million.

By its oral submissions, TMO also raises the question of whether the Director Defendants genuinely had any reasons for doubting Sinoside's offer. As to the latter point, I find that in light of the various offers made by Sinoside and Mr Edkins previously which had come to nothing the Director Defendants did have genuine reasons for doubting the availability of the proposed £2 million from Sinoside. I do not regard it as misleading that the October Circular did not set out these reasons and nor do I consider that this renders the Circular "tricky".

Conclusion on Issue 2(i)

420. Standing back and looking at the October Circular as a whole (which was apparently prepared with the benefit of advice (or at least input) from Mr Richard Bamforth, the Head of Litigation at Olswang), I reject TMO's case that it was either deliberately misleading or prepared in bad faith by any of the Director Defendants. On the contrary, in my judgment, applying a subjective test, it set out the Director Defendants' honest (and in some cases passionately held) beliefs about the interests of TMO and the damaging conduct of the Requisitioners. Applying an objective test (which it appears to be accepted by the Director Defendants is appropriate given the parlous financial condition of TMO) to the terms of the October Circular, I cannot see that an intelligent and honest man in the shoes of the Director Defendants would have had any reason to view the October Circular as misleading or "tricky".

The Market Place Subscription and the VSA Share Issue (Issue 2(ii))

421. TMO submits that the essential question for the Court is whether a director acting reasonably could have properly recommended that TMO enter into these transactions. It also submits that it is not sufficient for the Director Defendants to rely on their own subjective judgment (exercised, they say, in good faith) in order to justify the transactions, because this is a question which falls to be assessed objectively as a consequence of TMO's precarious financial position during the period preceding them. In any event, TMO says that no director acting reasonably could have believed that these transactions were in the best interests of TMO.

422. Again, I understood it to be accepted that by September 2013 TMO was in urgent and immediate need of cash investment to ensure its survival as a going concern. I did not understand there to be any resistance to the proposition that the task I must undertake is an objective one.

The Market Place Subscription

423. In closing, Mr Sutcliffe asserted that the conduct of the Board and Mr Audley "can properly be described as reckless (and therefore in bad faith) [because] they consented to the Market Place Transaction, not caring whether Market Place would ever come up with the money and caring only that the transaction provided the route to shares for defeating the EGM Resolutions". This submission reflects TMO's pleading at 75(2) of the Re-Amended Particulars of Claim which expressly pleads that recklessness is to be inferred from (i) the primary or dominant purpose of the Market Place Subscription which was to cause the EGM Resolutions to be defeated; (ii) the absence of any, or any adequate due diligence given the introduction of the Tetbury Three to the TMO Board by Mr Carlisle (who had previously defaulted on his underwriting commitment with TMO) and (iii) the

concerns expressed about the reliability and honesty of the Tetbury Three in the context of the purported investment by Elton John.

424. Having carefully analysed all of the surrounding documents and considered the Director Defendants' evidence in the light of those documents for the purposes of my consideration of Issue 1(ii) above, I accept this submission. Looking at the matter subjectively to begin with, I consider that the Director Defendants lost all perspective in the frenzied days leading up to the EGM. Such was their desire to defeat the Requisitioners at the EGM, and so maintain their control of the Board, that they were prepared to clutch at any straw that was offered to them without the exercise of either common sense or scepticism. They failed to 'stand back' and consider whether the Market Place Subscription was genuinely in the best interests of TMO and its creditors, or indeed, whether it could genuinely be expected to provide TMO with much needed finance. The Director Defendants took no steps to satisfy themselves that the "investors" vaguely referred to by Mr Kerr would come up with the money and the terms of the Market Place Subscription itself provided no comfort at all in this regard. No proper due diligence of any kind was undertaken. It is very clear that by the Board meeting on the evening of 23 October, the Director Defendants were resigned to the very real possibility that in fact no money would be forthcoming ("The major consequence if Avalon does not come up with the money is no money"), but were unconcerned about this in circumstances where they were all focussing predominantly on the fact that they were now in a position to 'win' at the EGM. They even discussed at this meeting, with advice from Mr Audley, how to justify any challenges to the Market Place Subscription, from which I infer an awareness on their part that it was likely to be criticised as improper. Entry into the Market Place Subscription was not a bona fide exercise of the Director Defendants' discretion.

425. Looking at the matter objectively, I do not consider that an intelligent and honest man in the position of the Director Defendants could reasonably have recommended that TMO enter into the Market Place Subscription in advance of the EGM.

The VSA Share Issue

426. TMO submits that the Director Defendants authorised TMO to issue shares to VSA recklessly, not caring whether VSA was contractually entitled to such shares, which, in my judgment, it was not. Paragraph 75(2) of the Re-Amended Particulars of Claim asserts that in the context of the VSA Share Issue, such recklessness is to be inferred from the fact that the primary or dominant purpose of the VSA Share Issue was to cause the EGM Resolutions to be defeated.

427. In light of the analysis set out above, I agree with TMO. I consider that the Director Defendants viewed Mr Edwards' suggestion as a fortuitous means of bolstering their position still further in advance of the EGM. Although there was some discussion around whether VSA was contractually entitled to receive the shares at the Board meeting on 24 October, there is no evidence that anyone (other than possibly Mr Reeves) had checked the VSA Retainer. Indeed it would appear that Mr Yeo, at least, understood that there was no immediate entitlement to the shares. All of the Director Defendants appear to have been keen to rush through the issue of the VSA shares on the basis that they "might be very useful" for the purposes of assisting with the vote at the EGM. I do not accept the Director Defendants' evidence that they genuinely thought that VSA had an

entitlement to the shares in circumstances where none of them appears to have checked the position (with the possible exception of Mr Reeves).

428. In any event, applying an objective test, I do not consider that an intelligent and honest man in the position of the Director Defendants could reasonably have recommended that TMO rush into the VSA Share Issue in advance of the EGM without a thorough understanding of VSA's rights and entitlements under its retainer. If the intelligent and honest man in the position of the Director Defendants had also understood that there was in fact no entitlement on VSA's part to the shares, or, at the very least, a good argument that there was no entitlement, he would have vetoed the transaction.

The Immediate Investment Representation (Issue 2(iii))

429. Paragraphs 46A and 46B were added to the Re-Amended Particulars of Claim relatively late in the day. They assert that on 24 October 2013 Mr Weaver had a meeting with Mr Akerman whose purpose was to discuss Rock Nominees' vote in relation to the EGM Resolutions. At the meeting it is said that Mr Weaver "orally represented to Mr Akerman that a "cornerstone investor" had agreed immediately to invest £3,000,000 in TMO shares on condition that the TMO Board remained unchanged and the EGM Resolutions were defeated at the EGM. Mr Weaver stated that the investment from the cornerstone investor would enable TMO to raise the balance of the current £8.5 million fundraising and transform TMO into a fully commercial business." TMO infers that Mr Weaver made this representation intending to induce Rock Nominees to vote against the EGM Resolutions, which it in fact did.

430. Paragraph 75(2A) of the Re-Amended Particulars of Claim pleads that the Immediate Investment Representation was made by Mr Weaver knowing that it was untrue because Market Place was not obliged to invest any sum in TMO for two years, or recklessly, not caring whether Market Place would be able immediately to invest such amount after the EGM, but motivated instead by the improper purpose of defeating the EGM Resolutions.

431. In circumstances where I refused permission to amend the Particulars of Claim to allege that the rest of the Board authorised the Immediate Investment Representation, it is only advanced against Mr Weaver. Insofar as TMO sought in its closing submissions to assert that Mr Weaver was acting within the scope of his delegated authority and that Messrs Yeo, Reeves and McBraida are vicariously liable for Mr Weaver's representation (pursuant to *Briess v Woolley* [1954] AC 333), I reject those submissions. This case has never been pleaded.

The 24 October meeting

432. Further to discussions at Board meetings as to the need to contact shareholders to get their votes (see for example the Board minute of 21 October 2013 at 9.30am), Ms Bramwell appears to have set up a meeting between Mr Akerman and Mr Weaver for the morning of 24 October at 10am.

433. In his witness statement, Mr Akerman said this at paragraph 24:

> "I recall Mr Weaver telling me the following:
> 24.1 he stated that a cornerstone investor had invested £3 million in TMO shares, an investment which secured TMO's immediate financial needs;

24.2 he assured me that as a result of the cornerstone investment, TMO would be able to raise the balance of the current £8.5 million fund raising;
24.3 he said that the cornerstone and other investments guaranteed that TMO would be transformed into a fully commercial business, delivering real value for TMO's shareholders;
24.4 he told me that the cornerstone investment was conditional upon the TMO board remaining unchanged and the resolutions being defeated at the EGM; and
24.5 he asked me for my support, and vote at the EGM".

434. In paragraph 25, Mr Akerman said that he believed what Mr Weaver told him "about the cornerstone and other investments" and that to him this was "a good news story" and that he "was persuaded by what he told me". He went on "In short, I believed that provided the EGM Resolutions were defeated, and the current Board remained in place, TMO would guarantee to receive a £3 million investment immediately following the EGM…". In light of this, Mr Akerman said he was "happy to support the Board".

435. In paragraph 33, Mr Akerman referred to the letter he had received on 7 November 2013 after the EGM making it clear that the £3 million cornerstone investment would be paid over a period of time, saying "I was very surprised to receive the 7 November letter. When I met with Mr Weaver before the EGM, he had told me that investment monies of £3 million would be received from the cornerstone investor immediately after the EGM, if the resolutions were defeated. It was clear from Mr Yeo's letter that what Mr Weaver had told me was not true. In fact the investment was made over an unspecified period of time and TMO remained very short of money" (emphasis added).

436. In paragraph 41, Mr Akerman said "Given the above matters, I consider that I was seriously misled by Mr Weaver during my meeting with him on 24 October 2013".

437. Under cross examination, Mr Akerman:

i) Confirmed that "my recall is that the intimation was very clear at the time, that a cornerstone investor was in place", a point he made on a number of occasions.

ii) As to what this meant, Mr Akerman said that whilst he had not understood this to mean that the money was "already in", nevertheless his belief was that "the cornerstone investor was in place and as I understood it post the EGM, that would be guaranteed", a point he later repeated, saying "…post the EGM, the resolution having been thwarted, monies would be available. That was my understanding." It is clear from this that insofar as paragraph 24.1 of his statement suggested that Mr Weaver had said that the money had already been invested, that was not correct. Mr Akerman confirmed that he was probably told that the investor "was investing" the money.

iii) In responding to a question about whether he stood by his evidence that he had been seriously misled by Mr Weaver, Mr Akerman drew a distinction between "a cheque for £3 million and a promise for £3 million deferred", clearly equating his understanding of what he had been told by Mr Weaver about a cornerstone investor being in place to "a cheque for £3 million", whereas the true position as set out in the 7 November letter represented only a promise for £3 million deferred. Mr Akerman said there was a "very substantial difference" between these two things and did not resile from the fact that he considered he had been

misled (notwithstanding his gentlemanly reluctance to make the point to Mr Weaver during his cross examination).

iv) When asked by Mr Weaver about his use of the word "guaranteed" in paragraph 24.3 of his statement (on the basis that he (Mr Weaver) was "a bit reluctant to accept that I used the word "guaranteed") Mr Akerman said "that's my best recollection of the conversation" and later "we have different recollections of those words", confirming again that "My recollection I think is very clear based on the conversation".

v) Continued to refer to the fact that it was his belief that Mr Weaver had not told him the truth: "But had he told me the truth…".

438. Mr Akerman was courtesy itself in responding to Mr Weaver's questions and confirmed that he was certain that Mr Weaver would not have tried to mislead him, but in my judgment this does not in any way detract from the evidence that Mr Akerman gave orally which was essentially that he had been told that a cornerstone investor was in place, that the investment "guaranteed" TMO's transformation, and that he had understood this to mean that the £3 million would be available immediately following defeat of the EGM Resolutions. I accept this evidence.

439. Mr Collings submitted that Mr Akerman's references to his "belief" and his "understanding" in his oral evidence as to the money being guaranteed is "not good enough for a fraud claim" because it would be equally consistent with Mr Akerman drawing his own mistaken conclusions from what he was told by Mr Weaver. However, to my mind, Mr Akerman's evidence clearly went beyond simply his own belief; but also addressed his recollection of the conversation. In other words, his oral statement of belief was directly referable to something he had been specifically told, rather than to his own mistaken understanding of what he was being told. As I have said, I accept Mr Akerman's evidence in this regard.

440. In his second witness statement, Mr Weaver asserts that he said "A cornerstone investor had been identified who had made an application for £3 million worth of shares", which, given Mr Akerman's oral evidence, is likely to be correct. Under cross examination, Mr Weaver confirmed that he had approached the meeting with the attitude that a cornerstone investor was in place and that "I said to Mr Akerman that a cornerstone investor had been identified". However, Mr Weaver says in his statement that he "absolutely did not use the word guarantee". I reject Mr Weaver's evidence insofar as it suggests that he did not inform Mr Akerman that the investment from the cornerstone investor guaranteed the transformation of TMO following the EGM. I find that he did give Mr Akerman information to that effect.

441. Whilst I do not place significant weight on it, I nevertheless note that Mr Akerman's evidence as to the assurance he received from Mr Weaver is consistent with an email sent by Mr Monk of VSA to Mr Yeo on 6 November stating that he too had been "assured 100% by David Weaver that the £3mn was committed".

442. Mr Collings submits that Mr Weaver's evidence is consistent with the email he sent to Mr Akerman on 29 October 2013 at 3pm saying "We now have a £3 million cornerstone investor". Mr Collings points out that Mr Akerman responded politely and did not express surprise that the "immediate investment" had failed to materialise. Mr Akerman

responds "Many thanks David and well done in your efforts. I look forward to being able to tell my investors that they are on the way to great prosperity". However, to my mind this response fits perfectly with Mr Akerman's evidence that he was told the £3 million investment would be available immediately after the EGM. An objective reading of this email against that background is that, given the result at the EGM, the money was "now" available, and Mr Akerman's statement that he was looking forward to telling his investors that they were on the way to great prosperity makes sense in that context. Mr Akerman plainly believed that what he had been told would happen on 24 October had come to fruition.

443. Mr Collings also submits that Mr Akerman did not complain following receipt of the 7 November circular and that, on the contrary, he was open to the possibility of reinvesting in TMO as late as December 2013. Whilst this is true, I accept Mr Akerman's explanation in cross examination that he was "probably remiss" in not raising the matter but that "here we are 2005 to 2013, I'm very much a stale bull, monies in my mind at least have been written off, acting in the best interests of my clients, trying to, you know, move on." Mr Akerman did not strike me as the sort of man who would be quick to complain about anything, much less jump to immediate conclusions that he had been misled or make what he would have regarded as unpleasant accusations to that effect.

444. Finally, I should refer to the fact that it was Mr Weaver's case at trial that he would have taken notes of the meeting with Mr Akerman on a laptop which he used until TMO went into administration and that these notes would have corroborated his version of events. Unfortunately, despite a substantial amount of correspondence and various witness statements, it now seems that by the time Rebio acquired the laptop, all data and files had been removed from it. Notwithstanding Mr Weaver's suspicions around the conduct of Rebio and Mr Glen in dealing with his laptop, there is no basis for me to do anything other than determine the dispute over the Immediate Investment Representation by reference to the documents and evidence that I have before me.

Conclusion on Issue 2(iii)

445. I find that:

i) Mr Weaver told Mr Akerman that a cornerstone investor was in place and that it was guaranteed that £3 million would be received after the EGM assuming the EGM Resolutions were defeated. This information plainly implied an irrevocable commitment from the cornerstone investor.

ii) Further, even without the use of the word "guarantee", a reasonable person in the position of Mr Akerman would have inferred from the words "a cornerstone investor is in place" that Mr Weaver was representing that TMO had already received an investment for £3 million, or that receipt of the £3 million was, at the very least, guaranteed.

iii) The representation made by Mr Weaver was untrue, in that Market Place had not guaranteed or promised that it would provide £3 million immediately after the EGM Resolutions were defeated. Mr Weaver knew that it was untrue; the Market Place Subscription provided for a long stop date of 2 years for receipt of the money and Mr Weaver had told the Board on 23 October that Mr Kerr "seemed

to be saying he expected to have some money flowing in the next couple of weeks" – however, the details of this were vague.

iv) Given its timing and the circumstances surrounding this representation, Mr Weaver plainly made the representation to Mr Akerman intending that he should rely upon it in casting the votes attaching to the shares of Rock Nominees against the EGM Resolutions.

v) Mr Akerman was induced by the representation to cast the votes attaching to the shares of Rock Nominees against the EGM Resolutions.

446. TMO relies by way of alternative on the fact that the statement that a cornerstone investor was in place was false because Mr Weaver deliberately concealed from Mr Akerman the terms of the Market Place Subscription (and Mr Weaver confirmed in cross examination that he had not told Mr Akerman that Market Place was not obliged to pay any money to TMO until 23 October 2015). TMO relies on *Oakes v Turquand* (1867) LR 2 HL 325 in this regard. Whilst in the circumstances of this case I would have been inclined to accept this submission, in light of my findings above, I need not go on to consider it in any further detail.

The First Cash Received Representation (Issue 2(iv))

447. Paragraph 50 of the Re-Amended Particulars of Claim pleads that during a telephone call on or about 27 October 2013, Mr Yeo represented to Mr Parker that TMO had received payment in cash for shares issued to a new cornerstone investor. TMO infers that this representation was intended to induce Presnow to vote against the EGM Resolutions.

448. Paragraph 75(3) of the Re-Amended Particulars of Claim pleads that the First Cash Received Representation was made by Mr Yeo knowing that it was untrue. It is expressly pleaded that TMO infers that this representation was authorised by the Board.

The Background to the 27 October 2013 call

449. There is no doubt that the Director Defendants were aware of the potential significance of the Presnow vote to the outcome of the EGM. This much is clear from documents to which I have already referred, but I note in particular for present purposes:

i) The Board Meeting at 5.30 pm on 21 October at which Mr Yeo said he would call Mr Caraballo to "try to find out Presnow's position".

ii) An email to Mr Caraballo at approximately 8.20 am on 22 October in which Mr Yeo referred to the Requisition and to his views that it had severely hampered the efforts being made by the Board to raise funds and he went on "I would welcome an opportunity to discuss this with you in the next day or two. The votes which your shareholding give you may well be decisive in determining the outcome of the EGM next Monday".

iii) The Board Meeting at 9.45am on 22 October at which Mr Reeves said that "he went through the share register this morning and it is very clear we need Presnow's vote". Under cross examination, Mr Reeves confirmed that having looked at the shareholder list provided to him by Ms Bramwell the previous day,

he had concluded that "Presnow's vote was crucial to ensuring that the board had any prospect of defeating the EGM Resolutions".

iv) An email to Mr Caraballo on the morning of 23 October in which Mr Yeo reported that TMO was in "advanced discussions with an investor who is prepared to subscribe £3,000,000 for shares in TMO at 4p per share, immediately that investor is satisfied that, if it subscribes, there will be sufficient votes to defeat the resolutions to be proposed at the general meeting next Monday. This investment will ensure that TMO has the money it needs to secure and develop the attractive commercial opportunities which are within our grasp. It is therefore very much in the interests of TMO and its shareholders to be able to show this prospective investor that Presnow has undertaken irrevocably to vote against the resolutions. Together with the other shareholders who have already committed to rejecting the resolutions we know that we will then have sufficient votes to defeat them by a comfortable margin". Mr Yeo asked again to speak to Mr Caraballo "in view of the urgency of this matter".

v) The Board Meeting on 23 October at 7pm at which Mr Yeo reported on a 45 minute call he had just had with Mr Caraballo. The minutes record: "Tim explained to Gonzalo that he had a choice now and we need his assurances now so that next week he is not dealing with new management and that depends on the vote. Tim also explained to Gonzalo that…there would be a massive dilution of shares if Sinoside gained control of the Board and that not only had we got £3 million come in but we were absolutely certain we could raise the £8.5 we set out to raise" (emphasis added).

vi) An email of 25 October at 9.30am to Messrs Yeo, Weaver and Audley in which Mr Edwards remarked that "It would be nice to know where Presnow sit because they have a decisive role in the proxy battle".

vii) Email exchanges between the Director Defendants and Ms Bramwell on 26 October in which Ms Bramwell informed the Director Defendants of the final votes from the registrars. Mr Yeo's response was that the figures were encouraging, that Presnow's vote might not now be necessary to win the vote but that "If we had their support as well it would be very roughly 200 million for us and only 140 million against, a very decisive outcome. Maximising the majority would be a deterrent to repeated trouble making requisitions by Sinoside and would encourage EJ and other potential investors that a substantial majority of shareholders back the board. It would also mean that we would have won the vote even without the new shareholders, though by an uncomfortably small margin".

450. In the week preceding the EGM, Mr Weaver was in contact with Mr Parker, who had asked for more details around various elements of the business plan, making it clear in his email of 24 October that "if we can have speedy sight of those documents it might reinforce our decision". Mr Weaver agreed to send through the necessary documents.

451. On 25 October Mr Parker chased Ms Bramwell for copies of these documents asking for them to be sent to him "this morning". He went on to say (apparently referring to a conversation that he and Mr Caraballo had had with Mr Weaver) "we discussed with David…whether the imminent subscription of £3m could be processed in time for the

shares to be on the register ahead of the vote on Monday. Are we correct in assuming the number for total shares in issue of 402,975,176 does not include share issuance related to that imminent subscription". Mr Bennett provided Mr Parker with the various documents he was seeking, including the latest Roadshow presentation at 10.30 that same morning. It was Mr Weaver's view, recorded in the Board minutes of the meeting at 5pm on 25 October, that in light of this information Mr Parker would "vote with the Board".

452. Pausing there, it is clear that Mr Parker had been informed about the Market Place Subscription by Mr Weaver on 25 October, as he confirmed in his statement. However he had no recollection of the conversation beyond what was in the documents. It is also clear that prior to his critical telephone conversation with Mr Parker, Mr Yeo had already provided Mr Caraballo with information about the Market Place Subscription, including that TMO had, in Mr Yeo's words as recorded in the meeting minutes, "got £3 million come in".

453. In his statement, Mr Parker said he had received a call from Mr Yeo on Friday 25 October. Although he could not recall the specific words spoken, he said that he asked if the £3 million investment had been secured and Mr Yeo "used words to the effect that the funding would be in place before the EGM". Mr Yeo had contacted Mr Parker again on Sunday 27 October and again, although Mr Parker could not recall the specific words used, his evidence was that "I believe that I asked Mr Yeo if the promised cash from the new investor had actually been received and he confirmed that it had". In light of this information, Mr Parker went on to say that he advised that Presnow should support the Board and vote against the EGM Resolutions. When he received the 7 November letter from Mr Yeo, Mr Parker "was in no doubt that I had been misled by Mr Yeo and others at TMO. The assurances I had been given about the board having secured funding were material to the advice I had given to Presnow regarding the voting at the EGM".

454. Under cross examination from Mr Yeo, Mr Parker's evidence about the Sunday conversation was: "the focus…was very much on whether the money was in the bank or not. And the input of the message that you gave me was that it was either in or as good as in. So the idea that I had was that it was going to be in the bank by the time of the EGM on Monday, as a result of that phone call". Later he said "…the substance of that phone call was so clear, it was all about whether the board was funded or not and if the cash coming in was received or imminently to be received, whether it was going to be on the Monday assuming the shares were going to be issued all the sense of it was the cash would have to be in the bank by the Monday".

455. Under cross examination by Mr Collings, Mr Parker confirmed that Mr Yeo had been "crystal clear" during the call on Sunday 27 October and that although he could not quote the exact words "what I do have [is] an extremely clear recollection of…the import of that phone call and the clarity with which, the impressive clarity with which Mr Yeo answered. It was brief, it was very clear and it gave me the conviction I was looking for". He again confirmed that Mr Yeo had said the cash was "in the bank or as good as in the bank".

456. Pausing there, I note that, in common with Mr Akerman, Mr Parker's witness statement appears to have gone too far in saying that Mr Yeo had confirmed that the money had in fact been received. However, he always made it clear that he could not remember the precise words used and his oral evidence was consistent in its confirmation that the

import of the conversation with Mr Yeo had been about whether the Board "was funded" such that the cash was "imminent" or "in, or as good as in". Mr Parker's contemporaneous handwritten note of the conversation with Mr Yeo says "£3 m pledged".

457. Mr Yeo's evidence in his statement is that he had one call with Mr Parker on the Sunday, that he had read the Chairman's Script provided by Mr Audley in advance of the call and that "nothing I said to Mr Parker on 27 October deviated from the script". In cross examination, Mr Yeo robustly denied that the purpose of his call to Mr Parker had been to persuade him that Presnow should vote against the EGM Resolutions, asserting that the call was merely to update him on recent events. Mr Yeo staunchly maintained that he "did not deviate from the script in my call with Mr Parker and I did not deviate from the script again the next morning at the EGM…I did not say on either occasion any words to the effect that the cash had been received in respect of the Market Place investment".

458. When cross examining Mr Parker, Mr Yeo did not challenge his account of their telephone conversation, although as a litigant in person he must be given some leeway in this regard and when the point was put to him in cross examination his response was that he had expressly denied the allegation. However, regrettably Mr Yeo went on to assert that Mr Parker "lied through his teeth about the contents of that telephone call" and he then embarked (mid cross examination) on intemperate and forceful submissions to the court, as I have described above.

459. I accept Mr Parker's evidence, which I found to be entirely credible and I reject Mr Yeo's evidence, which seemed to me to protest too much. Furthermore, I consider it to be wholly implausible that Mr Yeo would have stuck to the legally uninformative formulations used in the Chairman's Script prepared by Mr Audley, or that Mr Parker, who was anxious to know whether the cash had been received, would have been satisfied with that. Given the significance of the Presnow vote on the outcome of the EGM, I do not accept that the call Mr Yeo made to Mr Parker on a Sunday was anything other than a last ditch attempt to persuade Mr Parker to cast Presnow's votes against the EGM Resolutions, and I find that in seeking to persuade Mr Parker, Mr Yeo went well beyond the remit of the Script and instead represented to Mr Parker that the £3 million from the cornerstone investor was already in the bank or "as good as in the bank". The receipt of cash was clearly an important issue to Presnow (Mr Parker said that they were "waiting to be assured of cash") and I agree with TMO that this is probably why Mr Parker retained a clear recollection of the conversation.

460. I note that Mr Andenaes gave evidence in his statement that on the morning of the EGM he met with Mr Parker and Mr Edkins at a café near Olswang's offices and that Mr Parker said that he had been informed by Mr Yeo that TMO "had received £3 million from an investor". However, in common with Mr Parker, Mr Andenaes' evidence on this was watered down at trial: Mr Andenaes accepted in cross examination that Mr Parker may simply have said the money had been "found" or "invested" not that it had been received. Whilst this general watering down of the evidence of TMO's witnesses appears consistent with my earlier remarks that their statements were apparently rather over-engineered, nonetheless I accept the evidence that Mr Andenaes gave orally, which appears to me to fit with Mr Parker's account that he had been told the money was "as good as in the bank". In the circumstances, I suspect that Mr Edkins' evidence to the effect that Mr Parker had told him that "£3 million had been raised and that the funds had come in" also went a little too far, albeit I note that the general recollection of all three

witnesses is that, to use Mr Andenaes' expression, the money had been "found" and was as good as in.

Conclusion on Issue 2(iv)

461. In all the circumstances, I accept that, on balance, Mr Yeo represented to Mr Parker that the money was "as good as in the bank", knowing that the representation was untrue. No money had been received and the Market Place Subscription provided only for the provision of the money on a long stop date. There is no suggestion that Mr Yeo told Mr Parker about the long stop date and he confirmed in cross examination that he had certainly never told Mr Caraballo about the two year deferral.

462. I find that Mr Yeo made this representation intending to induce Mr Parker to recommend to Presnow that it should vote its 27,900,000 shares against the EGM Resolutions, which Mr Parker duly did. The Presnow votes were cast against the EGM Resolutions.

463. In closing submissions, Mr Collings pointed out the First Cash Received Representation is inconsistent with some of the contemporaneous evidence: if it was made, why did Mr Parker not mention it to Mr McBraida later that day when they travelled together from Bristol to London by train and why did Mr Parker not mention it at the EGM when Mr Yeo repeatedly gave a qualified answer to direct questions from Mr Edkins about whether the cash had been received? Why had Mr Parker and Mr Caraballo not pointed to the fact that they had been misled once they received the Board's 7 November 2013 letter?

464. I have considered these points carefully and sought to weigh them in the balance. I note that Mr Parker explained in cross examination (i) that he remembered having a general discussion with Mr McBraida when they travelled to London together on the train for the EGM but could not recollect whether he had told him about Presnow's voting position and (ii) that "I wouldn't normally embarrass a chairman in a general meeting by pointing out an apparent contradiction in something that he'd said to me in an earlier conversation", a point which, in my judgment rang true. In his witness statement Mr Parker dealt with the receipt of the circular on 7 November saying that he was "surprised" to receive it, that it prompted him to email Mr McBraida to ask whether it was legal for a company to issues shares and give a vote on those shares if they had not been paid for and that "I was in no doubt that I had been misled by Mr Yeo…". I accept Mr Parker's evidence about this. I do not consider that these points undermine the conclusion I have arrived at above.

465. Finally, I must consider whether Mr Yeo's representation was authorised by the remaining members of the Board, i.e. the Director Defendants. On balance, I consider that it was.

466. TMO's articles of association at article 30.1 make clear that "The board may also delegate to any director holding any executive office such of its powers as the board considers desirable to be exercised by him…"

467. It is clear from the documents to which I have referred that the Director Defendants were all well aware of the importance of Presnow in the context of the vote at the EGM: Mr Reeves confirmed in evidence that he had concluded that "Presnow's vote was crucial to ensuring that the board had any prospect of defeating the EGM resolutions".

468. During his cross examination, Mr Reeves denied knowing that Mr Yeo had spoken to Mr Parker on the evening before the EGM, however, it is clear that the Board had been discussing Presnow's position in the lead up to the EGM and that at the Board meeting on 24 October Mr Yeo had reported that "he had a call with Anthony Parker". Mr Yeo said in his evidence that he thought that the other members of the Board "might well have" known that he was speaking to Mr Parker before he did so.

469. In my judgment, Mr Reeves' suggestion in cross examination that Mr Yeo did not have the authority of the Board to speak to Mr Parker is not credible. Indeed this suggestion was followed by an admission that Mr Yeo was speaking to Mr Parker to ask for Presnow's vote and that if Presnow's vote was to be cast in favour of the Board then "They needed to be satisfied that there was a cornerstone investor who had agreed to pay £3 million, yes, and that was the situation".

470. Whilst Mr Weaver was not asked about this issue in cross examination and no suggestion was made to Mr McBraida that he had been aware of the conversation between Mr Yeo and Mr Parker before it took place, nevertheless, I am satisfied that it is to be inferred that Mr Yeo had been authorised by the Board to speak to Mr Parker with a view to persuading him that Presnow's vote should be voted against the Resolutions and I am also satisfied that, on balance, the remaining members of the Board all knew about Mr Yeo's contact with Mr Parker.

471. In the circumstances, I accept that the other Director Defendants are liable for the false representation made by Mr Yeo to Mr Parker (see in particular *Briess v Woolley* per Lord Oaksey at 344 and per Lord Reid at 346-348). I note that I received no submissions on the law from any of the Director Defendants on the issue of authority and it was never suggested that the Board could not have authorised Mr Yeo to make the First Cash Received Representation as a matter of law.

Second Cash Received Representation and the EGM (Issue 2(v))

472. It is common ground that the note made by Pinsent Masons, solicitors acting for Sinoside at the EGM, on 29 October 2013 accurately recorded the words used by Mr Yeo. Paragraph 1.4 of the note records that Mr Yeo explained that "notwithstanding the requisition…the existing share capital of the Company was now 373,299,669 ordinary shares of 1 pence each and that the Company had recently received a subscription for £3 million shares which had been issued".

473. The critical words are those used by Mr Yeo in response to three questions posed by Mr Edkins, as recorded in the Pinsent Masons' note as follows:

> "Mr Stephen Edkins…asked why the new shares had been issued to the subscriber ahead of the meeting?
>
> Mr Yeo explained that the Company had done so as it had been fundraising for some time, that it was in the best interests of the Company to raise the money and that the shares had accordingly been issued promptly to the new subscriber as they had to all previous subscribers of the Company including Mr Edkins.

> Mr Edkins then asked whether subscription sum of £3 million had been received by the Company?
>
> Mr Yeo responded by stating that the shares had been allotted and issued to the subscriber fully paid in accordance with the terms of the Companies Act 2006.
>
> Mr Edkins again asked if the money had been received into the bank account of the Company?
>
> Mr Yeo again stated that the shares had been allotted and issued as fully paid in accordance with the terms of the Companies Act 2006..."

474. TMO says that by his answers to Mr Edkins' questions, Mr Yeo impliedly represented (and the shareholders present at the EGM reasonably understood) that £3 million had in fact been received in cash in relation to the share subscription. At paragraphs 75(4) and 75(5) of the Re-Amended Particulars of Claim, TMO pleads that Mr Yeo made this representation to shareholders knowing that it was untrue and further, that it is to be inferred, from the failure on the part of the other Director Defendants to intervene at the EGM to correct the falsity of the representation, that Mr Yeo was authorised to make the representation by the Board in order to induce shareholders present at the EGM to vote against the EGM Resolutions. Alternatively, TMO says that the Director Defendants withheld from shareholders the terms of the Market Place Subscription and that it is to be inferred that this information was withheld deliberately in order to deceive shareholders, knowing that there was a serious risk that shareholders would vote in favour of the EGM Resolutions if they learned the truth about the Market Place Subscription.

475. The Director Defendants' case is that in using this form of words, Mr Yeo was complying with the Chairman's Script provided to him by Mr Audley and that the information provided to Mr Edkins in response to his three questions was accurate (albeit perhaps somewhat equivocal). The Director Defendants point out in particular that:

(1) The Chairman's Script provided in draft by Mr Audley was an iterative process, finalised over the course of a few days with input from the Director Defendants, none of whom disagreed with its final form. It set out the words that Mr Yeo was to use in taking the meeting through the EGM Resolutions, in dealing with disruptions (Schedule 1) and in dealing with invalid questions (Schedule 2). It is lifted almost verbatim from the standard Chairman's AGM script on the Practical Law database. Schedule 2 tracks section 319A of the CA 2006 which requires traded companies to answer such questions as "relat[e] to the business being dealt with at the meeting" subject to exceptions. The draft at Schedule 2 reflects TMO's aspirations to meet the higher standards of publicly traded companies where possible. The Board had received advice from both Mr Audley and from Olswang as to the approach it should take to the EGM (although I note that I have not seen any advice from Olswang and do not know whether they were fully informed about the circumstances of the Market Place Subscription or its specific terms).

(2) The EGM was a formal, potentially hostile environment at which it was important (and legitimate) to stick to the items on the agenda. The business of the EGM, as Mr Yeo said in evidence, was to decide on the appointment and removal of directors. The question of whether cash had been received was not directly relevant to the EGM Resolutions.

(3) The Requisitioners regarded the EGM in a similar light. At trial Mr Andenaes talked about the need to pick the right lawyers for the "mission". They instructed solicitors and counsel to attend who specialised in company law. They took technical points under the CA 2006, exercised statutory rights to information and examined the tactics that might be adopted in relation to circulars, voting and motions at the EGM.

(4) The statutory provisions set out in the CA 2006 are designed to strike a balance between the needs of the company and the needs of the Requisitioners and I should be slow to impose far reaching obligations of disclosure into situations where Parliament has already laid out a detailed framework of legal provisions. In this context my attention was drawn to *Kaye v Croydon Tramways Co* [1898] 1 Ch 358.

(5) The information provided by Mr Yeo in answer to Mr Edkins' questions was strictly accurate, albeit admittedly not complete. The short-form answer provided by Mr Yeo was consistent with the general approach to questions identified in Schedule 2 to the Chairman's Script.

(6) Mr Audley has years of experience as a corporate lawyer and gave a detailed account of the differing nature of general meetings and the reasons why he chose the words in the Chairman's Script, which I should accept:

"There are different kinds of general meetings that are held on a requisition. There are those where the decision about which way to vote are made at the meeting and there are those that aren't. In the former case, I think one has to be very full and frank with the shareholders present. In the latter case, where the battle lines are already drawn, where, in this particular context, over 92% of the votes have come in already by proxy by the 26th of the month, this meeting was a rubber-stamping operation. Nobody, in my view and in the directors' view, were going to be changing their minds on the basis of anything that was said at the meeting. And so in the case of that category of EGM, which includes this company, I did not think it was necessary to be answering questions in relation to matters that were not relevant to the question of whether the shares were capable of being voted at the meeting. And the reason I chose those words is (a) because, as Mr Sutcliffe acknowledges, they're accurate and (b) because they would reduce the possibility of a – disarray at the meeting where the requisitionists claimed that the shares in question ought not to be voted and therefore the meeting should be adjourned or postponed or called off…

"And another reason why I didn't think it was necessary to go further than this is that the requisitionists at this meeting were very hostile and were also the principal creditors of the company, were awaiting a cash compliance certificate in a few days' time and the board were expecting some money to

> come in from Market Place within a few days so that the cash compliance certificate on 31 October would have been looked rather better. And so for those reasons, I thought, and maybe I was wrong, but I certainly honestly thought and the directors also honestly thought, that it was best not to disrupt proceedings by giving information that was not relevant to the meeting, first of all, because, as I say, it wasn't going to change the vote and, secondly, because the question of whether cash or not had come in was not relevant to the topic of the agenda on the meeting, which was to decide on the appointment and removal of directors."

476. I have considered the Director Defendants' submissions very carefully, particularly given their suggestion that the Court should be slow to require disclosure in the context of an EGM. However, on balance, and having particular regard to (i) the context in which Mr Yeo's responses to Mr Edkins' questions were made, and (ii) an objective interpretation of those responses according to the impact they might be expected to have on a reasonable representee, I reject the Director Defendants' submissions.

477. Mr Collings accepted in his closing submissions that the information provided by Mr Yeo was not "a complete answer" to Mr Edkins' questions, that "it is on the face of it a bit surprising frankly" and that the words were equivocal. I agree. Indeed Mr Yeo did not in fact answer the two straightforward questions posed by Mr Edkins in direct terms. Instead he responded relying on a scripted answer replete with obfuscatory legalese. When asked in cross examination whether individuals without the benefit of Mr Audley's advice would have interpreted the legally formulaic response to Mr Edkins' questions that the shares had been issued "fully paid" as meaning that cash had been received, Mr Yeo said:

> "many people would, certainly, but not everybody and this sort of meeting is attended usually by people who are more than averagely familiar with these sort of matters, people who are professional investors" (emphasis added).

478. I agree with Mr Sutcliffe that a shareholder, even a professional investor, could not be assumed to have the depth of knowledge of the CA 2006 that would enable him to understand that issuing shares "fully paid" meant anything other than that cash had been received. Further, it seems to me that Mr Yeo's response to Mr Edkins' first question reinforced this impression, creating as it did a deliberate and explicit link between the existing fundraising and the raising of new money with the consequent and prompt issue of shares. Indeed, the fact of the existing fundraising is itself important context. The terms of the existing May 2013 fundraising as set out in the Offer of New Ordinary Shares dated 10 May 2013 required cash payment with the application for shares, as had every previous TMO fundraising, a fact that the reasonable attendee at the meeting is likely to have been aware of.

479. The use by Mr Yeo of this form of words, strictly accurate in themselves from a legal perspective, but neither complete nor readily explicable to an uninformed observer who was very likely to be misled by them, appears to me to have been an implied representation that cash had been received by TMO. Certainly the most natural interpretation of Mr Yeo's responses by the reasonable shareholder attending the EGM (to whom no disclosure of the Market Place Subscription had been provided and who cannot be expected to have any legal knowledge or expertise) is that cash had been

received by TMO. Further, I agree with TMO that this was in fact the meaning that the Director Defendants intended to convey, without saying so in terms, in order to avert the risk of shareholders asking difficult questions or changing their vote.

480. Mr Reeves agreed as much in cross examination:

> "Q. …[The] reason you chose not to give a straight answer to the question that Mr Edkins raised was because the Board did not wish to disclose to him or to any other shareholders present that TMO had not received any money at all from Market Place?
>
> A. Yes."

That this was the intention of the Board is clear from an email chain passing between the Defendant Directors and Mr Audley between 25 and 27 October in which they discussed how to avoid telling shareholders at the EGM that no cash had yet been received in respect of the shares issued to Market Place (an email chain to which I shall return in the context of looking specifically at Mr Audley's position). In his cross examination Mr Weaver acknowledged that a truthful answer to the question would have been "We hadn't received the money into the bank account" but that Mr Yeo stuck to the Chairman's Script ("he did not untruthfully answer the question because he read from the agreed script").

481. It is true that various observers at the meeting were suspicious about what had been said: Pinsent Masons' note records that "Mr Yeo…did not confirm that the cash had been received by the Company". Mr Edkins said that the formulation used by Mr Yeo "left open the fact that monies had not been received". Mr Andenaes said it sounded "coached" and alerted listeners to something "amiss". However, in circumstances where Pinsent Masons, as lawyers, may be expected to understand that Mr Yeo was not confirming the receipt of cash, and both Messrs Edkins and Andenaes were legally represented at the meeting, I do not consider that this evidence is of any particular assistance in indicating what the reasonable shareholder without access to legal advice would have thought.

482. Mr Parker's evidence was that as an experienced professional investor, he was familiar with the concept of "irrevocable commitments", but he was unaware that it was legal to issue shares that could be voted without those shares having been paid for. This strikes me as much more likely to chime with the understanding and knowledge of reasonable investor/shareholders, and I agree with TMO that the fact that information had been disseminated to various shareholders in advance of the meeting to the effect that TMO had a "cornerstone investor" made it all the more likely that upon hearing Mr Yeo's answers, those shareholders would have understood them to mean that money had been received. I do not consider that the fact that many shareholders had already placed their votes by the time of the meeting undermines this conclusion.

483. Whilst I of course recognise that it is important to have regard to the statutory formalities that attend the calling of a general meeting, together with the need for the Board only to answer questions that relate to the business of the meeting, I find it very difficult to see how, in the circumstances of this case, information about the receipt of cash from the new investor did not directly relate to the business of the meeting, or indeed that it was

"not relevant" as Mr Audley suggested: after all, the existence of a cornerstone investor was something that the Board wished shareholders to be aware of in the context of placing their votes at the meeting and it was the very point on which questions were raised. It was information that was obviously relevant to shareholders in weighing up which of the competing boards was likely to have the best chance of raising the funds that the company so desperately needed.

484. Furthermore I cannot see why the fact that a meeting is hostile, or that the provision of information might disrupt that meeting, should somehow reduce the obligation on the part of directors to provide accurate and complete (or at the very least, not misleading) information to shareholders. I asked Mr Collings whether he could show me any authorities to support the propositions he was making in this regard, but he was unable to show me anything specifically on point.

485. In my judgment, Mr Yeo (authorised by the Board) made a knowingly false implied representation to shareholders attending the EGM that £3 million in cash had been received in respect of the shares issued to a new subscriber, intending that it would induce shareholders not to change their vote or ask difficult questions.

486. Having said all of that, however, there is no evidence that any listeners at the EGM were in fact misled by that representation such that they were induced to act in a particular way. Mr Edkins and Mr Andenaes were not, as I have already mentioned, and Mr Parker had already obtained his mandate to place Presnow's vote; he could not have voted differently of his own volition. Although TMO pointed out in its closing submissions that shareholders other than Presnow, Andbell and Diverso attended the EGM, ("at least Mr Child of St. Peter Port was there"), there was no evidence before the Court that any shareholder whose vote had not already been cast was in fact misled by what Mr Yeo said and it was Mr Collings' submission in closing that in fact the only person who voted at the EGM was Mr Parker, in two capacities. In the circumstances, I do not consider that this allegation could possibly have any causative effect.

487. As for TMO's submission that the Board withheld the terms of the Market Place Subscription from shareholders, I agree. The Director Defendants had a duty to the company to disclose their wrongdoing in entering into the Market Place Subscription in bad faith and with an improper purpose pursuant to *Item Software (UK) Ltd v Fassihi* [2005] 2 BCLC 91 (per Arden LJ at [40]-[41] and [64]-[68]). They failed to do so. In my judgment, the Director Defendants could not fulfil their duties of loyalty in this case except by disclosing to shareholders the terms of that transaction and their failure to do so is indeed a badge of impropriety, as TMO contends.

488. In light of my findings above, I do not need to consider in any detail whether Messrs Weaver, Reeves and McBraida should physically have sought to intervene during the EGM to correct the false representations made by Mr Yeo, pursuant to the principle in *The Siboen and The Sibotre* [1976] 1 Lloyds Rep 293 (per Kerr J at 320-321) on which TMO relied.

489. It was Mr McBraida's evidence that "it would have been outrageous for me to have jumped up and contradicted the chairman" during the meeting and the decision having been taken to stick to the Chairman's Script, this may be correct. However, the Director Defendants should not have taken that decision in the first place which involved, as I

have found, a deliberate attempt to mislead attendees at the meeting together with the withholding of information that it was their duty to disclose.

490. For the sake of completeness, I note Mr McBraida's submission that he does not remember receiving the email from Mr Yeo on the morning of 27 October 2013, but given Mr McBraida's lack of clear recollection about much of what took place at this time, that is perhaps unsurprising. I do not regard this as extricating him from responsibility for the representations that were made at the EGM (which had been under discussion in emails between all of the Director Defendants since 25 October) or from the withholding of information about the Board's wrongdoing, in which he was directly involved.

Rejection of Andbell Loan Offer (Issue 2(vi))

491. TMO's case is that the rejection of the Andbell Loan Offer on 22 November 2013 was contrary to the interests of TMO and made in bad faith (Re-Amended Particulars of Claim at paragraph 75(6)), essentially because (i) at the time the offer was made the Board had no reason to believe it would obtain funding from elsewhere; and (ii) the terms in which the Board rejected the offer were disingenuous and misleading.

492. In the TMO Supplemental Note, I was reminded in this context of the qualifications on the general principle of subjectivity as set out in *Re PV Solar Solutions Ltd* [2018] 1 BCLC 58, to which I have already referred. I have these principles firmly in mind in considering this allegation.

The relevant facts

493. The Andbell Loan Offer was received on 11 November 2013. Andbell offered to make a standing loan facility of £700,000 immediately available to TMO on terms that (i) the entire current Board of directors, with the exception of Mr McBraida, resigned; (ii) Andbell would have the right to appoint two directors of its own choosing in order better to reflect the shareholder structure of the company; and (iii) due diligence be carried out into the current financial state of the company "in order that our client is satisfied that there are no known or anticipated events that have caused or could cause the company to become insolvent".

494. At a Board meeting which appears to have been held by phone on 14 November at 9am, the Director Defendants and Mr Audley discussed the funding position of the company. Mr Hussain of PwC was not on the call. Against the background of lacklustre interest from investors, Mr Yeo stated that "we have to consider the insolvency problem. If Zelf was on the call he would say do we have enough belief we have enough money to cover our liabilities". There was discussion about the roadshow and Mr Reeves noted that potential investors "want to see a cornerstone put money in". Mr Audley asked the Board (excluding Mr Weaver who had just left)

> "if they had discussed the Andbell offer and stated it seemed to him that if the Board accepted the £700k loan that the Board would be agreeing to borrowing and this could be considered unacceptable as it is a different proposition and would there be any possibility that the money could be paid back. The Board discussed and considered the proposal from Andbell and rejected

> it for the reasons described…Max thought it was sensible to write to them stating what is the point of borrowing money if it is not possible to raise equity because then all the Board would be doing is taking on more debt and the debtors of the company could be £700k better off. The Board can offer that if the £700k was offered as equity the Board could accept but it is not proper to accept more debt".

495. At a further Board meeting held in person at VSA's offices on 19 November at 9 am, the company's funding position was again discussed. Mr Edwards of VSA was present, but again, Mr Hussain of PwC was not present. There was discussion about the efforts to raise money, which had still not borne fruit. Mr Yeo stated that "we are going to need £400k to £500k to get to the New Year" and said that he wanted to be clear that "if we lean on someone for a loan we can only ethically do so if we are clear we have money". Mr Reeves confirmed that the company did not have enough cash to keep going. Mr Audley asked "if loans were a practical proposition" and stated that loans had to be put through the subsidiary (Adeptt) "because TMO cannot have any loans pari passu to the loan note holders. Also there are serious questions to borrowing from third parties if you think it cannot be repaid". Mr Yeo then said that the Andbell offer had to be rejected for this reason. Mr Audley suggested that he draft a letter for the Board "as the Board have considered the offer; they would not close the door on the offer and made a possible counter offer." The Board then agreed that the terms of the Andbell offer as they stood were "unacceptable" and that Mr Audley should draft a letter for its review.

496. Towards the end of the meeting on 19 November, the Board was informed that there was only £36k in the bank and that more was needed to pay salaries. Mr Yeo remarked that the company was "getting very close to a difficult decision" and said that his own thoughts were that "unless we get something definite from Harry [Kerr] I think we should speak to Zelf". Mr McBraida then floated an increase in his existing loan by 25% but said that he would expect an increase in options and the option period from 2 to 3 years. The minute records that the majority of the Board were "happy to accept the provisions it will also remove the need to make a call to Zelf in the next couple of days". This increased loan from Mr McBraida (in the form of a facility of up to £50,000) was approved at a further Board meeting held by phone and involving Mr Yeo and Mr Weaver on 22 November at 10.30 am.

497. In an email exchange between Ms Bramwell and Mr Reeves on 19 November, Mr Reeves noted that he considered £500,000 to be a very conservative estimate of what was required in the short term if the company was to move forward and meet its daily liabilities. He thought that £750,000 was a more realistic figure "between now and the year end". These views were reflected in an email he sent to Mr Kerr on the same day in which he said that TMO required "something like £500k or preferably £750k of short term money not only to keep the company going but to move forwards on the Brazilian project".

498. On 22 November, a loan agreement was executed between Mr McBraida and Adeptt Limited in the sum of £50,000 in consideration for TMO granting an additional £200,000 worth of warrants to Mr McBraida.

499. On the same day, Mr Audley drafted a response to the Andbell Loan Offer for approval by the Board in the following form:

> "The TMO Board has considered the offer of a standing loan facility made in your letter of 11 November 2013.
>
> You will be aware from our earlier correspondence that the Board has resumed the equity fundraising that had to be suspended due to the unwelcome requisition. Having taken advice, the Board believes strongly that the prospective investors with whom TMO and its financial advisers are currently dealing would not invest if the current Board were to resign and the investors found themselves dealing with a new Board, particularly one controlled by Andbell, with Mr Andenaes on record as having stated that he is not interested in TMO or its business, but only in Andbell having its loan notes repaid.
>
> The only proper purpose of increasing TMO's borrowings at this stage is to bridge the gap until sufficient cash from equity subscriptions is received. The loan facility granted by Mr McBraida is consistent with that purpose, whereas accepting the Andbell terms is not. The Board therefore believes that it would not be proper for TMO to borrow money from Andbell unless Andbell can provide firm commitments for the minimum amount of equity finance required.
>
> The Board would welcome further discussions if Andbell can provide such commitments".

500. The letter was approved in this form.

Discussion

501. Against that background the Director Defendants invite me to conclude that by authorising the letter to Andbell of 22 November 2013, they acted in what they believed to be the interests of the company for the benefit of its members and creditors as a whole. Essentially, the Director Defendants say that they genuinely believed that it was not in TMO's interests to accept the Andbell Loan Offer and that the terms of the letter of 22 November 2013 were neither disingenuous nor misleading. They point out that the case advanced by TMO is not about the assessment of bona fide business decisions on the part of the Director Defendants or the exercise of their commercial judgment (matters with which I should not concern myself) but with the exercise of bad faith. They say that the 22 November letter was not an outright rejection but an explanation of the problems with the offer and an invitation to Andbell to address those problems, and that it was not in bad faith.

502. As to the Director Defendants' subjective belief, the Board minutes of 14 and 19 November show that the Board's main concern was accepting a loan when it might not be repaid and this concern was reiterated by Mr Reeves, Mr Weaver, Mr Yeo and Mr Audley in cross examination. By way of example, Mr Yeo said "…it would have been unlawful to take on debt unless we were confident that the debt could be repaid…we would be jeopardising the position of the company's existing creditors".

503. However, this is not the reason that was given in the letter of 22 November for rejecting the Andbell Offer (notwithstanding that the 22 November letter is expressly pleaded by Mr Reeves and Mr Audley as "accurately summaris[ing] the reasons for the TMO Board's rejection of the Andbell Loan Offer").

504. I agree with TMO that the 22 November letter appears to have been somewhat misleading:

(1) it is common ground that the Board had taken no independent advice on the Andbell Loan Offer (the only advice had come from Mr Audley at the 14 November Board meeting). Mr Collings submits that nevertheless the Defendants all gave a consistent account of "standing instructions" from PwC and Olswang against taking unsubordinated debt. Mr Audley gave evidence that the directors had received "a sort of A-level course in insolvency law over the summer" from Mr Turner at Olswang and Mr Hussain at PwC and that "The board by that stage probably knew more about insolvency law than many insolvency practitioners". Whilst I accept that the Board had indeed received regular advice focussing on the particular circumstances of TMO at any given time, nevertheless, Mr Audley's evidence on this (echoed by the Director Defendants) appeared to me to exaggerate the position with a view to diminishing the importance of obtaining independent advice. This was a new offer from Andbell made at a time when the company was on the brink of insolvency. It was rejected in favour of Mr McBraida's offer without any specific evaluation or advice from PwC as to whether that was the right approach to take – notwithstanding, for example, that earlier in the year, at the Board meeting on 6 August 2013, advice had been sought from Mr Hussain specifically in relation to the choice between the Sinoside/Andbell Proposal and the Reeves Offer. In my judgment, reasonable directors in the shoes of the Director Defendants would have sought updated independent advice and the Director Defendants recognised this. It was misleading to suggest that they had done so. I can only infer that the reference to "advice" was intended to give the letter credibility by implying that the decision to reject the Andbell Loan Offer had the imprimatur of an external adviser;

(2) there is no evidence that the Board or its financial adviser were "currently dealing" with any potential investors who had made it clear they would not invest if the Board were to be controlled by Andbell. Again, I can only infer that the Director Defendants were seeking to add weight to their rejection of the Andbell Loan Offer.

505. Furthermore, it is wholly unclear why Mr McBraida's offer of a £50,000 loan was consistent with the purpose of bridging the gap until (currently non-existent) equity subscriptions were received, whereas Andbell's offer was not. Indeed Mr McBraida's offer was on terms which plainly disadvantaged the general body of shareholders and creditors by providing him with an additional £200,000 of down round warrants.

506. Given that TMO was of dubious solvency, the Board was required to consider the interests of creditors as paramount. Those creditors included Andbell and Diverso by far the largest single creditor group pursuant to the Loan Notes. In cross examination Mr Audley accepted that the Board had given no consideration at all to the fact that the Andbell Loan Offer was made by the majority of TMO's creditors (the inference being

that Andbell and Diverso were working together in advancing the offer – or at least that Diverso agreed with the proposal being made by Andbell) and that they were happy for TMO to borrow money.

507. I agree with TMO that it made no objective sense for a company in TMO's position to reject the Andbell Loan Offer, in circumstances where (1) the Board required £500,000 to £750,000 of short term money; (2) TMO did not even have sufficient funds to pay employees' salaries and (3) the Board had a duty to have regard to the interests of its creditors, whose interests appear not to have been properly considered. Given the significance of the decision, it is very difficult to understand why it was made without proper independent advice, or how it could have been in the interests of the company not to obtain such advice comparing the two offers that had been made and advising on the position of the creditors. An intelligent and honest man in the position of the Director Defendants would not have dismissed the Andbell Loan Offer in the terms of the 22 November letter without obtaining such advice. Whilst I recognise that the letter did appear to offer the potential for further discussion with Andbell, nevertheless this was purely on condition of further equity finance.

508. In all the circumstances (and particularly given the misleading information provided in the 22 November letter) I infer that whether looked at subjectively or objectively, the rejection of the Andbell Loan Offer was a decision made in bad faith by the Director Defendants in circumstances where (I can only infer that) accepting the offer would have rendered futile their actions to retain control of TMO at the time of the EGM and opened those actions up to the scrutiny of a new board.

Issues 3 and 4: The breach of contract/fiduciary duty claim against Mr Audley

509. Mr Audley's Consultancy Agreement with TMO appears to have been cut and pasted (not very carefully) from another earlier agreement.

510. It contains, inter alia, the following terms:

i) That during his engagement, Mr Audley would provide the Services with all due care, skill and ability and use his best endeavours to promote the interests of TMO (clause 3.1(a));

ii) That Mr Audley would be paid a daily fee of £1,000 subject to a minimum of £3,000 per month and a maximum of £6,000 per month (all excluding VAT) (clause 4.1));

iii) That Mr Audley would assume "personal liability for any loss, liability, costs (including reasonable legal costs), damages or expenses arising from any breach by [him] of the terms of this agreement including any negligent or reckless act, omission or default in the provision of the Services" (clause 10.1);

iv) That Mr Audley's aggregate liability in respect of all matters described in clause 10.1 "shall not exceed an amount equal to the maximum monthly fee payable pursuant to Clause 4 and [he] shall not be liable for consequential indirect or consequential loss" (clause 10.2);

v) That each party agreed that "the only rights and remedies available to it or arising out of or in connection with, any Pre-Contractual statement shall be for breach of contract. Nothing in this agreement shall, however, limit or exclude any liability for fraud" (clause 15(c));

511. Notwithstanding the fact that the Services to be provided by Mr Audley were expressly said not to include the giving of legal advice to TMO, it is now (very belatedly) accepted by Mr Audley that he did in fact give legal advice to TMO pursuant to the Consultancy Agreement. It is also accepted that in doing so, he carried on doing many aspects of the work for TMO which he had previously done through Olswang and he gave advice on which the Board relied. It is common ground that Mr Audley's work for TMO in connection with the Market Place Subscription, the VSA Share Issue and the EGM fell within the scope of his Consultancy Agreement. As Mr Collings pointed out in his written closing submissions "If he carried out those activities negligently or dishonestly, he will be liable under clause 3.1(a)".

512. Mr Collings made two general submissions, however, as to the scope of Mr Audley's role as legal advisor.

513. The first was that Mr Audley's role was limited by the scope of his instructions, that he was not on a general retainer and that, accordingly, in relation to two of the allegations against him concerning a failure to advise, there was no duty to advise because he had not been asked to do so. Mr Collings relies, in particular, on *Pickersgill v Riley* [2004] PNLR 331 to the effect that a solicitor is under no duty to advise a business client as to wisdom of a contemplated transaction. However, to my mind this reliance is misplaced in the circumstances of this case.

514. In *Pickersgill*, the Privy Council made clear that a solicitor's duty will depend on the scope of his duty, which may be variable. It will depend upon his instructions and the particular circumstances of the case. A solicitor is not obliged to travel outside the scope of his instructions in order to make investigations which have not been expressly or impliedly requested by the client, which is why the Privy Council held that the solicitor in that case was not liable for having failed to investigate the financial substance of a company with whom his client had agreed a transaction involving the sale of shares in circumstances where his instructions were merely to implement that transaction. The solicitor was not the client's "homme d'affaires". However, the Privy Council made it clear that the solicitor's non-participation in the negotiation of the terms of the share sale would not have relieved him of the duty of pointing out to his client any legal obscurities of which his client might have been unaware and of drawing his client's attention to any "hidden pitfalls".

515. This is of course entirely consistent with the principle to which TMO draws my attention, as articulated by the Court of Appeal in *County Personnel (Employment Agency) v Alan R Pulver & Co* [1987] 1 WLR 916, per Bingham LJ at 922D to the effect that: "If, in the exercise of his reasonable professional judgment, a solicitor is or should be alerted to risks which might elude even an intelligent layman, then plainly it is his duty to advise the client of these risks or explore the matter further".

516. As I shall explain in a moment, the failures to advise on which TMO relies appear to me to fall within the category of failures to identify risks which should have been obvious to an experienced corporate solicitor such as Mr Audley providing the legal consultancy

services that he was in fact providing. Those services appear to have been broad and consistent with the offer he made in his email to Mr Weaver of 15 April 2013, namely:

> "…I propose that I provide services to TMO as a Legal Co-ordinator. This would involve my doing much as I do for TMO at the moment – drafting documents, reviewing documents submitted by third parties, giving my views on commercial and legal matters and, in areas which are not within my area of expertise, finding the most cost-effective specialist to provide legal services".

The provision of his views on "commercial and legal matters" involved Mr Audley's attendance at every Board meeting as a matter of course and his close involvement with the Director Defendants in the entry into the Market Place Subscription and the VSA Share Issue together with the preparation for, and approach to, the EGM. He routinely provided legal advice to TMO's Board by email and in Board meetings and he accepted in his evidence that TMO's Board did not seek company law advice from anybody other than himself (after he became a consultant in April 2013) and only sought advice from Olswang where specialist advice was required in relation to insolvency or litigation, i.e. areas which were outside Mr Audley's expertise.

517. Furthermore, I note that in his witness statement, Mr Audley accepts that if he had ever formed the impression that the Director Defendants were acting for an improper purpose "I would have told them this was improper"; a sensible acknowledgment, in my judgment, that this would have fallen within the scope of his duties.

518. The second submission made by Mr Collings was that, to the extent that Mr Audley's obligation to provide the Services with skill and care is accompanied by an obligation "to use his best endeavours to promote the interests of TMO", such obligation "adds nothing material" owing to the fact that its objects are too uncertain.

519. I am inclined to agree, and note in particular the passage cited by Nugee LJ at [40] in *Kea Investments Ltd v Watson* [2020] EWHC 2599 (Ch) from the judgment of Moore-Bick LJ in *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417 at [18]:

> "In general an obligation to use best endeavours, or all reasonable endeavours, is not in itself regarded as too uncertain to be enforceable, provided that the object of the endeavours can be ascertained with sufficient certainty".

However, I did not understand TMO to place much, if any, reliance on the "best endeavours" obligation and accordingly I need address this no further.

520. It is common ground that Mr Audley owed a fiduciary duty to TMO to act in its best interests. However, Mr Audley contends that his fiduciary duty is coterminous with his contractual obligations, which include the limitation of liability provision at clause 10.2 of the Consultancy Agreement. This is disputed by TMO, which says (as I understood Mr Sutcliffe's oral closing submission) that the fiduciary duty is a stand-alone duty which is unaffected by any provisions in the Consultancy Agreement. I shall return to this point

when addressing Mr Audley's case on the true interpretation of clause 10.2 of the Consultancy Agreement.

Allegations of Breach of Duty

521. I turn now to the allegations of breach of contract/fiduciary duty made against Mr Audley, which are identified in paragraph 77 of the Re-Amended Particulars of Claim. I observe that I must also have regard to TMO's Amended Consolidated Reply which pleads that Mr Audley's breaches of duty constitute "deliberate wrongdoing or fraud" in that by his conduct Mr Audley (i) deliberately misled TMO's shareholders; and/or (ii) gave advice to the TMO Board intending it would be relied on to mislead TMO's shareholders and/or knowing it would be relied on for an unlawful purpose; (iii) gave advice to the TMO Board knowing it to be incorrect; (iv) failed to give advice to TMO and its directors in respect of the unlawfulness of their conduct or proposed conduct, knowing that TMO was intending to embark on a course of conduct which was unlawful; (v) acted in bad faith contrary to the interests of TMO and in breach of fiduciary duty where no honest person with his legal experience and knowledge could have believed that the course of conduct proposed by TMO and its directors was lawful; and (vi) in the circumstances, deliberately and dishonestly assisted the Director Defendants in the breaches of their fiduciary duty. It is common ground that I need to make findings on these allegations of dishonesty which were pleaded by TMO with a view to rebutting Mr Audley's case that the limitations set out in clause 10 of his Consultancy Agreement apply.

522. I shall take each of the alleged breaches in turn but by way of preliminary comment I note that I can deal with some relatively shortly given the detailed findings that I have set out above. I also observe that although TMO sought to include an allegation against Mr Audley in its closing submissions to the effect that he was in breach of his contractual and fiduciary duties in the drafting and execution of the Market Place Subscription, this was an allegation that TMO had sought to introduce into its pleading at the last minute by way of amendment and was not permitted. It does not appear in the final version of TMO's Re-Amended Particulars of Claim, it was not addressed by Mr Collings in closing and accordingly, I shall not address it in this judgment.

The preparation by Mr Audley of the TMO Board EGM Recommendation (Issues 3&4(i))

523. TMO alleges that on or about 1 October 2013 Mr Audley prepared a first draft of the TMO Board EGM Recommendation which was in substantially the same terms as the October Circular sent to shareholders on 4 October 2013. It is said by TMO that it is to be inferred that Mr Audley deliberately intended the TMO Board EGM Recommendation as drafted by him to mislead shareholders in order to induce them to vote against the EGM Resolutions.

524. In circumstances where I have rejected the allegation that the October Circular was misleading, I also reject this allegation for the same reasons. It was not negligent for Mr Audley to draw up the draft October Circular on instructions from the Board and I accept that its contents accurately reflected the agreed position of the TMO Board. Further and in any event, I accept Mr Collings' submission that this allegation is of no causative effect because it is not suggested that any alleged defects vitiate the vast majority of votes which were lodged by proxy ahead of the EGM.

The advice from Mr Audley that shares could be issued without payment of cash (Issues 3&4(ii))

525. TMO alleges that at the Board Meetings on 9 and 22 October 2013, Mr Audley advised the TMO Board that shares could be issued without payment of cash and that he gave such advice "knowing and intending that it would or was likely to cause the TMO Board to issue shares for the purpose of defeating the EGM Resolutions" and therefore in breach of the duties owed by the Director Defendants pursuant to section 171(b) of the CA 2006.

526. I find that this case is made out on the evidence. TMO submits, and I agree, that there was a "close proximity of connection" between the advice given by Mr Audley and the issuing of shares to Market Place:

i) Mr Audley first raised the possibility of issuing shares without payment for cash at the Board meeting on 9 October in the context of a discussion that, without investment before 28 October, "the board would not necessarily have the vote it needed to fend off the requisitionists". The immediate effect of the advice, as the minute records, was to provide reassurance to Mr Yeo. In the circumstances, I reject Mr Audley's evidence in his witness statement to the effect that his advice was given "in the context of how to address arguments from interested investors that they would have liked to invest but were unlikely to do so because they would be unable to raise the money in time to subscribe for shares before the EGM", which appears to me to be an *ex post facto* reconstruction which is not borne out by the terms of the Board minute.

ii) Mr Audley raised the possibility a second time at the 6.30 pm meeting on 22 October expressly in connection with the transaction that it was hoped would be done on the following day with Mr Kerr.

iii) Mr Audley was the recipient of emails on 22 and 23 October (referred to above) evidencing the desire on the part of the Director Defendants to obtain a subscription agreement with Mr Kerr, including Mr Yeo's "knife edge" email of 23 October which carried the clear inference that Mr Kerr should not be told of the knife edge nature of the vote until he had signed up to the deal.

iv) Mr Audley then travelled to Tetbury with Mr Weaver to obtain the subscription agreement and he prepared a draft of that agreement, specifically referring to the fact that the shares were being issued in accordance with the CA 2006 section 583.

v) Mr Audley was well aware of the unusual features of the Market Place Subscription identified earlier in this judgment and had been involved in drafting them. I have already addressed the unsatisfactory nature of his evidence in relation to the "irrevocable undertaking" and the "reasonable endeavours" placing. Given all the circumstances to which I have already referred, I consider that it is inconceivable that a reasonably competent solicitor acting in the best interests of TMO could have thought that entry into such an agreement by TMO was for the primary purpose of raising funds. I also consider that it is inconceivable that such a solicitor would not have advised on the need for further due diligence in advance of signing such an agreement. I do not accept Mr Audley's evidence that the mere fact that Mr Kerr was "FSA registered" was

enough. I consider that this was simply the justification that Mr Audley had himself identified at the time as the answer to any challenge raised to the transaction. I do not consider that a reasonably competent solicitor acting in the best interests of TMO could possibly have viewed that information alone as providing sufficient comfort given all of the uncertainties around the detail of the Market Place Subscription, the identity of the proposed investors and the timing of any payment.

vi) Mr Audley appears to have been surprisingly casual about the change in identity of the counterparty (as I have mentioned above).

vii) Mr Audley was plainly aware at the time of how the Market Place Subscription was likely to be perceived by others, as is evidenced by his comments at the Board meeting on the evening of 23 October 2013 to the effect that "Sinoside could say the Board behaved badly as it was a mere contrivance". This does not appear to have caused Mr Audley to consider it necessary to give any advice to the Board about the wisdom of entering into such an agreement.

viii) Mr Audley was not able to explain why there had been no automatic conversion of the Loan Notes, but asserted, implausibly in my judgment, that he was convinced that had the 10 business day period for the conversion of the Loan Notes come up before the general meeting, then those conversions would have taken place.

527. Mr Audley accepted in evidence that he was aware in October 2013 that any director who authorised the issue of shares for a primary or dominant purpose of defeating shareholder resolutions would be acting unlawfully. However, this knowledge did not prevent him from advising on the possibility of issuing shares without payment of cash in circumstances where I consider it should have been obvious to a reasonably competent solicitor in Mr Audley's shoes that the Director Defendants would or might act on this advice for the improper purpose of influencing the vote in the Board's favour at the EGM. After all, Mr Audley had himself emailed the Director Defendants on 24 September suggesting that "someone needs to do the arithmetic and work out how much is needed to ensure the resolutions are defeated and then encourage angry shareholders who have the money to spend it in subscribing for shares…We need to be able to tell prospective investors, and Mr Edkins, that we are certain that the resolutions will be defeated. If we can't then it is TMO that will be defeated".

528. In the circumstances I reject Mr Collings' submission (made in opening) that Mr Audley had no duty to advise on whether the issue of shares to Market Place would amount to a breach of the Director Defendants' section 171 duty.

529. I also reject Mr Audley's evidence that he was convinced that the Director Defendants were motivated principally by raising money. This does not appear to me to be credible given the contemporaneous documents to which I have already referred in considerable detail and the extent of Mr Audley's involvement in drafting the terms of the Market Place Subscription. In my judgment the advice given by Mr Audley provided the Board with the means to issue shares for an unlawful purpose and Mr Audley knew that. He had himself foreshadowed such conduct in his email of 24 September. Accordingly I consider that his advice was given in bad faith, in the knowledge that it would or was

likely to cause the TMO Board to issue shares for the purpose of defeating the EGM Resolutions, and so contrary to his contractual and fiduciary obligations to TMO.

The alleged failure on the part of Mr Audley to advise that the issue of shares to Market Place would constitute an offer of securities "to the public" (Issues 3&4(iii))

530. TMO alleges that Mr Audley failed to advise the TMO Board that issuing shares to Market Place was or was likely to constitute an offer of securities "to the public" in breach of the CA 2006 section 755 and would put TMO at risk of being wound up under the CA 2006 section 758(3).

531. The relevant provisions of the CA 2006 provide as follows:

i) Section 755(1) contains a general prohibition which prevents a "private company limited by shares…and having a share capital" from offering to the public any securities of the company, or allotting or agreeing to allot any securities of the company "…with a view to their being offered to the public";

ii) Section 755(3) provides an exception to the general prohibition where the company acts in good faith and in pursuance of arrangements under which it is to re-register as a public company before the securities are allotted;

iii) Section 756 is concerned with the "Meaning of 'Offer to the Public'. Section 756(1) defines "offer to the public" widely as "an offer to any section of the public, however selected";

iv) Section 756(3) qualifies that definition, providing that an offer is not regarded as "an offer to the public" if:

> "…it can properly be regarded, in all the circumstances, as –
>
> (a) not being calculated to result, directly or indirectly, in securities of the company becoming available to persons other than those receiving the offer, or
>
> (b) otherwise being a private concern of the person receiving it and the person making it."

v) Section 756(4) provides that an offer is to be regarded (unless the contrary is proved) as being a "private concern of the person receiving it and the person making it" if:

> "(a) it is made to a person already connected with the company…; or
>
> (b) it is an offer to subscribe for securities to be held under an employees' share scheme…"

vi) Section 756(5) defines "person already connected with the company" as including (amongst other things) (a) an existing member or employee of the company and (b) a family member of that person.

532. TMO's case is that the terms of the Market Place Subscription plainly contemplated the offer by Market Place of shares allotted to it by TMO "to the public". In its written opening submissions TMO said that "There was no express or implied limitation in the Market Place Agreement. The fact (if correct) that Market Place had a "very limited number of clients" is irrelevant. One client would have been enough".

533. This allegation is made against the background of an email sent by Mr Audley to Mr Edwards on 14 August 2013 (copied to Mr Reeves) in which Mr Audley provided Mr Edwards with a note on "the legal and regulatory background to the TMO fund raising". This was of course only 10 weeks prior to the Market Place Subscription. The note (which Mr Audley accepted in evidence reflected his knowledge of the legal position at the time) focussed on the meaning of sections 755 and 756 of CA 2006, as follows:

> **"**Quite separately from the prospectus rules, there is also section 756 of the Companies Act 2006, which prohibits a private company from making an offer of its shares to the public.
>
> Under section 756(3)(a) of the CA 2006, an offer will not be an offer to the public if it is not calculated to result, directly or indirectly, in the offered shares becoming available to anyone other than those receiving the offer. The key point here is not who receives the offer, but who can accept it…if the offer is addressed and delivered to specific individuals, and the offer can be taken up by the specified recipients only, it will be capable of falling within the carve out in section 756(a) (*sic*) of the CA 2006, regardless of the number of recipients of the offer. I set out below the definition of offer to the public, which includes a specific carve out for "members" (i.e. shareholders) of the company. So since the offer will be made to the shareholders, and to a few non-shareholders, this should not be regarded as an offer to the public and therefore there would be no need to convert TMO into a public company.
>
> However, section 756(3)(a) requires that the offer is not calculated to result directly ot indirectly in the offered shares becoming available to anyone other than those receiving the offer. This wording shows that the identity of the recipient of the offer, and what he intends to do with the shares upon taking up the offer will be relevant factors in determining whether the offer falls within the exemption in section 756(3)(a). For example, ***if the offer is made to a broker with intention that he will subsequently sell the offered shares on to third parties, this is likely to take the offer outside of section 756(3).*** In this regard, note also the presumption in section 755(2) of the CA 2006".

The note then set out the provisions of section 756 of the Companies Act 2006.

534. It is common ground that Mr Audley did not give any advice to TMO at the time of the Market Place Subscription that it fell, or might fall, within the scope of the section 755(1) prohibition on offering securities to the public. However, Mr Audley says he was not

negligent and in breach of the terms of the Consultancy Agreement in not giving such advice.

535. Mr Audley's case, as set out in his witness statement, is that he does not agree "that the proposed placing of what was described by Mr Kerr, at the time, as a very limited number of clients of Market Place and possibly a very limited number of placees subsequently identified by TMO, would constitute an offer to the public". During his oral evidence, Mr Audley maintained this position, making the following points:

i) he had understood Market Place to be acting as "a broker for its own clients, what I understood to be a limited number of its own clients, not a broker offering shares to institutional shareholders or the outside world. The public in other words".

ii) the limited number of clients was perhaps in the order of magnitude of "five or six" although he had "never thought of that figure before, but that's the sort of order of magnitude I'm thinking about, no more than that". He went on "It was a sort of private client relationship that Mr Kerr/Avalon/Market Place had with their…clients". Later he said "I got the impression that [Mr Kerr] would be picking up the phone to maybe half a dozen people. I don't remember him saying that figure…My understanding was that Mr Kerr was not going to be offering, you know, slugs of 5,000 here and 5,000 there to scores of his clients. I thought he'd be talking to half a dozen or so of his own clients and no other clients. And I regard that…as not being an offer to the public".

iii) He had not "thought of section 755" at the time of the Market Place Subscription and did not foresee a problem.

536. However, Mr Audley conceded in cross examination that:

i) The Market Place Subscription was "calculated to result, directly or indirectly, in 75 million shares, or at least some of those, in TMO becoming available to persons other than Market Place";

ii) The potential placees did not receive the offer to purchase shares and had not even been identified at the time of the Market Place Subscription.

537. When Mr Audley was asked to explain how the section 755 prohibition was not engaged in such circumstances he gave the following explanation:

> "…my view is that if you are doing what VSA Capital were doing, which is making an offer to institutional investors, private clients of their and others and so forth around the City, that falls fairly and squarely within the prohibition, because it is an offer to the public. In contrast, a private client broker making shares available to a limited number, a handful, of its own clients…I do not regard that, if I may say prima facie, as evidence that it's a section of the public. I believe that word "public" has – wider connotation than simply saying: any more than one person is the public because it's a section of the public. That's my belief. I might be wrong, but I've always believed that. And so when it

> comes to making offers to a very limited number of people, I don't think that constitutes an offer to the public"

538. Mr Audley went on to explain that the reason he held this belief is because he had always viewed section 756(3) and (4) as a "non-exhaustive list of examples of private concerns, the things that aren't offers to the public…". Mr Audley concluded "I've been rigorous when it's come to offers to more than a handful of people, but when it comes to a very limited number, I've regarded it as a private concern, notwithstanding the fact it doesn't necessarily fall within subsections (3) and (4) of section 756".

539. Mr Collings maintained in his written closing submissions that I do not need to decide whether Mr Audley was right in the views that he held, and he did not thereafter make any submissions one way or the other. I note, however, that in his opening submissions Mr Collings contended that "the issue of shares did not breach section 755 of the 2006 Act", albeit that he did not explain this further.

540. In any event, it seems to me that the answer to the point is straightforward. To my mind, Mr Audley's understanding of the provisions of section 755 and 756 does not bear scrutiny. Section 756(1) expressly confirms that "This section explains what is meant in this Chapter by an offer of securities to the public" and there is nothing "non-exhaustive" about the carve out provision in section 756(3); on the contrary, that provision specifically identifies the two occasions on which an offer is not to be regarded as an offer to the public. Section 756(4) then goes on to assist in understanding the second of those occasions (i.e. when an offer is "a private concern of the person receiving it and the person making it).

541. Furthermore, despite Mr Audley's evidence to the contrary, I do not consider that his understanding as described in his evidence is consistent with what he had advised on 14 August 2013, where he acknowledged that an offer not addressed and delivered to specific recipients, but instead made to a broker who will sell on to third parties, is "likely" to fall foul of the section 755 prohibition. Accordingly, I also reject the suggestion that Mr Audley has always held the belief about the true interpretation of sections 755 and 756 to which he referred in his evidence.

542. Further, and in any event, the difficulty with Mr Audley's evidence is that whilst he now says that he thought at the time that Market Place would be acting as a broker to only a very limited number of its clients, there is no evidence whatever to support this. On the contrary, it was Mr Yeo's understanding at the time (which he must have obtained from Mr Weaver and Mr Audley, as he did not attend the meeting in Tetbury) that Market Place would be obtaining subscriptions "for a whole range of clients of Avalon and Market Place…there was going to be quite a few clients behind this Market Place subscription". This chimes with the letter from Mr Yeo to shareholders dated 7 November 2013 (drafted by Mr Audley with input from Mr Yeo), in which it is reported that "…through an introduction from one of our shareholders, we entered into discussions with Market Place Financial Services Limited, a company authorised and regulated by the Financial Conduct Authority, which has subscribed, ***on behalf of its clients and other placees***, £3,000,000 for ordinary shares at 4p per share" (***emphasis added***). Furthermore, I note that the Market Place Subscription itself, drafted by Mr Audley, does not impose any limitation on the number of potential investors that might be approached.

543. In all the circumstances I find that Mr Audley acted negligently and in breach of the terms of his Consultancy Agreement in failing to advise the TMO Board that the Market Place Subscription fell foul, or at the very least risked falling foul, of CA 2006 section 755 on the grounds that it involved an "offer to the public". I reject Mr Collings' submission that "Mr Audley's approach is not so bad that no competent or honest consultant in his position could properly follow it". As a solicitor with expertise in company law who had previously been called upon to advise on the impact of that section in his email of 14 August 2013, Mr Audley should, in the exercise of his professional judgment, have been alerted to that risk; a reasonably competent solicitor would have been alerted to that risk. Indeed, given the terms of his earlier advice, it is very difficult to believe that Mr Audley did not appreciate the risk. Much more likely, it seems to me, is that he decided to turn a blind eye to the risk so as not to frustrate the Board's chances of obtaining the votes it needed to defeat the EGM Resolutions.

544. In circumstances where Mr Audley was, as I have said, at the heart of the negotiations around the Market Place Subscription and had given the advice in the first place which cleared the way for shares to be issued without any corresponding payment of cash, I agree with TMO that the strong inference from his failure to advise on the very point he had raised in connection with TMO's fundraising effort a couple of months previously is that he took a conscious decision not to do so. The provision of such advice was plainly within the scope of his duty. However, had he given appropriate advice, I find that he knew it might prevent the issue of shares to Market Place and thus put the Board's position at the EGM at risk. His failure to give appropriate advice was in bad faith and contrary to his fiduciary duty of loyalty to TMO.

The alleged failure to advise that the issue of shares to Market Place and VSA Capital was a breach of the Defendant Directors' duties (Issues 3&4(iv))

545. TMO alleges that Mr Audley failed to advise the TMO Board that it was a breach of their directors' duties under the CA 2006 section 171(b) to issue shares to Market Place and VSA for the purpose of controlling or influencing the outcome of the vote in relation to the EGM Resolutions.

546. As will already be clear, I reject Mr Audley's case that he had no positive duty to advise on these issues and further that he never in fact formed the impression that the Director Defendants were exercising their duties for an improper purpose.

547. I accept TMO's submission that the features of the Market Place Subscription and the VSA Share Issue were only consistent with those transactions having the improper purpose of influencing the vote at the EGM. Mr Audley was at the heart of the discussions between the Director Defendants in connection with these transactions and I find that he must have been aware of that unlawful purpose. I refer to the section of this judgment relating to the breaches of the Director Defendants' duties in relation to the Market Place Subscription.

548. As for the VSA Share Issue, whilst it was Mr Audley's evidence that the VSA shares were issued "in accordance with a contractual commitment", I do not consider that any reasonably competent solicitor looking properly at the terms of the VSA Retainer could have come to this conclusion (for reasons I have explained). I have mentioned Mr Audley's evidence (given for the first time in the witness box) that if the suggestion of issuing shares to VSA had been raised by himself or by the Board then "I think that would

have been for the purpose…of skewing the vote", and logically I cannot see why the fact that Mr Edwards raised the suggestion makes any difference to the improper purpose. In any event, Mr Edwards having raised the suggestion in an email, it was Mr Audley who then picked up on it, raising it at the Board Meeting on 24 October and effectively inviting the Defendant Directors to consider it.

549. In failing to provide appropriate advice as to the Market Place Subscription and the VSA Share Issue, I consider that Mr Audley acted in breach of his contractual and fiduciary duties to TMO. The very significant risk of the exercise by the Director Defendants of their duties for an improper purpose should have been clear to Mr Audley in exercising his reasonable professional judgment. Indeed, these two transactions were so obviously open to challenge on grounds of their improper purpose that I agree with TMO that Mr Audley's failure to provide appropriate advice cannot be explained away as mere negligence (especially where he plainly knew and understood the law in this area). I can only infer that Mr Audley made the conscious decision not to advise of the risks because he had become so closely and dangerously entwined with, and engaged by, the objectives and interests of the Director Defendants that he had lost sight of his own duties as a solicitor (the terms of his email of 24 September strongly support this inference). In failing to give appropriate advice, Mr Audley was acting to further those objectives and interests at the expense of the interests of TMO. I accept that this was in bad faith.

550. In my judgment Mr Audley acted contrary to his contractual and fiduciary obligations in failing to advise the TMO Board that it would be acting for an improper purpose if it issued shares to Market Place and to VSA.

The advice from Mr Audley to Mr Yeo that there was no requirement to inform shareholders of the payment terms on which the shares had been issued to Market Place (Issues 3&4(v))

551. TMO alleges that on about 27 October 2013, Mr Audley advised Mr Yeo that there was no requirement to inform shareholders of the payment terms on which the shares had been issued to Market Place. TMO seeks to infer that Mr Audley "gave such advice knowing and intending that it would or was likely to be relied on by Mr Yeo to withhold vital information from shareholders which would influence the votes they cast in relation to the EGM Resolutions".

552. The evidence on which TMO relies is as follows:

(1) Mr Audley prepared the Chairman's Script for delivery by Mr Yeo at the EGM and sent it to the Director Defendants under cover of an email dated 25 October.

(2) On 27 October, Mr Yeo identified that "The real question which [Sinoside/Andbell] may or may not be smart enough to ask is whether all the recently issued shares are fully paid? And if they are not when will they be paid up? Even if we are on rock solid legal ground here having to admit in public that we do not know for certain when they will be fully paid would be embarrassing". Mr Yeo went on to say that "I would like to explore specifically whether we have to answer those questions at all. If we do can we

use a form of words such as "All the shares in issue have been issued in accordance with the Articles of Association" to deal with this".

(3) Mr Audley responded on the same day:

"It is accurate to say that the shares were issued fully paid in accordance with the Companies Act 2006. There is no requirement to elaborate and I think it is fair to say that the financing discussions are still in progress and are confidential. These emails are not legally privileged and even if they were, the board of directors as reconstituted from time (*sic*) would have the right to see such communications, so I would prefer not to elaborate on some thoughts I have until I see you."

Under cross examination, Mr Audley said that he did not know what financing discussions or what "thoughts" he was referring to here but he accepted that whatever those "thoughts" were, he had wished to conceal them from prying eyes. Given that the Market Place Subscription had already been entered into, his advice that it would be fair to say that financing discussions "are still in progress" appears to be a distortion of the truth.

(4) In his oral evidence, Mr Audley sought to justify the advice in his email by reference to the long explanation which I have already set out in full as to the existence of different kinds of general meetings and the need to be "very full and frank" at meetings where a matter is still to be voted on, but the acceptability of refusing to answer questions where "over 92% of the votes have come in already by proxy" such that the meeting was a "rubber stamping operation".

(5) Under cross examination, Mr Audley accepted that he had advised Mr Yeo on the answers that should be given to the questions raised at the EGM. He acknowledged that direct answers to the questions posed would have been different: the "truthful answer" to the second question of whether the subscription sum of £3 million had been received by the company was 'No' and Mr Yeo's answer involved "dodging the question"; the truthful answer to the third question was that money had not been received into the company's bank account and "The answer Mr Yeo gave was clearly an evasive answer".

553. In my judgment, this allegation is made out. Mr Audley accepted in his evidence that:

i) a director who deliberately chooses to withhold from shareholders factual information relevant to a decision will be acting in bad faith and

ii) a director who deliberately makes a false or misleading statement in order to influence the outcome of the vote will be acting in bad faith.

554. Against this background, I accept TMO's submission that Mr Audley's explanation seeking to justify his advice is neither credible nor realistic. It is premised upon the suggestion that there are circumstances in which it is lawful for directors at an EGM to make statements to shareholders which are deliberately "untruthful" and "evasive". This is, at best, a startling suggestion.

555. Furthermore, I note that Mr Audley's long explanation about different types of general meetings (on which Mr Collings placed considerable reliance) did not feature anywhere in his email of 27 October and had not been mentioned in his witness statement for trial. The first time he provided this explanation was in the witness box on the second day of giving evidence. I accept TMO's submission that it had the appearance of being an *ex post facto* attempt to justify his conduct.

556. I also accept TMO's submissions that his explanation does not, in any event, ring true on a variety of counts:

i) I fail to see how there can possibly be a rule that the information that must be provided to shareholders is affected by the number of proxies already submitted. If this were correct, it would enable directors to conceal unlawful or improper conduct from shareholders where that conduct was the very thing which had induced shareholders to submit proxies voting in a particular direction.

ii) To my mind Mr Audley's explanation seeks to play down the significance attached by the Board to the votes of the remaining shareholders who had not yet voted. Mr Yeo's attempts to secure Presnow's vote the night before the EGM demonstrate that the Board and Mr Audley appreciated that the vote might still hang in the balance and that last minute voting might be significant.

iii) The explanation ignores a director's duty to disclose his own wrongdoing in accordance with his good faith duty (see *Fassihi*).

557. In all the circumstances I find that Mr Audley acted in breach of his contractual and fiduciary duties in advising Mr Yeo that there was no need for the Board to advise shareholders of the payment terms on which shares had been issued to Market Place. I also find that this advice was given in bad faith, with a view to supporting the position the Director Defendants wished to adopt at the EGM.

The preparation by Mr Audley of the draft response to the Andbell Loan Offer (Issues 3&4(iv))

558. TMO alleges that on 27 November 2013, Mr Audley prepared a draft response to the Andbell Loan Offer in identical terms to the draft approved by the TMO Board. TMO invites the Court to infer that "Mr Audley thereby acted contrary to TMO's interests and in bad faith". It relies on its submissions in respect of the bad faith allegation against the Director Defendants arising from their rejection of the Andbell Loan Offer.

559. Mr Audley contends that in preparing the draft response, he was carrying out the instructions of the Board, as recorded in the minutes of the 19 November Board meeting and further that the draft reflected the Board's commercial decision: "The Board agreed that the terms as they stand are unacceptable and Max should draft a letter for the Board to review". He also points out that he shared the Board's view that TMO could not properly accept the offer ("the board's decision was utterly rational. I mean it's just common sense").

560. Having regard to my decision in relation to the conduct of the Director Defendants in connection with the Andbell Loan Offer, I am satisfied on balance that Mr Audley acted negligently and in breach of his contractual and fiduciary duties in preparing the draft

response. In summary, as I have already explained, the draft response did not in fact reflect the reason that is now given for not accepting the Andbell Loan Offer, namely the desire to avoid borrowing money. Instead it set out entirely different reasons which I have found to be thoroughly disingenuous. Further, no attempt was made to seek independent advice, as Mr Audley confirmed in his evidence.

561. A reasonably competent solicitor in Mr Audley's position would have advised the Board to take fresh independent advice focussing specifically on the two offers available to TMO and would not have prepared a letter containing inaccurate and misleading information. I accept TMO's submissions that this was done by Mr Audley negligently, in breach of fiduciary duty and in bad faith.

Issue 5: Causation

562. TMO's causation case is pleaded in the following paragraphs of its Re-Amended Particulars of Claim:

i) In paragraph 65(2), that "Rebio has successfully developed the TMO Business and Assets for the purpose of producing biochemicals and related products (including high value medical devices)".

ii) In paragraph 79 that:

a) had the Defendants not acted in breach of their respective duties, TMO would not have issued shares to Market Place or VSA, or alternatively (if shares would have been issued to Market Place), Rock Nominees, Presnow and all other shareholders would have been told of the terms on which the shares had been issued. In either case the majority of shareholders would have voted in favour of the EGM Resolutions which would have been passed and the Requisitioners would have taken majority control of the TMO Board on or shortly after 28 October 2013; alternatively

b) the Director Defendants would have accepted the Andbell Loan Offer on or shortly after 11 November 2013 with the result that Messrs Yeo, Weaver and Reeves would have resigned as directors and been replaced by Mr Andenaes and Mr Edkins who would have taken majority control of the TMO Board.

c) In either scenario, Andbell and Sinoside would have immediately provided a funding line for TMO and so ensured that TMO avoided administration and subsequent liquidation. Further, TMO would have suspended the development of the TM242 technology in which TMO had invested up until that date. Instead it would have pursued a business plan which focussed on the production of biochemicals and related products, including high value medical devices. That plan would have been substantially similar to the Rebio Business Plan in fact pursued by Rebio since acquiring the TMO Business and Assets in March 2014.

iii) In paragraph 79A that had TMO avoided administration and pursued the Rebio Business Plan from 11 November 2013, TMO would have raised substantial sums by way of investment and applied those sums to the development of the business. I shall return to the detail of this shortly.

The Law:

563. TMO's causation case invites the court to apply the conventional "but for" analysis, available in both equity (see *AIB Group (UK) plc v Redler* [2014] UKSC 58) and contract.

564. At the time of opening submissions, there appeared to be a dispute between the parties as to which of the three categories of breach of trust identified in *AIB* applied in this case, with TMO maintaining that this case concerns breaches involving an element of infidelity (i.e. the second category of breach) and the Defendants suggesting that the allegations in this case involve breaches of duty leading directly to damage or loss to trust property (i.e. the first category of breach). This originally led to the Defendants submitting that it was necessary to identify the 'asset' that has been damaged. However, TMO having clarified its position in opening, the dispute appears to have been resolved and it is no longer contended that I need to identify the asset that has been damaged. Mr Collings submitted in closing that "it makes no difference because the consequence is the same so far as causation is concerned".

565. Similarly a dispute as to whether the loss alleged falls within the scope of the Defendants' duties has also been resolved, such that it is agreed by the parties that I am not required to consider arguments as to the correct application of the well-known principle in *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191.

566. Indeed, by the time of closing submissions, I did not understand the legal principles to be in issue between the parties: it is common ground that for equitable claims of breach of fiduciary duty (i) a but for test applies: the purpose of the remedy of equitable compensation is to put the 'beneficiary' in the position he would have been in 'but for' the breach, (ii) the loss must flow directly from the breach and is to be assessed with the full benefit of hindsight; (iii) causation is to be assessed on a common sense view – foreseeability is not a concern in assessing compensation; (iv) the chain of causation may be broken by interruption on the part of a third party.

567. In *AIB*, Lord Toulson approached the application of the but for test by asking (at [73]) what the result of "proper performance" of the obligations which had been breached would have been and concluded (at [76]) that "[w]hat has to be identified in each case is the content of any relevant obligation and the consequences of its breach".

568. It is common ground that the but for test will also apply to contractual claims (i.e. against Messrs Yeo, Weaver and Reeves under their Service Contracts and Mr Audley under his Consultancy Agreement). However, any contractual claim is also subject to common law principles such as remoteness and scope of duty.

569. During his oral closing submissions I suggested to Mr Sutcliffe that certain aspects of his claim appear to rely on a loss of a chance type analysis which would require TMO to prove a significant chance that a third party would have acted in the manner alleged, with any damages then awarded on a loss of a chance basis (for example that third party

investors would have been prepared to inject money into TMO in the counterfactual scenario). Despite referring in his written opening submissions to the approach taken by the Supreme Court in *Perry v Raleys Solicitors* [2020] AC 352 to the standard of proof to be applied in loss of a chance cases (claimant/defendant acts – balance of probabilities; third party acts – significant chance), Mr Sutcliffe responded to my question by explaining that TMO's claim was not a loss of a chance claim, that he was not inviting me to make a percentage chance assessment but that "We are saying it's a but for test and as a result of the wrongdoing, TMO has lost the opportunity to do these things".

570. In his written closing submissions, Mr Sutcliffe submitted that "proof of loss is simplified by reason of the lack of third party involvement". I understood this to mean that he was inviting me to treat Messrs Andenaes, Glen and Edkins as "the claimant" for these purposes as they would have been controlling TMO in the counterfactual (alternatively that they were so closely linked to TMO that it is open to the Court to conclude that their actions are to be proved on the balance of probabilities, not on the loss of a chance basis; see *Veitch v Avery* [2008] PNLR 7*)*. None of the Defendants suggested that this was the wrong approach to take to the evidence of Messrs Andenaes, Glen and Edkins and I accept that where, for practical purposes, all three gentlemen would have been on the Board, or closely connected with the running of TMO in the counterfactual, I can safely treat them as falling within the question of "what the claimant would have done" and thus judge their evidence on the balance of probabilities.

571. However, I should add that I fail to understand this approach in circumstances where it appears to be TMO's case that third party investment would have been obtained by TMO in the counterfactual scenario. The standard of proof in such circumstances should, in my judgment, be "a significant chance". Given TMO's submissions, I shall however consider any third party acts both on the basis of the balance of probabilities and by reference to whether there is a significant chance of the third party acting in the manner alleged.

572. Finally, I note that notwithstanding the submissions to which I have just referred, Mr Sutcliffe sought to draw support for his case from the loss of a chance case of *AssetCo plc v Grant Thornton UK LLP* [2021] PNLR 1. That case involved a negligence claim for damages by Assetco against its auditors, who had failed to detect a management fraud. The fraud was subsequently discovered following a change of management. Assetco then entered into a scheme of arrangement with its creditors and a restructuring, which allowed it to avoid insolvent liquidation. Assetco was awarded damages on the basis of a counter-factual that assumed that Assetco would have avoided certain expenses and made profits if the fraud had been discovered earlier. The Court of Appeal upheld the judge's evaluation of a series of lost chances, dependent on the actions of third parties, as near certainties (either 100% or so high that they fell to be treated as 100%) which did not therefore require any percentage reduction. Mr Sutcliffe submits that the decision is "instructive because the counter-factual (and the arguments raised against it) bears similarities with the present case". I shall return to this later when considering these alleged similarities.

Would the EGM Resolutions have passed?

573. This question requires a straightforward 'but for' analysis and the starting point in any counter factual analysis is to consider the breach position; in other words, what actually

happened. Mr Collings and Mr Loveday produced an extremely helpful Appendix to their written closing submissions identifying the actual outcome at the EGM as per the Equiniti record, together with various alternative scenarios. This showed that at the EGM, 139,225,832 shares were voted in favour of the EGM Resolutions, and 218,357,256 shares were voted against. The winning margin was 79,131,424 shares. Further analysis identified that two votes were not in fact cast by their proxies such that the final figures should be 139,225,830 votes for the EGM Resolutions and 218,357,256 shares voted against; the winning margin being 79,131,426. Nothing turns on the difference of 2 votes between these two analyses.

574. Given my findings on breach, the counterfactual position must assume that neither the Market Place Subscription nor the VSA Share Issue would have taken place in advance of the EGM and therefore that TMO would not have issued shares to Market Place or VSA (as pleaded in paragraph 79.1 of the Re-Amended Particulars of Claim). Thus in the counterfactual, the votes cast by Market Place (75,000,000) and VSA (2,625,000), a total of 77,625,000 would not have been cast. However, this is not enough in itself to swing the vote – the EGM Resolutions would still have been defeated by (using Mr Collings' figures) 1,506,424 votes. It is necessary for TMO to establish that one or more other substantial shareholders would have voted differently.

575. In particular, Mr Collings' Appendix shows that if the Market Place shares and the VSA shares had not been issued and Presnow had voted its 27,900,000 shares in favour of the EGM Resolutions, then those resolutions would have been carried by 54,293,576 (there would have been 167,125,832 votes for and 112,832,256 votes against the EGM Resolutions).

576. Accordingly, I must begin by considering what would have happened had the First Cash Received Representation not been made by Mr Yeo (and authorised by the Board) to Mr Parker.

577. In his witness statement, Mr Parker confirmed that if he had been told about the terms of the Market Place Subscription by Mr Yeo or at the EGM itself "it is likely that I would not have recommended to Presnow that it should support the Board at the EGM. Instead I believe I would have recommended that Presnow should vote with Sinoside in favour of the EGM Resolutions".

578. TMO's case on this is simple; it says in its written closing that "it was patently clear during his evidence that Mr Parker regarded the receipt of cash as all-important and his recommendation to Presnow depended on this". In the TMO Supplemental Note, TMO addressed this in more detail with specific reference to an exchange between Mr Collings and Mr Parker during Mr Parker's cross examination. I shall return to TMO's submissions about this exchange in a moment.

579. The Defendants say that Mr Parker's evidence did not come up to proof and that the decision as to how to vote did not reside with Mr Parker, but with Mr Pryor. They also submit that Mr Parker could not exceed his mandate and so would not have been in a position to change the way Presnow voted at the EGM (a submission with which I agree). Further, they say that Mr Parker's evidence in cross examination was that Presnow's "default position was always to support the Board" and that Mr Parker could not say what Mr Pryor's decision in respect of Presnow's vote would have been in the counterfactual.

580. The key exchange between Mr Collings and Mr Parker in cross examination is as follows:

> "Q. Do you think that Mr Pryor – who is I imagine the person to whom you spoke to on the telephone and who would have given you your mandate, is that correct?
>
> That's right.
>
> Q. Would he necessarily or habitually have followed your recommendation, or would he have made up his own mind in relation to the material that he had, possibly in consultation with Mr Caraballo?
>
> A. Well, that's a little bit difficult to answer, simply because this is the only situation I can recollect involving the mandate that I had with Presnow where there was anything like this sort of complexity around a decision, particularly in relation to voting our shares. So in every other case, we had voted at the recommendation of the board. So I couldn't really prejudge what Mr Pryor's attitude would have been in this case. I think it is fair to say that he placed some trust in me and was willing to be led by me, but he certainly was quite forensic in his own questioning.
>
> Q. Yes, so he is still his own man, as it were?
>
> A. Yes".

581. Mr Morgan probed this issue again in his cross examination of Mr Parker:

> "Q. So you talk about advice to Presnow. Who took the decisions at Presnow?
>
> A. Mr Pryor.
>
> …
>
> Q. And it was him who took the decision about which way to vote at the meeting wasn't it?
>
> A. Yeah.
>
> Q. When did he take that decision in relation to the TMO EGM?
>
> A. I would have got the confirmation from Presnow after the call I had with Tim Yeo…
>
> …
>
> Q. And since this matter has come into issue have you talked to Mr Pryor about the basis upon which he took his decision?
>
> A. No, I don't think so.

…

Q. So I mean although you have a view you don't actually know [if Mr Pryor would have decided differently], do you?

A. No. It's – no its not really my position to do that, no.

582. Looking carefully at all of Mr Parker's evidence in its context, I do not agree with the Defendants that these exchanges are fatal to TMO's case on causation. I say that for the following reasons:

i) Mr Parker's unchallenged evidence in his statement (which I accept) was that had he known the terms of the Market Place Subscription he would have recommended that Presnow vote with Sinoside in favour of the EGM Resolutions. Mr Parker was already "disappointed by TMO's failure to deliver on its business plan and had concerns about its management and the capabilities of its executives" and I find that knowledge of the Market Place Subscription would have only served to compound this disappointment and lack of trust in the Board.

ii) There is no doubt that Presnow (in the shape of Mr Pryor) was waiting on Mr Parker's recommendation before deciding which way to vote.

iii) It is implausible that Mr Pryor would have ignored a recommendation from Mr Parker to vote with Sinoside. As Mr Parker said, Mr Pryor "placed some trust" in Mr Parker and was "willing to be led by" him. Had Mr Parker been told the truth about the Market Place Subscription it is inconceivable that he would not have passed that information on to Mr Pryor (together with his own doubts about the Board) in explaining and justifying his recommendation, particularly given that Mr Pryor was "forensic" in his questioning.

iv) Furthermore, it is clear that Mr Parker had been talking to the Requisitioners with a view to determining their plans. His witness statement refers to the fact he spoke to Mr Edkins. It records that "Sinoside had invested considerably in TMO and was promising further immediate investment and to underwrite the fundraise, if the EGM resolutions were passed". An undated handwritten note in the Parker Notes which (from its content) appears to record a conversation in advance of the EGM with one of the Requisisioners (I infer, Mr Edkins) records that Mr Parker was told that the Board was "reckless" and was "burning £250k pcm" and that the Requisitioners were planning "accelerated debt conversion". The note ends with what appear to be musings by Mr Parker, "Why is board taking this position over Diverso? Explains fantasising about Brazil???". The information that Mr Parker had gleaned from his contact with the Requisitioners would inevitably have been factored in to his recommendation to Mr Pryor.

v) The unusual information about the truth of the Market Place Subscription combined with the additional information that Mr Parker would inevitably have given to Mr Pryor in making his recommendation would plainly have taken this particular decision out of the norm. Whilst Mr Pryor was no doubt "his own man", I consider that in all the circumstances it is extremely unlikely that the "default position" of voting at the recommendation of the Board would have continued to apply. It was not suggested to Mr Parker that Mr Pryor would not

have followed his recommendation and I consider on balance that Mr Pryor would not have overridden the recommendation of his trusted adviser, who had clearly talked to the relevant parties and would have been expressing a clear view.

vi) The fact that Mr Parker very honestly accepted that he did not know what Mr Pryor would have decided does not appear to me to affect the position. On balance there is no reason why Mr Pryor would have rejected Mr Parker's recommendation, and the Defendants have not suggested any reason why he would have done so.

583. In all the circumstances, I accept that if the First Cash Received Representation had not been made, Presnow would have cast its vote in favour of the EGM Resolutions.

584. My decision in relation to the Presnow vote makes it strictly unnecessary for me to consider any other possible scenarios. However, it is TMO's case that Rock Nominees would also have changed its vote had Mr Akerman not been the subject of the Immediate Investment Representation and so I must consider this briefly.

585. By way of preliminary point, the Defendants invite me not to consider this issue at all on the grounds that the Re-Amended Particulars of Claim do not expressly plead any details in paragraph 3 as to the shareholding of Rock Nominees and that I have previously refused to permit an amendment which would have included reference to Rock Nominees. In closing, however, Mr Sutcliffe pointed to paragraph 79.1 in which an averment is made as to the disclosure that Mr Weaver would have made to Rock Nominees in the event that shares had been issued to Market Place, together with a general averment that "the majority of shareholders entitled to vote at the EGM (including Presnow) would have voted in favour of the EGM Resolutions which would have been passed…". In this context it is fair to say that it has always been TMO's case that it was not in fact necessary to make any amendment to paragraph 3; a point I picked up in refusing the application to amend.

586. On balance I am prepared to accept that TMO's pleading as it stands is sufficient to raise as a live issue the approach that Rock Nominees would have taken to the EGM had Mr Weaver not made the Immediate Investment Representation to Mr Akerman.

587. By my calculations, if the Market Place shares and the VSA shares had not been issued and Rock Nominees had voted its 9,035,525 shares in favour of the EGM Resolutions, then those resolutions would have been carried by 16,564,626 (there would have been 148,261,357 votes for and 131,696,731 votes against the EGM Resolutions). A fortiori, the EGM Resolutions would have been carried if both Presnow and Rock Nominees had voted in their favour. In cross-examination of Mr Akerman, Mr Collings suggested that in fact only £8.8 million Rock Nominees shares were in fact voted at the EGM, however, even if correct, this is not material.

588. Mr Akerman's evidence in his statement (which I accept) was to the effect that he considered he had been seriously misled by Mr Weaver, that had he been told the truth about the terms of the Market Place Subscription he would have lost any remaining faith in the Board and would have wanted to see a change of Board control. There is no question in his mind but that he would have "voted in favour of the EGM Resolutions". Mr Akerman repeated this evidence in cross examination, saying "But had he told me the truth, I don't think there is any doubt. I mean, what could I have done?".

589. TMO submits that, in the circumstances, but for the Immediate Investment Representation, the outcome of the EGM would have been different. I note that Mr Akerman's statement records that prior to his conversation with Mr Weaver, he was very disillusioned with the TMO investment in circumstances where, over a period of some 8 years, TMO had raised and spent a great deal of money and yet had made very little discernible progress. Mr Akerman goes on to say that "Against that background, I thought it might well be best to support the proposal to change the Board and management of TMO. Very simply, I did not think that the Board and management of TMO had been successful. Further I considered that a new Board, led by the company's major shareholders, might lead TMO in a new and more successful direction."

590. This evidence was not undermined in cross examination and in the circumstances I find that, on balance, if the Immediate Investment Representation had not been made, Mr Akerman would have cast Rock Nominees' votes in favour of the EGM Resolutions.

591. In the circumstances set out above, I find that but for the breaches on the part of the Defendants, the vote at the EGM would have gone differently, the EGM Resolutions would have passed and control of the Board would have transferred into the hands of the Requisitioners on or after 28 October 2013.

Would the Andbell Loan Offer have been accepted?

592. In his closing submissions, Mr Collings realistically accepted that if the refusal of the Andbell Loan Offer constituted a breach of fiduciary duty "this element of causation is made out" because the Andbell Loan Offer entailed a change to the composition of the Board. I did not understand the other Defendants to disagree with this. TMO's financial position was dire and the requirement for additional funds was urgent.

593. Accordingly I find that but for the breach by the Defendants in relation to the Andbell Loan Offer, TMO would have accepted the offer and the Requisitioners would have taken over majority control of the Board on or around 11 November 2013.

594. However, I note that Mr Morgan submits that taking an unsubordinated line of credit from Andbell with no prospect of repaying it would not have improved TMO's balance sheet position and would in due course have increased TMO's overall indebtedness, a submission I accept. This is relevant in the context of considering whether TMO would have avoided administration.

Would TMO have obtained funding and thereby avoided administration and insolvency?

595. It is TMO's case that upon taking over control of the Board after the EGM, alternatively upon the acceptance by TMO of the Andbell Loan Offer, Andbell and Sinoside would immediately have provided a funding line to TMO and Andbell would not have made an application to put TMO into administration on 19 December 2013.

The Evidence

596. In Mr Edkins' statement he explains that in his view the administration of TMO "was not inevitable" at the time of the EGM and "would certainly have been avoided". Mr Glen agrees in his statement pointing out that any suggestion that Diverso and Andbell had a strategy to force TMO into administration and acquire its assets "is groundless. To the

contrary, we did all we could to ensure the success of TMO and save it from administration". Mr Andenaes also agrees. In his statement he explains that "Andbell would have provided financial support to TMO insofar as necessary to ensure that it avoided administration"

597. Mr Edkins (who on Mr Glen's account in his evidence was dealing with financial matters) goes on to explain in his statement that it was the Requisitioners' intention upon gaining control of the Board to refocus TMO, at least in the short term, on a single line of business, namely biochemicals. He explains that this would have enabled TMO significantly to reduce its monthly overheads (as in fact occurred when Rebio acquired the Business and Assets of TMO) and that the costs of restructuring would have been met "out of investment". He points out that TMO was entitled to claim tax relief in respect of the many millions of pounds that it had invested in the research and development of TM242, that these tax credits ran to "several million pounds" and that "it would have been advantageous to retain and restructure TMO, to take advantage of those credits, rather than allowing the company to enter into administration". Further he emphasises the "high profile" reputation that TMO had in the renewables market, which itself had a commercial value. Finally he points to the fact that the majority of TMO's debt was in the form of Loan Notes held by Andbell and Diverso. He states that Andbell and Diverso "could (and would) have procured the consent of 75% of the Loan Note holders (as we did for the January 2013 Restructuring) to accelerate the conversion of the debt into equity". (Mr Parker's notes appear to support Mr Edkins' final point as to the intention to engage in accelerated debt conversion of the Loan Notes).

598. Much of this evidence (with which Mr Glen expressly agreed in his statement) was unchallenged during Mr Edkins' cross examination. Mr Glen added that "had we gained control of the Board in October 2013, Diverso and Andbell would have supported TMO in the same way that we supported Rebio following the acquisition of TMO's business and assets" (emphasis added). Mr Andenaes' evidence is to similar effect: "Andbell has invested heavily in Rebio since the acquisition". Mr Andenaes estimates that investment at around £2.5 million, although he does not say in his statement when it was made.

599. As for the financial support that would have been available, TMO points to the following additional oral evidence given by Mr Edkins:

i) Diverso had £1.5 million in "free and clear" funds from the June 2013 underwrite sitting in accounts in Hong Kong and Singapore;

ii) a new Board would have focused on raising funds from new investors to avoid "investor fatigue" and the "pivot towards biochemicals probably would help us approach a new investor base";

together with evidence given by Mr Andenaes that Andbell had "up to £50 million in cash or marketable securities…an additional 3 or 4…companies…owned by owners of Andbell…would have close to between £10m to £20m in marketable securities".

600. Accordingly, TMO submits that the new board in the counter factual would have had no incentive to put TMO into administration and very substantial cash and investors at their disposal to avoid that from happening and to ensure its survival.

601. The Defendants dispute this conclusion and it does seem to me that where I am dealing with evidence as to the counterfactual which inevitably involves a retrospective reconstruction (made many years after the event) as to what would have taken place, I must look very carefully at (i) whether there is evidence to support that reconstruction and (ii) whether there is evidence to suggest that TMO's witnesses (who have a personal interest in the outcome of this litigation) may be mistaken in that reconstruction.

602. I also observe that insofar as TMO's evidence on the counterfactual is influenced (as much of it plainly is) by what subsequently transpired in relation to Rebio, that company was developed and financed without the disadvantage of the crippling debt that was strangling TMO's prospects of raising funding in the months prior to its descent into administration. Rebio was an "off the shelf" company with a small board of close-knit directors, a discrete body of shareholders, a reduced payroll due to redundancies made by the Joint Administrators, no onerous property, no historic debt and a new business plan (as I shall return to shortly). I accept the Defendants' submissions that I must take care in considering whether Rebio is an accurate or appropriate indicator of what might have happened to TMO had the control of the Board been transferred to the Requisitioners in October or November 2013.

603. First, then I turn to consider whether there is evidence to support the counterfactual for which TMO contends.

604. A very important element of TMO's counterfactual appears to me to be first, that TMO would have been restructured to focus on a single line of business and so reduce costs, and second that the costs of the restructuring of TMO would have been met out of "investment", whether from third party investors or from Andbell, Sinoside or Diverso.

605. As to the first of these propositions, Mr Edkins appears to me to have given an important answer to Mr Collings during cross examination. It was put to him that in 2014, after the failure of TMO and the acquisition of its business and assets by Rebio "the bottom fell out of the bioethanol market". Mr Edkins confirmed that it did. It was then put to him that "in fact from that point on the sort of biofuel bandwagon has been much less popular hasn't it?" and Mr Edkins replied "I think that's why the board [of Rebio] decided to focus on the biochemicals part of the business". He then went on to confirm that the fall in the market had not been forecast.

606. To my mind, this answer does not sit comfortably with the suggestion that in October/November 2013, the new Board would have immediately restructured TMO to focus on biochemicals. On Mr Edkins' evidence, it did not in fact choose to do that with Rebio until the collapse in the bioethanol market, when it was effectively forced to refocus. I note also in this context Mr Andenaes' evidence in his witness statement that Rebio initially adopted a business plan comprising three units, including TMO's core business involving the production of second generation ethanol. He confirms that it was not until late 2014/early 2015 that it became clear that this business was not commercially viable. On this particular issue, I do not see why the position would have been any different for TMO – indeed TMO's Re-Amended Particulars of Claim expressly pleads that TMO would have pursued a business plan from shortly after 11 November 2013 which would have been "substantially similar to that pursued by Rebio since acquiring the TMO Business and Assets in March 2014". Furthermore, I cannot find any reference to any such immediate restructuring in any of the contemporaneous proposals made by

the Requisitioners to the Board about their intentions for the future of the company, including the statement of intent they made in the Requisition.

607. If there had been no restructuring and TMO had continued to pursue its core business involving the production of second generation ethanol, it was Mr Glen's evidence that that business could not have survived the crash in oil prices in 2014.

608. As to the second of these propositions, I note that Mr Edkins does not say how much the restructuring would likely have cost or where the necessary investment would have come from. Indeed, on close analysis, he does not descend into any real detail in his statement about this "investment". Although in his oral evidence he confirmed that some money was sitting in an account in the Far East, that money was never offered to TMO by the Requisitioners as an investment and Mr Edkins did not say that Diverso would in fact have made that money available to TMO in October/November 2013.

609. It is TMO's case, as pleaded in paragraph 79A.1 of its Re-Amended Particulars of Claim, that from 11 November 2013, TMO would have raised "the sum of £9,800,000 that Rebio has in fact raised since March 2014 less the sum of £1,235,906 applied by Rebio in purchasing the TMO Business and Assets", or such lesser sum as would have enabled TMO to develop its Business and Assets. The sum of £9,800,000 is identified in Mr Patel's report, which confirms that it is his understanding that "Rebio has obtained investment from a variety of sources since its inception in 2014". In his first witness statement Mr Glen explains that between 2014 and 2017, "Rebio raised a total of around £3m in equity from existing and new investors. These investors included Andbell, Loan Note holders, new South American investors introduced by Mr Edkins and a new Norwegian investor introduced by Mr Andenaes". Mr Glen does not expressly refer to money being received from Diverso and he does not provide a break-down. Mr Edkins also does not say that Diverso subsequently invested in Rebio; rather that he personally invested "through investment vehicles", which he does not identify. There is no evidence as to the circumstances in which any of the new investors was prepared to provide funding to Rebio.

610. To escape immediate insolvency, TMO would have needed enough money to pay its trade creditors and tax debts in December 2013, which totalled over £800,000. It would also have needed to pay its employees in excess of £200,000 (the rough sum it was burning through every month, even with directors' working unpaid, as Mr Yeo confirmed in an email to Mr Edkins dated 2 December 2013). In this context I have no doubt that Mr Hall's evidence that, to avoid administration, TMO would have required an immediate funding source of approximately £1 million in 2013, together with £3-5 million a year thereafter (aside from the £5.6 million needed to redeem the Loan Note Liabilities) is correct and I did not understand it to be seriously challenged.

611. Outgoings of around £200,000 - £250,000 per month were projected to continue until 2014. Furthermore, TMO's debts were very significant. There was around £4 million outstanding on the Loan Notes held by Diverso and Andbell and their allies, repayable in September 2015 together with around £1.6 million in other Loan Notes held by smaller investors who were independent of Diverso and Andbell, repayable in December 2015 (i.e. a total of approximately £5.6 million would have had to be found to pay off these Loan Notes by the end of 2015). In addition, having regard to the Joint Administrators' Report to Creditors and Statement of Proposals of 29 January 2014, other liabilities to creditors appear to have exceeded £1 million and would have had to be settled. Interest

continued to accumulate on these Loan Notes at 12% per annum. Whilst the Loan Notes would have been paid off had funding been raised, I accept Mr Hall's evidence that new investors would have regarded the Loan Notes as (1) debt incurred to finance historic losses which would need to be repaid from future cashflows generated by TMO's business; and (2) potentially diluting any new shareholding the new investors would take if they converted to equity.

612. In addition, TMO owed £210,000 in respect of the loan from Adeptt Ltd repayable the following year. If the Andbell Loan Offer had been accepted then a further £700,000 would have been owed by TMO.

613. Moreover, by December 2013 TMO had already accumulated retained losses of over £37 million by the date of its administration and I accept Mr Hall's expert opinion that, in the counter factual, the legacy of TMO's balance sheet would have made TMO "additionally unattractive to an investor". As he said in his report: "…the presence of legacy losses from TMO's previous business in its balance sheet and the loan notes would have been an impediment to it raising additional funding for its new business".

614. There is simply no evidence whatever before the Court that any third party investor would have been prepared to invest fresh equity in TMO in circumstances where that investment would need to be used to discharge historic debt (including the Loan Notes if the investment was not made at 4p per share). On the contrary, there is evidence of significant "investor fatigue", borne out by the Board's failure during the May Fundraise and the continuing fruitless efforts throughout the Autumn of 2013 to raise any substantial funds. Insofar as it was Mr Edkins' evidence that the pivot towards biochemicals would have helped with a new investor base, I accept that this may very well be the case, but if that pivot would not have occurred until the collapse in the bioethanol market then I fail to see how it could have addressed the investor fatigue that it is acknowledged existed in late 2013. As Mr Edkins says in his statement, TMO had never generated a return for its shareholders and its share price had fallen very substantially. The Parker Notes record Mr Parker's view that "TMO about to run out of cash. Highly unlikely that money comes from anywhere other than Diverso".

615. Whether applying a balance of probabilities test or what I understand to be the correct test of a significant chance, I do not consider that TMO has satisfied the burden of proving that investment would have been available from third parties. There is no evidence on which I could find on balance that any third party investors would have been identified and no evidence on which I could assess the chances of any third party investors being found at anything other than vanishingly small. In my judgment, the combination of investor fatigue and TMO's financial position in the context of the polarisation of positions generated by the EGM had exhausted all further possible avenues by which TMO might have raised equity from third party investors.

616. As I have said there were a number of Loan Note holders who were unconnected to Andbell and Diverso. Absent further investment at an appropriate level, automatic conversion of their Loan Notes would not have occurred and there is no evidence as to the approach that these Loan Note holders would have taken in the event of a change in the Board and, further, no evidence whatever that they would have consented to accelerate the conversion of their debt into equity (as Mr Edkins suggests). Once again, these are third parties, unconnected to TMO, who have not given evidence. I can make no finding as to what views they would have taken on the balance of probabilities or,

indeed as to the fact that there was a significant chance that they would have consented to any particular proposal that may have been made to them.

617. Turning to the position of the Requisitioners, whilst I accept that Mr Andenaes gave evidence in his statement that Andbell would have provided financial support to TMO insofar as was necessary to avoid administration, no evidence was produced by TMO that Andbell in fact had the readily available cash reserves of something in the region of the £1 million that would immediately have been needed and Mr Andenaes did not say in terms how much Andbell would have been prepared to invest. A similar point may be made in relation to Mr Glen's evidence that support would have been forthcoming from Diverso. I note also that the evidence of both these witnesses on this point appears to be closely tied to the fact that Andbell and Diverso have both supported Rebio following its acquisition of TMO's Business and Assets.

618. However, I have seen no evidence as to financial support for Rebio from Diverso and insofar as Mr Andenaes estimates Andbell's support at around £2.5 million, he does not say when this sum was in fact made available to Rebio or in what circumstances. In any event, using Rebio as a comparator is not to my mind an appropriate or realistic indicator of the investment that might have been available to TMO in late 2013 given the entirely different status of Rebio, to which I have already referred above. Without a proper consideration of the different circumstances that would have applied to TMO, I do not find their evidence about this to be realistic.

619. I note in particular the express desire on the part of Andbell in the Andbell Loan Offer to undertake due diligence into the "current financial state of the company" with a view to identifying any matters that might cause the company to go into insolvency, and I consider that it is much more likely that this is exactly what the Requisitioners would have done had they gained control of TMO. Upon a detailed consideration of TMO's finances, I agree with the Defendants that it would likely have made much better financial sense for Andbell and Diverso to force TMO into administration so that they could acquire TMO's assets free from its debts, as they in fact did. In this regard I note that in January 2013 (as is recorded in the Board minutes of 21 January 2013), prior to the January Re-structuring, Mr Glen and Mr Andenaes had in fact proposed a pre-pack administration.

620. The contemporaneous evidence does not assist TMO on this score. Insofar as Sinoside and Andbell made offers of funding in advance of the EGM, these offers included vague references to raising various sums of money from unspecified persons or entities and without identification of the proposed price per share (hence the undoubted suspicion with which the Director Defendants viewed these offers). Thus the Requisition suggested that subscribers would be procured for £2 million worth of shares "at a price set by investor demand". This was explored with Mr Glen in cross examination who said he could not remember where this money would have come from albeit he said that the Requisitioners "would have cornerstoned the investment". However, this was not set out in the Requisition itself and no offer to subscribe for shares was subsequently made by Andbell, Sinoside or Diverso notwithstanding their recognition of the company's dire financial position. The Andbell Loan Offer (which expressly envisaged a change of Board control) offered only a loan of £700,000 on the basis that it represented "around 3 months' worth of working capital", but no statement that any investment would be made into the company, notwithstanding that the Andbell Loan Offer envisaged a change in control of the board. An alternative offer made by Diverso in December 2013 offered a

secured loan facility of £250,000, but still no equity investment. Although, as I have already noted, Mr Parker was of the view that if money was going to come from anywhere it would most likely come from Diverso, there is no contemporaneous evidence to show that Diverso had the reserves of cash that would have been needed, or that it was willing to make an equity investment.

621. On the basis of the contemporaneous documents, none of the Requisitioners appears to have been prepared to cause their respective companies to inject any fresh equity into the business at this point in time (let alone the immediate investment of £1 million followed by substantial monthly cash requirements that would have been necessary to keep TMO alive). Ultimately it was Andbell that sought the administration order against TMO in circumstances where no third party investor had been found (and Andbell was obviously not prepared to inject equity to save TMO from administration). None of this seems to me to be consistent with the proposition that, in the counterfactual, Andbell, Sinoside or Diverso would have put yet more money into TMO to avoid administration.

622. I agree with Mr Morgan's closing written submissions that:

> "What Andbell did in December 2013 in putting the company into administration and immediately entering negotiations with the administrators to buy the assets (thus dumping the body of shareholders and the debt) is perhaps the best evidence of what would have happened if the Board of [TMO] had ceded control to Andbell and Sinoside just over a month earlier".

623. Applying the 'but for' test and with the benefit of hindsight, I do not consider that TMO has satisfied the burden of proving that in the event of a change in control of the Board in late 2013, TMO would have been restructured, its costs reduced and investment raised from the Requisitioners, their companies and/or independent third party investors sufficient to save TMO from administration. I agree with the Defendants that on balance (and applying common sense) it is more likely that if Sinoside and Andbell controlled the TMO Board they would have caused TMO to enter into a pre-pack administration, company voluntary arrangement or other insolvency procedure which would have resulted in TMO being stripped of its Business and Assets.

624. The approach taken by the court in *Assetco* does not alter my conclusion and I rather doubt that in cases involving the counterfactual it is helpful to consider what are likely to be the very different counterfactual circumstances of another case. I note the judgment of Richards LJ at [156] to the effect that the judge's evaluation of the hypothetical counterfactual issues in that case had been "directed to very specific and fact-sensitive hypothetical issues, unique to this case". However, I should address Mr Sutcliffe's submissions briefly in circumstances where he submitted that the situation in this case is "closely analogous to *Assetco*":

    i) At paragraph [142] the Court of Appeal addressed the Judge's decision that Assetco had discharged the burden of proving it would have avoided insolvency. The Judge had concluded that, in the counterfactual, none of the various groups of creditors would have sought to wind up Assetco, "not least because it would make no commercial sense for them to do so". This was in circumstances where those creditors "would know they stood to receive substantially more" under a scheme of arrangement. In my judgment this is very far from the situation in this

case where I have found that there is no evidence that the investment that TMO so badly needed would be forthcoming and where it would have made commercial sense for Andbell and Sinoside to put TMO into administration in any event – as they in fact did.

ii) At paragraph [143], the Court of Appeal referred to the Judge's conclusion that the chances of a shareholder with 37.5% of the voting rights opposing the restructuring were "vanishingly small". No similar question arises in this case, but I have found that Mr Edkins' evidence that there would have been an immediate restructuring is not consistent with evidence he gave orally, with evidence from other witnesses and with TMO's own pleading.

iii) At paragraph [162]-[163] the Court of Appeal addressed the Judge's decision to accept evidence that a group of investment funds controlled by North Atlantic Value LLP (NAV) would have supported Assetco through to a scheme of arrangement on the basis that Assetco could become a highly profitable business. The Judge said he had "no doubt" that this was the case. However, this decision was made on the basis of the evidence accepted by the Judge in that case. It is not in any way "analogous" to the evidence given in this case.

625. In light of my finding on this issue, there is strictly no need to go on to consider the other elements of causation identified in the list of issues and, further, no need to examine the question of loss. However, I nonetheless set out below my findings.

Has Rebio developed the TMO Business and Assets for the purpose of producing biochemicals and related products (including high value medical devices?) and has Rebio been successful?

626. This issue really involves three elements: first whether Rebio has "developed" the TMO Business and Assets which it acquired; second whether it has done so successfully and third, could and would TMO have done so in the counterfactual. The second question falls within the remit of loss and damage and I shall return to it there. The third question raises the issue of whether TMO could have obtained the finance which Rebio has done, an issue that I have addressed above.

627. As for the first question, it is key that I seek to identify and compare (i) the nature of TMO's business in December 2013 and (ii) the nature of Rebio's business when it began in 2014.

628. TMO submits that "provided Rebio started with the same business as TMO would have had, the Court simply asks whether TMO, under the control of the new board, would have proceeded along the same lines as Rebio". Thereafter, says Mr Sutcliffe, the fact that Rebio's business may have diverged substantially from the business which the Director Defendants would have followed had they remained in control is irrelevant, because the important point is that in the counterfactual, TMO would have been managed by the same Board as is now managing Rebio. Thus it is TMO's case that, in the counterfactual, TMO would have developed its Business and Assets in the same way that Rebio has developed them (by pursuing the Rebio Business Plan) and that TMO is entitled to be compensated for the lost opportunity so to do.

629. In a detailed Part 18 Response to a Request for Further Information served by Mr Reeves and Mr Audley, TMO addressed the question of how it is alleged that Rebio has

developed TMO's business and assets (following the Rebio Business Plan) saying that this development has occurred by:

i) Abandoning the TM242 Technology (on the grounds of its lack of commercial viability). On the evidence this occurred towards the end of 2014.

ii) Adapting TMO's biochemicals business plan at the time of its administration to produce high value biochemicals and related products in smaller quantities in furtherance of (a) the Pharmaceutical Business (identified as the development and manufacture of pharmaceutical products using resorbable polymers made from lactic acid) and (b) the Medical Polymer Business (identified as the manufacture and supply of resorbable polymers from lactic and glycolic acid for use in a range of medical devices including sutures and orthopaedic screws); and

iii) Modifying the PDU for use in (a) the Pharmaceutical Business and (b) the Medical Polymer Business.

630. In relation to the Pharmaceutical Business, the Part 18 Response pleads that Rebio is developing an intravitreal injection for the treatment of glaucoma, together with long acting drug release products for the treatment of type 2 diabetes. In relation to the Medical Polymer Business, TMO pleads that Rebio has a contract to supply to a substantial Chinese company and, although running the business from the Dunsfold Park Site until the end of 2019, has since moved to a new site in Gatwick.

631. The Defendants reject this analysis, saying that abandonment of the TM242 business is not development (a point with which I agree), and that far from being modified for use in Rebio's business, the PDU has been mothballed since October 2012 and has since been scrapped; Mr Glen did not dissent from this in his oral evidence, although his written evidence gave a different impression.

632. The Defendants point out that TMO has nailed its pleaded case firmly to its claim that TMO's Business and Assets were "successfully developed" into Rebio's business and assets and that TMO would have the benefit of that development but for the Defendants' actions. They point out that TMO did not have a biochemicals business plan at the time of its administration which would have been capable of development and that, in any event, TMO's proposed line of business involved something entirely different from the business that Rebio subsequently developed. Accordingly they say there is no evidence that TMO has lost the opportunity to develop its business and that the development of a completely new business is not the way in which TMO has put its case. Thus in paragraph 110 of his opening submissions, Mr Collings said this:

> "It is accepted that Rebio is perfectly entitled to abandon, rather than develop, any of the TMO Business and Assets which it acquired. It is accepted that what is left may still establish a sufficient identity between what Rebio is doing now and the TMO Business and Assets which it acquired (but not if Rebio is also conducting an entirely new business which dwarfs the vestiges of the business which it acquired from TMO). It is accepted that Business and Assets encompasses the intangible as well as the tangible. But they do have to have been Business and Assets of TMO – as acquired by Rebio, and allegedly developed."

Were it otherwise, says Mr Collings, Rebio could not possibly be used as a proxy for the assessment of loss and damage.

633. I accept TMO's submission that I must begin by looking to see whether Rebio started with the same business that TMO had at the time of its administration. Thereafter the question is whether that business was successfully developed by Rebio in a way that it would have been developed by TMO in the counterfactual. If this involves developing the business along new avenues then, as long as TMO can establish on balance that that is the way in which it would have been developed had TMO not gone into administration, I see no reason to suppose that such development is not causally relevant. I agree with TMO that the mere fact that Rebio's business has now diverged substantially from the business that the Board was contemplating in the Autumn of 2013 does not mean that TMO should be precluded from recovering loss. However, as TMO accepts, it is essential that Rebio started with the same business that TMO had at the time of its administration, if it is to be regarded as having developed that business.

634. As to the first question of whether Rebio started with the same business as TMO:

i) One aspect of TMO's business strategy, as discussed for example at the Board Meeting on 27 February 2013 involved biochemicals. Mr Glen's recorded view at the time of this meeting is that "the biochemical route should be explored…";

ii) Mr Parker's notes record "TMO & Biochemicals – JG put list of biochems to TMO over a year ago" and he identified these as Succinics, Glycolics and Polylactics.

iii) Mr Edkins' evidence was that Mr Glen and Mr Weaver "were working either in parallel or in tandem on a number of these initiatives". Mr Andenaes said that his recollection was that Mr Glen was targeting a high margin product as opposed to Mr Weaver who was going towards a "low margin mass market".

iv) TMO's plan, as it emerges from the Board minutes, was to pursue the PDU Business option, i.e. to convert the PDU to enable it to produce high volume biochemicals, potentially including PLA, succinic acid, ammonium sulphate and gypsum. The minutes of the Board meeting on 4 July 2013 record that "Various options have been explored to produce high value biochemical at the PDU. The preferred option is Poly Lactic Acid (PLA). This is biodegradable plastic for which the primary market is food packaging and plastic cups…A £3 million budget capex is required for modification to the PDU to debottleneck the facility and allow maximum lactic acid production by adding a fermenter and to introduce lactic acid purification and polymerisation technology".

v) Mr Edkins explained that the primary use of funds for the summer 2013 fundraise by TMO was "to engage in feasibility studies and raise money for those feasibility studies" in relation to the "biochemicals business line" which would have involved this conversion of the PDU.

vi) In cross examination, Mr Weaver accepted that part of TMO's commercial strategy involved "the use and production of biochemicals" and that this was not just something that Mr Glen had raised when he became involved in TMO. Furthermore Mr Weaver confirmed that the business plan being actively pursued

by TMO at the time of the EGM Requisition "certainly did include biochemicals". This was, of course, the conversion of the PDU.

vii) However, this was not a business line that TMO had taken beyond the theoretical stage. At the Board meeting on 4 July the Board was recommending the creation of a PDU business entity and the need to put together a PDU test programme for process validation and to seek project financing. Mr Andenaes subsequently rejected the idea of creating a new PDU business entity, saying he considered the PDU to represent the only material asset of TMO.

viii) It was clear from the evidence that the proposed line of business involving biochemicals required considerable third party evaluation (together with the necessary funding of that evaluation) before it could even be determined that it was viable. If viable, it was estimated that the conversion of the PDU would likely cost something in the region of £3.5 million.

ix) The minutes of the Board meeting of 28 August 2013 record that "The conversion of the PDU to produce Poly Lactic Acid (PLA) is being pursued. This would be for a facility for the production of 3,000 tonnes per year of PLA based on molasses as a 1G feedstock". Mr Andenaes continued to reject the idea that this new business should be hived off into a separate business entity.

x) In a valuation document created by VSA in November 2013, VSA recorded TMO's business as the continued development of the 2G bioethanol sector, in particular in Brazil, together with the PDU Business Option:

> "Following completion of a bagasse (sugarcane processing waste) testing programme in late 2013, TMO will convert its Surrey-based process demonstration unit (PDU) into a lactic acid (LA) production plant. To facilitate this conversion, TMO is currently in discussions to secure £5.2m in debt financing (£4.6m total capex spend)…
>
> …should demand dictate, the Dunsfold plant could be further adapted by adding additional processing units to polymerise the LA to produce PLA, an emerging bioplastic with applications in 3D printing, among other sectors…
>
> PLA is produced by polymerisation of LA monomers and its primary use is as a feedstock for the manufacture of biodegradable food packaging. 3D printing, currently a niche market, represents another use for PLA with significant market growth potential…
>
> …we forecast that adding additional polymerisation equipment to the existing LA plant would cost c. £7.0m…
>
> With the PLA market certainly classified as emerging, securing an off-take agreement is absolutely essential to the successful development of a project in the sector. To this effect TMO is in advanced talks with a number of third-party food packers with a

view to getting at least one letter of intent in place in the near future".

xi) Mr Glen's evidence was that in 2014, Rebio adopted an initial business plan "based on three business units, which largely mirrored the lines of business TMO had pursued shortly prior to its administration". First, the production of biopolymers and bioplastics from biochemicals for use in medical devices, second the integration of Rebio's technology within AD systems to increase biogas yield and third the development of second generation bioethanol using TM242. Mr Glen's evidence was that the biochemicals aspect of this business (which Rebio has pursued having discontinued the other two on the grounds that they were not commercially viable) is "really just a continuation" of the "fantastic idea" which Mr Weaver and his team put forward for the production of polylactic acid from lactides.

635. On balance, and notwithstanding Mr Glen's evidence to which I have just referred, I consider that the evidence shows that Rebio did not begin with essentially the same business as TMO. The evidence in Mr Glen's first statement appears to me to make this plain: the production of biopolymers and bioplastics from biochemicals for use in medical devices is nowhere near the high volume business that TMO had been anticipating and wanting to investigate. I can see no suggestion in the papers that TMO was looking at the production of anything for the pharmaceutical or medical markets and, indeed, it had not gone beyond identifying a need to raise significant funds to convert the PDU and attempting to find "third party food packers" who might be interested in its proposed product. By contrast, Mr Patel in his report describes Rebio as "a speciality medical company focusing on the development, commercialisation and manufacturing of proprietary products to enhance therapeutic outcomes". Further, the fact that Rebio used a few off the shelf assets acquired as bankrupt stock does not appear to me to be sufficient to amount to a development of TMO's existing business.

636. Whilst the potential for the production of biochemicals had been firmly on TMO's agenda for some time, the niche business which Rebio has created and now seeks to pursue was nowhere in sight – indeed Rebio did not have a properly developed business plan at the time of acquiring TMO; its business plan was only developed over a year later and even then is not specifically recorded anywhere. Rebio has not sought to exploit any of TMO's existing patents which appear to have related to the exploitation of the TM242 technology and, importantly, has made no effort to convert the PDU (which, as I have said, has been scrapped), notwithstanding that the conversion of the PDU lay at the very heart of TMO's plan for the production of biochemicals. Indeed Mr Glen's evidence in his third statement that as part of the process of developing TMO's Business and Assets, Rebio has relied on "upgrading of the PDU, which is employed in the business of Rebio", appears to be wholly inaccurate. The other factors on which Mr Glen says Rebio has relied, namely "considerable research and development data" and the bioengineering expertise of TMO's research team, do not appear to me to evidence the development of TMO's existing Business and Assets. The biochemicals plan was in its infancy and people are not, as Mr Collings put it, "acquired or developed" as part of an asset acquisition. Rebio appears to have abandoned all of the business partnerships and projects on which Mr Weaver was working at the time of TMO's administration.

637. I agree with Mr Morgan that Rebio in fact appears to have abandoned the TMO business completely (including the options that it was investigating) and started up a totally new

and different business within the shell left by the defunct business of TMO. The answer to the question posed by Mr Sutcliffe is that, on the evidence, Rebio did not start with the same business as TMO and therefore it did not "develop" that business.

638. I accept the Defendants' submissions that where TMO has tied its case expressly to establishing that Rebio in fact developed TMO's existing business, that is the end of the causation analysis. There is simply no causative link. TMO could, of course, have pleaded that it lost the opportunity to develop a new business of the type developed by Rebio and that such a business would have been developed in the counterfactual, but it did not put its case in this way in its Re-Amended Particulars of Claim and has not sought to advance such a case at trial.

639. I note further that the fact that Rebio did not develop TMO's existing business is also relevant to the question of whether funding would have been available in the counterfactual: an investor may very well wish to invest money into the business plan of a new company involving the production of biopolymers and bioplastics from biochemicals for use in medical devices, but may have taken a very different view about the wisdom of investing in a company that was riddled with historic debt and was seeking to fund the expensive conversion of the PDU for an, as yet, untested market. In the counterfactual and even assuming the receipt of fresh equity in the amounts raised by Rebio, TMO would now have creditors totalling over £12 million and would be losing £1 million per year. I agree with Mr Morgan that, with the benefit of hindsight, this neatly illustrates that, on balance, TMO could not have avoided going into administration, whether in or about December 2013, or in late 2014 as a consequence of the collapse in the price of oil.

Loss and Damage (Issues 6, 7 and 11)

640. I deal with this as briefly as I can, given that, absent establishing a case on causation, TMO is not entitled to recover loss in any event.

641. I should begin by setting out my views of the competing expert evidence.

642. I am sorry to say that I found Mr Patel's evidence less than impressive. In particular:

i) In his report, Mr Patel had accorded an enterprise value of $50 million to Rebio as a proxy for TMO by reference to Rebio HK, Rebio Finland and Rebio – i.e. the whole Rebio Group, which he had not been instructed to do and which was not consistent with TMO's pleaded position (that Rebio Technologies Limited, incorporated in the UK, is the proxy for TMO). Whilst the Rebio Group includes Rebio, it is, for obvious reasons, substantively different. During his cross examination by Mr Morgan, the following exchange took place:

> "Q. Mr Patel did you follow your instructions and value Rebio Technologies Limited the UK company?
>
> A. No, I valued the consolidated group".

The trouble with this approach is that Mr Patel has not considered the financial position of individual entities within the Rebio Group, as he confirms in the Expert Joint Statement. The consolidated Group can never be a true proxy for

TMO, it is not pleaded as a true proxy for TMO and Mr Patel's report does not support TMO's pleaded case on quantum. The Court has no evidence from Mr Patel as to the value of Rebio itself.

ii) As only became apparent in re-examination, Mr Patel's valuation was heavily dependent upon a forecast prepared "by management" which he appears to have understood to be a December 2019 forecast (albeit that there were two 2019 forecasts and this one appeared to have been modified in 2020) but which (on instructions) Mr Sutcliffe suggested in re-examination was in fact a 2016 forecast. So as to avoid confusion I shall refer to this forecast (which was referred to by Mr Patel in his report as "forecast.xlsx") as the "**Key Forecast**"; indeed Mr Collings described it as "the most important single document in the whole of this 6 year £38.5 million litigation". This level of confusion in relation to a document which formed an essential part of Mr Patel's valuation appeared to me to be extremely unfortunate and to affect his credibility as a careful and independent expert. Indeed in his closing submissions, Mr Sutcliffe identified that TMO's legal team and Mr Glen had all been under the impression that Mr Patel had relied upon a December 2019 forecast when in fact he had relied upon the Key Forecast. I shall return to the consequences of this confusion further below. In response to a question I posed at the end of his evidence, Mr Patel appeared to acknowledge that a valuation based on an outdated forecast would be a "cause for concern".

iii) Mr Patel did not provide a valuation in his report, as he was instructed to do, on the assumption that the Court would value Rebio as at the date of trial. Instead he identified a valuation date of 30 June 2020. Whilst I appreciate that it is difficult to provide a value as at a date in the future, nonetheless I would have expected Mr Patel to have provided a clear update to his valuation as at the date of trial. The closest he came to doing so was in his presentation at the start of his evidence in which he illustrated on a chart "the impact of shifting the valuation date to 29 January 2021 and 17 March 2021" and noted that "<u>All else being equal</u>, a shift in the valuation date increases value" (<u>emphasis added</u>). In response to a question that I raised about the significance of the words "all else being equal", Mr Patel responded that "a valuer would need to reassess the facts and circumstances at any valuation date to understand whether there'd been any risk in the business or any changes in the cash-flows, but "all else being equal, this would be the impact on the valuations". Elsewhere in his oral evidence, Mr Patel accepted that an updated valuation would necessitate a review of the facts and circumstances "as at the valuation date, not only in terms of the market but also in terms of the business and its operations". In closing, Mr Sutcliffe focussed on Mr Patel's evidence that "all else being equal" a shift in the valuation date from 30 June 2020 to 17 March 2021 would increase the valuation. But it is plain that one cannot safely assume that "all else" would be, or has been, equal.

iv) Finally, as Mr Morgan pointed out, Mr Patel was prepared to "assume" though not accept that if one starts with a flawed set of figures one gets a flawed result, but even then he sought to justify a valuation that relied on flawed data (as I explain in more detail below) by suggesting that everything could be addressed by determining the level of risk within the forecast (i.e. by using the discount rate) even if no checks were undertaken on the underlying figures. I consider that this approach defies logic.

643. Aside from the unsatisfactory aspects of his evidence to which I have referred above, I found Mr Patel to be overly argumentative and noted that on occasions he was reluctant to concede perfectly sensible points put to him in cross examination. I agree with Mr Morgan that at times he sought to give answers that were designed to protect his position rather than seeking to assist the Court (an example was his initial reluctance to provide a straightforward response to questions about whether he had followed his instructions and had valued Rebio).

644. Further, when under pressure, it appeared to me that Mr Patel was prepared to make assertions which were wholly unsupported by evidence. Thus he insisted that an Enterprise Value for the Rebio Group of $50 million in 2020 was "not unrealistic", despite the fact that this involved an increase in the Enterprise Value since 2018 of 150% and despite having described the (very much lower) increase in Enterprise Value of 80% (wrongly arrived at in his original report) as "reasonable", based on the same achievement of a number of milestones. To my mind, none of the proposed milestones went anywhere close to justifying a 150% increase in value in the Rebio Group since 2018.

645. By contrast, I consider Mr Hall to be a credible and straightforward expert witness. Despite an attempt by Mr Sutcliffe to question Mr Hall's expertise, I accept his evidence that he has 25 years of experience in valuing early stage businesses:

> "I have valued many early stage companies. Whether they're in this sector or other sectors, they have the same features, which is they have no track record of established earnings and their future performance is inherently uncertain. I've done that many, many times".

The fact that Mr Hall very fairly accepted that he has never used the probability weighted method, an alternative method used by Mr Patel, did not appear to me to undermine his credibility or the value of his evidence. Mr Hall plainly understood the approach that Mr Patel had adopted and was able to provide sensible commentary upon it.

646. In particular, I accept that despite having applied himself carefully to the question of valuation, Mr Hall considered that he was unable to arrive at any sensible figure for the value of the Rebio Group given the lack of evidence available to him and the unsatisfactory nature of the forecasts on which Mr Patel relied. I was obviously very concerned to see whether Mr Hall was simply reluctant to provide a valuation in order to support the Defendants' case, but I did not form this impression of his evidence. Instead it appeared to me that, where necessary, Mr Hall made appropriate concessions (conceding immediately, for example, that an early stage business which is loss making and has been loss making since its inception is capable of having a substantial value) and provided clear explanations and justifications for the position he had adopted. I reject Mr Sutcliffe's submission that Mr Hall was unwilling to acknowledge that the Rebio Group business had any value and that this undermines his credibility as an expert. Mr Hall's opinion was not that the Rebio Group obviously had no value, but rather that he did not have the wherewithal to begin to determine what, if anything, that value might be.

647. Mr Hall explained his approach very clearly during his cross examination in response to it being put to him that uncertainty or risk can be taken into account in the valuation approach applied. He said:

> "It can be, provided the valuer has sufficient evidence to do so. I don't know whether we want to go through all of them now, but to me there's a wide range of uncertainties about the magnitude of the positive cash-flows and the timing is just as important as the magnitude because there's a high discount rate. So if it were possible to address those uncertainties by additional evidence, then one could adjust the projections and I could adjust the projections and possibly provide an alternative estimate of value for Rebio. But in my view there was so many uncertainties that it's just not possible to do that. All you can do is run some sensitivities on Mr Patel's projection, which is exactly what I've done".

He went on to explain that:

> "If I am to produce a credible alternative valuation to the estimate that Mr Patel has provided an opinion on, I would need a range of evidence which would enable me to adjust the projections he's relied on, because there is no doubt in my mind that those projections already have not been achieved and there is considerable doubt about whether the remainder of them, going right out to 2038, particularly to 2026 which is a crucial period, whether they're going to be achieved for the value stated and for the timing stated. Unless I had additional evidence to enable me to adjust those forecasts I can't come up with a credible alternative."

648. In the Expert Joint Statement, Mr Hall explained that a key area of uncertainty was around any likely delay in cashflow. Mr Glen's evidence already acknowledges a likely delay date on which Rebio can expect to make a net profit to 2022/2023. Mr Hall pointed out that a delay in expected cashflow of only one year (with all other estimates remaining unchanged) reduces Mr Patel's valuation estimate by approximately 34%. He went on to say "As there is a range of uncertainties on when the timing of those cashflows can now reasonably be expected, that to [Mr Hall] makes it highly uncertain what adjustment needs to be made to [Mr Patel's] valuation estimate. That is the key reason why [Mr Hall] has not sought to estimate an alternative valuation".

649. A fundamental area of disagreement between Mr Patel and Mr Hall was the extent to which the adoption of a high discount rate (which both experts accepted would be justified in this case owing to the Rebio Group's early stage of development) was sufficient to take into account all identifiable risks arising in relation to the forecasts. Mr Patel had adopted a discount rate of 40-50%, while Mr Hall had adopted a discount rate of 52%, explaining in cross examination that this reflected the fact that "you're looking at a proposition that is so risky that it's almost impossible to value."

650. Mr Patel's view was that his discount rate accounted for all identifiable risks that the forecast would not materialise, whereas Mr Hall disagreed, saying in cross examination

(with reference to the facts of this case): "if, for example, you can see that the very first year of those projections will not be achieved by a wide margin, it would not be sound valuation methodology, in my view, nor would it be commercial, to ignore that, and say: that's fine, because I have applied a high discount rate" and that "just because you've chosen a high discount rate doesn't mean that you just accept the projections at face value, as Mr Patel has done. You would also examine the evidence to see if those projections need to be modified".

651. I accept Mr Hall's evidence on this and I note that he rejected the suggestion that the modification of the forecasts happens through the use of the probability weighted method, saying that such method "does not address any other of the wide range of risks that any start up or early stage business inevitably faces". I accept Mr Morgan's submissions that Mr Patel's attempt to defend his valuation by resorting to the discount rate he had chosen demonstrates that he has not carried out a valuation exercise on which reliance can properly or safely be placed. As Mr Collings put it in closing, "a hopeless forecast cannot be fixed by discounting it by 50%. The initial discount rates discussed by the experts…are based on generic statistics for venture capital investments in start-ups. They do not reflect the known characteristics of the particular business, or the known problems with the forecasts relied on".

652. Against that background I accept Mr Hall's evidence where it differs from that of Mr Patel and, had it been relevant, I would have rejected TMO's loss claim, not least because (as succinctly put by Mr Morgan) Mr Patel has "valued (i) the wrong business, (ii) at the wrong date; (iii) on the basis of inadmissible opinions from a third party to whom Mr Patel did not even speak." I have addressed the first of these two problems above and I agree with the Defendants that these problems with TMO's expert evidence are fundamental. I do not consider that Mr Patel's opinion provides a sufficiently safe foundation on which the Court can base any conclusions about the Rebio Group's future success and, as I shall explain, the absence of key factual evidence leaves me in the realms of pure speculation. I agree with Mr Morgan that Mr Patel has produced no more than a purely mathematical calculation of an end figure for value using wholly unsubstantiated forecasts. Overall, in my judgment, TMO has failed to place sufficient evidence before the Court on which the Court can evaluate any loss (always assuming for these purposes that Rebio is an appropriate proxy for TMO). My main reasons are set out below.

653. It is common ground between the experts that the appropriate way to value the Rebio Group and/or its business and assets is to use a Discounted Cash Flow methodology ("**DCF**"), having regard to future streams of revenue.

654. A DCF valuation depends on a number of key inputs, including projected future revenues of the company and projected profit margins on those future revenues. Where the valuation involves an established business, these inputs can be identified by reference to historic revenues and profits. However, no such information is available in this case because Rebio is what Mr Patel referred to as "an early stage business". Similarly TMO has not sought to call industry experts to give evidence alongside Mr Patel with a view to identifying how successful the Rebio Group is likely to be in developing its medical polymers business and its drug delivery business.

655. Instead, Mr Patel has relied upon the Rebio Group for these key inputs, specifically a series of projections for the Rebio Group contained in documents called "financial

forecasts". These forecasts are said by Mr Patel in his report to have been prepared by the Rebio Group's management. In summary, the forecasts show that "management expects" new drugs to enter the market in 2021 onwards resulting in an exponential growth for the next 6 years with an increase in revenue from c. USD 1.4m in FY20 to USD 136.3m in 2026.

656. Mr Patel explained that he had assessed the forecasts for the risks within them and then applied a discount rate to the forecasts to come up with a value. However, Mr Patel also accepted that the accuracy of a forecast is critically dependent upon "the quality of the opinion of the person producing the forecasts" and that "if available" he would want to interrogate the formulae underlying the forecast. During cross examination by Mr Morgan, the transcript records the following exchange:

> "Q. So your valuation is based upon the opinions of others as to how well this is all going to perform and sell and enter the market and achieve market penetration?
>
> A. It's based on a set of forecasts, yes, that has been provided"

In the Expert Joint Statement, Mr Patel agreed that his opinion was sensitive to variations in the assumed timing and magnitude of the forecast cashflows from Rebio's business.

657. By his own admission, Mr Patel has not carried out any due diligence on these forecasts, but has instead taken them at face value (explaining in his evidence that they had a "level of detail" from which he assumed that they were plausible). He had not had access to the person producing the projections and he did not apparently seek to cross check them against the reality of the Rebio Group's operations, or indeed against other financial documents he had copies of, including (as Mr Collings pointed out) the Rebio Group's 2020/2021 budget which projected significant net losses by the date of trial; and the Rebio Group's Shareholder Update for Q1 2020 which appears to reflect a company which has been involved in "unsuccessful capital raising from Asian investors", has "limited financial resources", has "conducted another round of redundancies" and struggled to get its pharmaceutical proposals off the ground. The Shareholder Update concludes "we believe future fund raise and valuation expansion will depend on further breakthrough in clinical data provided by the projects".

658. Mr Patel accepted during his evidence that he had not seen any of the "material behind the forecasts" – i.e. the source data from which the forecasts had been compiled. Further, he acknowledged that "there is inherent – significant inherent risk in these projections. The degree of volatility you see in such businesses is very, very significant". Indeed it is clear from Mr Hall's report that the forecasts produced to Mr Patel vary significantly between themselves and Mr Glen accepted in his oral evidence that figures in a forecast may be adjusted up or down depending on the needs of the person requesting them.

659. TMO has failed to produce any factual evidence in support of the detailed "expectations" in the forecasts and it has failed to provide any explanation for the absence of the individual who appears to have created them, namely Mr Chang. Mr Patel's evidence was that he understood that the Key Forecast had been produced by the Rebio Group "finance team which would have been under the direction of Mr Chang". However, the Court does not have any factual evidence about the date on which the Key Forecast was created, the circumstances and purpose of its creation and whether it was approved by

the Rebio HK Board (or the Board of any other Rebio entity). Mr Glen provided some general evidence in his statements to the effect that the development of the Rebio Group's products is progressing well, but beyond (largely) general assertions, he did not seek to justify the specific detail in any of the forecasts. Thus his assertion in his second statement that "It is anticipated that the Rebio Products will enter the market from 2021 onwards which will result in a revenue increase on an exponential level from around USD 1.4m in FY20 to USD 136.3m in 2026" does not begin to explain or justify how or why the Rebio Group anticipates this outcome.

660. The Defendants have had no opportunity to cross examine Mr Chang on the reliability of the Key Forecast, the 2019 forecast or any other forecast.

661. There is no evidence that Mr Chang has any pharmaceutical industry experience or accounting qualifications and it would appear that he is most certainly not independent: he is a shareholder in Rebio HK and a creditor of TMO. He appears to have been a director of Rebio until April 2020. According to Hewlett Swanson "Mr Glen and Mr Chang are close friends of long standing". I am prepared to infer from his absence that Mr Chang's evidence would not have assisted TMO's case.

662. Mr Glen agreed during his evidence that he would provide the underlying data on which the various forecasts were based, but nothing came of this. In a letter dated 16 March 2021, Hewlett Swanson stated that he had "not identified the spreadsheet(s) from which the data for the 2019 forecast was taken". In closing Mr Sutcliffe appeared to me to confirm that this was a reference to the 2019 forecast and not to the Key Forecast; on that basis, there has in fact been no search whatever for the data which went into the Key Forecast on which Mr Patel has relied. Mr Patel confirmed that he had not looked at any material underlying that forecast and it is worth noting in this context that Rebio only ever provided voluntary disclosure and never carried out any searches.

663. Notwithstanding that TMO appears to have been unable to identify underlying data used to create the 2019 forecast, it would appear that more granular data on the Rebio Group's activities does exist, because Mr Patel confirmed his belief that WI Harper, an investor, was given access to a "data room" before making its investment – but data of this sort has not been provided to the Defendants or the Court and the Defendants have not had the opportunity to explore that data in cross examination.

664. As I have already alluded to, it became apparent during his cross examination that Mr Patel was in any event utterly confused about the date of the Key Forecast on which he was relying. In his Replies to questions under CPR Part 35, Mr Patel asserted that he had used a 2019 forecast, but (as I have said) in re-examination Mr Sutcliffe put to him that this was in fact a 2016 forecast.

665. If the Key Forecast relied upon by Mr Patel was in fact created in 2016, then to my mind it has the effect of undermining substantial parts of his evidence, which assumed that the forecast on which he was basing his valuation was dated December 2019 and could be relied upon owing to the fact that it was (in turn) based on a 2018 forecast which he assumed had been the subject of due diligence by WI Harper, an investor in Rebio HK to the tune of £2million in 2018. This ground for comfort does not apply if the Key Forecast on which he has in fact relied was created in 2016. Similarly his view that the forecast on which he was relying provided confidence in circumstances where it reflected milestones achieved between 2018 and 2020 also no longer applies. Unsurprisingly in

the circumstances, there was no evidence at all from Mr Patel to indicate why it was appropriate for him to rely on a forecast dating back to 2016.

666. By reference to the Key Forecast's contents and metadata, Mr Collings submitted that the reality appears to be that the forecast on which Mr Patel relied was modified on 20 July 2020, three days before the Rebio Group sent it to Mr Patel for the purpose of his expert evidence. It contains different (and higher, less conservative) figures from those contained in the December 2019 forecast that is before the Court, although Mr Glen's evidence was that no forecast had been prepared by the Rebio Group since the December 2019 forecast. The Key Forecast was modified by Miss Elson who has not been called to give evidence. When dealing with the Key Forecast in closing submissions, Mr Sutcliffe frankly acknowledged the unsatisfactory lack of evidence saying "And what is not clear, and I appreciate you don't have evidence on this, is whether that document created in December 2016 was changed post that date".

667. In his report and during his oral evidence, Mr Patel referred to conversations he and his team had had with Mr Glen about the various forecasts provided to him. The references to these conversations in his report led to the service by Mr Glen of a second witness statement in which he formally dealt with the 2018 and 2019 forecasts, including confirming that they had been approved by Rebio HK's Board of directors. However, Mr Glen does not explain anywhere in his evidence how the Key Forecast came to be prepared and has not confirmed that it was approved by the Rebio Board. Mr Glen was unable to cast any light on the position during his cross examination. Mr Patel's apparent reliance upon a document which had not been properly addressed in the witness evidence does not appear to me to exhibit the care I would expect from an expert in a case such as this.

668. On any view (whether created in 2016 or 2020) it would appear that Mr Patel based his valuation upon a document whose provenance cannot be established with any degree of certainty and which even he accepted was "only a series of expectations". However, these were expectations (i) on the part of a witness who has not been called to give evidence; and (ii) which have not been verified by any expert evidence. In my judgment it was for TMO to prove its case on the forecasts, but it has singularly failed to do so. It is impossible for the court to determine whether the Key Forecast contains credible predictions of Rebio's future income and success.

669. Further and in any event, given that TMO now insists that the Key Forecast was created in 2016, it seems to me, that for the reasons identified above, this seriously undermines much of Mr Patel's evidence. I accept Mr Morgan's submissions in closing that neither the experts, nor the Court, has any basis upon which they can decide which set of forecasts to rely upon as the starting point for any valuation exercise (even assuming that it is appropriate to place any reliance on these forecasts).

670. I am extremely surprised that this issue had not been identified and addressed by Mr Patel in advance of giving his evidence. Mr Hall had identified in his report the uncertainty around the metadata in relation to the forecasts, but Mr Patel had apparently not sought to try to resolve this uncertainty. In all the circumstances I reject Mr Sutcliffe's submission that this matter has only very limited impact on the overall issue of valuation. In his oral submissions, Mr Sutcliffe acknowledged that "the figure of £51 million increasing to £69 million is not reliable, because [the Key Forecast] is not the December 2019 forecast. You do not have the valuation for the December 2019 forecast that we

thought this was" and went on to accept that the Court's task in quantifying TMO's loss had been "made more difficult by the fact that Mr Patel used the wrong valuation".

671. In his written closing submissions, Mr Sutcliffe accepted that the sums claimed in the Re-Amended Particulars of Claim needed to be reduced "to reflect the fact that the December 2019 forecast is more conservative than the December 2016 forecast" but failed to identify what that reduction should be, contending only that it should be "modest and should ensure that the actual developments in Rebio's business since the time of WI Harper transaction are properly reflected in Rebio's current value". I asked Mr Sutcliffe during his oral closing how he suggested that I should arrive at a figure, but beyond (i) accepting that Mr Patel's original number would "need to come down" and (ii) pointing to the more conservative 2019 forecast, Mr Sutcliffe was unable to give me any real concrete assistance. Ultimately he suggested a figure of "somewhere in the region of USD 35 million to USD 45 million", accepting that essentially the Court was left to pluck a figure from thin air.

672. As at the date of trial, the Rebio Group is reporting net current liabilities which exceed its cash and assets that can be realised within one year. As I have already said, the Court has no expert evidence of the value of Rebio (as opposed to the Rebio Group). Rebio's most recent accounts to 31 March 2020 show that it made a comprehensive loss for that year alone of £1,347,415 and had a net deficiency in shareholders' funds of £6,230,315 with retained losses of £9,280,043. It owed £6,553,540 as amounts falling due after more than one year. Absent funding or generation of further cash from trading, Rebio will be technically insolvent. It continues to be loss making and is apparently only surviving by reason of the ongoing support provided by Mr Glen and Mr Andenaes in the form of directors' loans. It was Mr Hall's evidence, which I accept, that the Rebio Group "needs additional cash not just to meet its additional creditors but to carry on its product development. And all it's had since November 2018, which is 27, 28 months, is some shareholder loans which could be viewed as showing a lesser commitment than an injection of share capital". Mr Patel agreed in the Expert Joint Statement that the Rebio Group appears to require further capital in order to continue development work on its products, in common with other companies in the sector. There is no evidence that any further funding is in the pipeline and no potential funder has been identified. Indeed, in my judgment, it is difficult to see on what basis any value at all can be accorded to Rebio at present.

673. Rebio's only revenue to date appears to have been generated by the sale of 200 kilos of product in December 2020 creating USD 220,000 worth of income. However, Mr Hall's evidence was that that product is projected to be only ½ % of the revenue projection for the Rebio Group in 2038 and as such as "insignificant compared to the business plan that Mr Patel valued".

674. Mr Patel's projections depend heavily upon the expectation that a product known as Exenotide will drive the majority of the value estimate that Mr Patel has produced, but the early part of those projections have already proved unreliable. The Rebio Group has fallen short of each of Mr Chang's previous forecasts dating back to 2016 by wide margins. Mr Patel accepted that the Rebio Group had not reached the revenue generation levels that were shown in those forecasts. Indeed the Rebio Group Shareholder Update Q2 2020 forecasts revenue to be achieved by the Rebio Group at only a fifth of the revenue forecast to be achieved by the Rebio Group in the Key Forecast.

675. In circumstances where the expectations identified in the Rebio Group's forecasts have turned out to be flawed, it is difficult to see how Mr Patel's arithmetical calculation of value based on those forecasts (whether the Key Forecast is from 2016, 2019 or 2020) is not also flawed. Whilst, as I have already said, it was Mr Glen's evidence that having originally predicted reaching overall net profitability in 2021/22, there is now a possibility that will not occur until 2022/23, I note Mr Hall's evidence that he has seen no analysis to support that conclusion and I accept his evidence that "the track record of Rebio's management of substantially missing previous revenue forecasts must significantly erode any confidence that any reliance can be placed on their current forecasts".

676. Accordingly, it does not seem to me that I can attach any real weight to Mr Glen's assertion in his second statement that "there is no doubt that Rebio will achieve profitability in relatively short order". Mr Hall also expressed the view (which I accept) that the actual results of the Rebio Group to 2020 undermined the projection on which Mr Patel relied "And I would say that any valuer would consider that highly relevant, not only to the projection for that year, but also the remainder of the projection".

677. The experts agreed that a useful cross check for the overall valuation was the market approach – i.e. looking to see what value a willing third party negotiating at arms-length would have placed on the Rebio Group. In closing, Mr Sutcliffe drew my attention to *Total Spares & Supplies Ltd v Antares SRL* [2004] EWHC 262 at [222] per David Richards J, as follows:

> "An approach which seeks to arrive at the price which a willing third party negotiating at arms-length would pay for Limited or for the benefit of the agreement will fully reflect the uncertainties of the business."

678. In November 2018, WI Harper Fund VIII LP, a Cayman Islands limited partnership, subscribed for 10% of the share capital in Rebio HK for USD 2 million. On the market approach, Mr Patel thus calculated an enterprise value for Rebio of USD 28.1 million (i.e. an implied equity value of USD 20 million plus debt of USD 8.1 million). There is, however, no evidence or disclosure as to the extent of any due diligence by WI Harper and no details about how WI Harper arrived at its valuation, although Mr Patel confirmed that he expected that due diligence would have been undertaken. Further, there is no evidence about WI Harper's motivations for investment; there is no evidence that it was a rational arm's length transaction. Mr Patel accepts in the Joint Statement that his calculation has been incorrectly based on Rebio UK's balance sheet, when in fact, because the investment had been made in Rebio HK, he should have used the consolidated balance sheet for the Rebio Group as at the date of the WI Harper Investment.

679. In any event, I reject Mr Patel's evidence that an increase in Enterprise Value since that investment of 150% (based on an assumption that the net debt position of the Rebio Group was nil) was reasonable. There is simply insufficient evidence available to justify a 150% increase in value. The evidence on which Mr Patel relies focuses on positive developments in the Rebio Group business without also taking account of more recent challenges as identified in the Shareholder Update Q1 2020. In the circumstances I do not consider the market approach to provide a useful cross check in the circumstances of this case. I accept Mr Hall's evidence in the Joint Statement that "the implied value at

which WI Harper made its investment in Rebio in November 2018 provides no validation for [Mr Patel's] valuation estimate of Rebio at June 2020" and I do not consider this evidence to be undermined by his frank acknowledgement in cross examination that the price at which WI Harper made its investment (assuming an arm's length transaction) was by definition the market value of Rebio HK at that date.

680. In my judgment it is very difficult to attach any real weight to the Key Forecast, or indeed to Mr Patel's evidence of anticipated value based on that forecast and, having regard to all the matters identified above, I certainly cannot arrive at any alternative figure for loss, as I am invited to do. I accept Mr Hall's evidence that the set of projections used by Mr Patel is "overly optimistic in terms of timing and magnitude of positive cash flows" and that absent further information he could not come up with an alternative valuation. I cannot see how the Court can sensibly arrive at a figure when an expert valuer genuinely could not do so owing to a lack of evidence.

681. It is, of course, trite law that very often the Court's task in achieving reparation will not always be precise and that (for example) issues of proportionality may, on occasions, require the Court to take a pragmatic view of the degree of certainty with which damages must be pleaded and proved. Equally, there will be circumstances in which it is appropriate for the Court to be tolerant of imprecision where the loss is incapable of precise measurement, perhaps because it will arise in the future and is a purely hypothetical exercise.

682. Mr Sutcliffe drew my attention to *Parabola Investments Ltd v Browallia Cal Ltd* [2011] 1 QB 477, per Toulson LJ at [22]-[24] and in particular the observation that where the quantification of loss:

> "involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account".

683. I have considered very carefully whether this guidance requires me to come up with a figure in this case, but I have concluded that it does not. Whilst valuation cases may often require a relatively broad brush approach, particularly where they involve a hypothetical exercise, I do not consider that I have any basis on the available evidence for plucking a figure out of thin air or for "evaluating the chances". To my mind such an approach would go far beyond mere tolerance of imprecision and would (on the state of the evidence) extend into the realms of remote speculation.

684. In all the circumstances, there is no need for me to consider what, if any adjustments might be needed to the assessment of TMO's loss.

Other Defences (Issues 8, 9 and 10)

685. In light of my earlier findings, I can deal with these "other" defences quite shortly.

686. First, given my findings of bad faith on the part of the Director Defendants, there is no basis on which I can find that they would have entered into the Market Place Subscription

and the VSA Share Issue even had they not had an improper purpose. Thus the "would have done it anyway" defence must fail.

687. Second, there is similarly no basis on which I can find that the Director Defendants would be entitled to exoneration (in the event that I had made findings of loss). Section 1157 CA 2006 permits exoneration in proceedings for negligence, default, breach of duty or breach of trust against an officer of a company if "it appears to the court hearing that case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case…he ought fairly to be excused". The Director Defendants neither acted honestly nor reasonably, as I have already dealt with in detail.

688. Third, had it been relevant, I would have rejected Mr Audley's case that clause 10.2 of his Consultancy Agreement has the effect of limiting his liability for dishonesty, for the following main reasons:

i) The parties' intentions must be ascertained from the contractual wording, read in context.

ii) "Commercial contracts are not to be artificially construed and liability even for deliberate wrongdoing can be excluded, *a fortiori* limited, provided appropriate wording is used. While a suggested limitation of liability for employee wilful default does require close scrutiny, *HIH* underlines that, so far as concerns deliberate wrongdoing in the course of performance of an admittedly valid contract, the matter is one of construction" *Frans Maas (UK) Limited v Samsung Electronics (UK) Limited* [2004] 2 Lloyds Rep 251, per Gross J at [139(iv)].

iii) The inherent improbability of one party assuming responsibility for the consequences of dishonest wrongdoing by the other makes it necessary to look with particular care at the question of construction. "The law, on public policy grounds, does not permit a party to exclude liability for the consequences of his own fraud" *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2014] EWHC 2197, per Popplewell J at [15(3)].

iv) Looking purely at the contractual wording:

a) Clause 10.2 which provides for the limitation of liability is expressly said to relate to Mr Audley's aggregate liability "in respect of all such matters as are described in clause 10.1";

b) Clause 10.1 provides that Mr Audley shall have personal liability for "any loss, liability, costs (including reasonable legal costs), damages or expenses arising from any breach…of the terms of this agreement including any negligent or reckless act, omission or default";

c) I agree with TMO's submissions that, as a matter of construction, the restriction on Mr Audley's prima facie liability in clause 10.2 cannot apply to a contractual performance involving fraud or deliberate wrongdoing, as that is not "described" in clause 10.1 and there is no scope for reading "fraud or deliberate wrongdoing" into the inclusionary words. In the case

of fraud, such a reading would involve imposing a limitation which is not permissible as a matter of public policy.

d) The fact that the parties decided to include an express carve out for fraudulent conduct in clause 15(c) in the context of pre-contractual statements does not tip the balance in favour of Mr Audley's construction. On the contrary, it shows that in the context of that provision, TMO was not prepared to assume the risk of fraud.

689. Given my interpretation of Mr Audley's Consultancy Agreement, there is no need for me to consider whether his fiduciary duty is a stand-alone duty, unaffected by his contractual arrangements.

The Counterclaim (Issues 12 and 13)

690. Messrs Yeo, Weaver and Reeves all make a claim by way of Counterclaim against TMO for breach of contract, namely TMO's failure to maintain appropriate D&O insurance with respect to any claims arising during their tenure as directors. Messrs Yeo and Weaver explain the absence of any legal representation by reference to this breach; absent insurance, they have been unable to afford legal representation.

691. TMO responds to this allegation in its Reply, asserting that TMO had no obligation to take out appropriate cover where it lacked the means to purchase the cover, the decision by the Joint Administrators and Joint Liquidators of TMO not to purchase the cover was a rational exercise of their powers in good faith, and that it would have been a breach of the Joint Administrators' general duty under Insolvency Act 1986 Schedule B1 paragraph 3(2) to perform their functions in the interests of TMO's creditors as a whole to apply TMO's limited resources to the purchase of cover.

692. The relevant provision of the Service Agreements entered into by each of Messrs Yeo, Weaver and Reeves provides that:

> "The company will obtain at its expense appropriate Directors' and Officers liability cover for [the Director's] benefit on such terms as the Board may from time to time decide".

The insurance is to be "maintained during [the Director's] appointment as a Director during the currency of this agreement and with respect to any claims arising during such appointment".

693. It is common ground that TMO's Articles gave TMO power to take out liability insurance for the benefit of its directors, but did not stipulate the terms.

694. TMO took out D&O insurance in June 2013 (covering liability up to £3 million and legal expenses). This appears to have been dealt with by Ms Bramwell, to whom the Board had delegated authority. The policy expired on 1 June 2014 and was a "claims made policy", meaning that it provided no protection for claims made after its expiry. TMO accepts that the policy was not renewed. TMO had not intimated the intended claim to any of the Director Defendants prior to the expiry of that policy.

695. Mr Reeves engaged in email correspondence with Terry Hobgen of the Bluefin Group in May 2014 about the D&O policy. In particular, Mr Reeves asked Mr Hobgen in an email of 28 May 2014 to confirm "that should there be action taken against the directors for the period prior to the policy expiring the cover is still valid?". Mr Hobgen replied on the same day: "Cover is still in place for TMO and its directors and officers for the remaining current period of insurance – up to 29 June 2014. However, following the date of going into administration cover is only in run off – applicable to claims made arising from activities prior to date of administration." Mr Reeves thanked Mr Hobgen for his response and said that he had forwarded the email on to the other directors for their consideration.

696. During their evidence, Messrs Yeo, Weaver and Reeves confirmed that they had made their own decisions not to take out further cover, having read (and apparently misunderstood) Mr Hobgen's email. They made no further enquiries of Mr Hobgen.

697. Mr Duffy was cross examined by Mr Collings on this issue and said that he remembered that there had been "a cost issue": "From memory, I think one of my case team said about the D&O policy and I said, "We haven't got enough cash to pay for that". Mr Duffy also confirmed that extending D&O cover would not normally be something that he would do in an administration for that reason.

698. Whilst I am satisfied on the basis of Mr Duffy's evidence that he made a rational decision not to renew the cover on grounds of cost, that does not appear to me to meet the contractual claim made against TMO.

699. In my judgment, TMO has acted in breach of its contractual obligation to Messrs Yeo, Weaver and Reeves to obtain appropriate D&O cover (and their own decisions not to renew their cover do not detract from this point).

700. As I understand it, however, the counterclaim is only relevant in circumstances where Messrs Yeo, Weaver and Reeves are found to be liable (in which case they invite the Court to extinguish TMO's claim by way of set off pursuant to Rule 14.25 of the Insolvency (England and Wales) Rules 2016 and to order TMO to indemnify them against their legal expenses). In circumstances where TMO has not established its case on causation or loss, there appears to be no need for me to take the matter further.

701. In any event, however, I observe that had Messrs Yeo, Weaver and Reeves disclosed to a potential insurer their conduct as set out above, in my judgment cover would have been refused and/or (if the conduct had come to light subsequently) cover would subsequently have been avoided. In the premises it is difficult to see that there could be any sum to set off against TMO's claim (had it been successful) or any entitlement to an indemnity against legal expenses, and I dismiss the Counterclaim on this basis.

Conclusion

702. For all the reasons set out in this judgment, the claim is dismissed. I shall hear the parties on any consequential matters that may arise.