Neutral Citation Number: [2020] EWHC 3210 (Ch)

Case No: CR-2019-001218

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND &WALES

IN THE MATTER CINTEP DEVELOPMENT LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2020

Before :

MR DAVID HOLLAND QC
(SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION)

- -

Between :

(1) PETER BREWIN **(2) NICHOLAS CHRISTY**	**Petitioners**
- and -	
(1) BATHROOM BRANDS HOLDINGS UK LIMITED **(2) CINTEP DEVELOPMENT LIMITED**	**Respondents**

- -
- -

DAVID LEWIS QC (instructed by **KEYSTONE LAW**) for the **PETITIONERS**
FRASER CAPBELL (instructed by **SLAUGHTER AND MAY**) for the **FOR THE FIRST RESPONDENT**
THE SECOND RESPONDENT DID NOT APPEAR AND WAS NOT REPRESTED

Hearing dates: 25, 26,29 and 30 June and 3 July 2020.

- -

Approved Judgment

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

....

MR DAVID HOLLAND QC (SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION)

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Mr David Holland QC :

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INTRODUCTION

1. This is a petition for unfair prejudice, under sections 994 to 996 of the Companies Act 2006 ("the 2006 Act"). The allegations arise from the conduct of the affairs of Cintep Development Limited ("the Company") by the First Respondent ("BBHUK") through its nominated directors of the Company, Messrs Hance, Riley and de Beer. It is alleged that this conduct was unfairly prejudicial to the Petitioners, Messrs Brewin and Christy.

2. The trial is of liability only, with valuation to be determined at a separate hearing if I find that unfair prejudice has been established.

EXECUTIVE SUMMARY

3. The following brief outline of the claim is taken largely from the agreed Case Summary.

4. The Petitioners, Mr Brewin and Mr Christy, invented patented technology for use in a new water recycling shower system (the "recycling shower"). Technically, Mr Brewin is the inventor of a water recycling shower system and Mr Christy is the inventor of a heat pump recycling shower system. They incorporated an Australian company, Cintep Pty Limited ("Cintep AU") on 15th September 2009 for the purpose of developing and commercialising the recycling shower.

5. Following discussions, in August 2014, BBHUK and the Cintep AU shareholders agreed to enter into a joint venture via a new company, being the Company, to develop and commercialise the recycling shower.

6. Heads of Terms were signed on 8th August 2014 by BBHUK and Mr Brewin on behalf of the Cintep AU shareholders (the "Heads of Terms"). On 12th August 2014, the Company was incorporated. As agreed, the Company Board comprised Messrs Christy (as Managing Director), Brewin, Hance, Riley and de Beer.

7. On 22nd August 2014, BBHUK subscribed for 6,493,492 shares in the Company pursuant to the terms of a Subscription Agreement (the "Subscription Agreement"). Under the Subscription Agreement, BBHUK paid £112,000 and agreed, inter alia: (a) to make further contributions into the Company of not less than £1 million between the date of the Subscription Letter and 8th August 2015; (b) after 8 August 2015, to pay the cost of developing the recycling shower to manufacture and (c) to enter into a shareholders agreement (the "Shareholders' Agreement") by way of Deed of Adherence (the "Deed of Adherence").

8. The initial equity split was 75.5% to BBHUK and 24.5% across the Cintep AU shareholders, some of whom would receive share options in the Company, to be exercised at a later date, which could have increased their minority holding to 37.02%.

9. The Company acquired technology and the relevant intellectual property rights from Cintep AU.

10. BBHUK did not however sign a Deed of Adherence to the Shareholders Agreement.

11. In the months between August and November 2014, as had been agreed, BBHUK requested that Mr Christy and two engineers who were employed by Cintep AU (Mr Conway-Lamb and Mr Dyhrberg) relocate to the UK and offered them terms of employment.

12. BBHUK contends that during a visit to the Petitioners' premises in Australia in October 2014, their engineers, including a Mr Glenn Porter, discovered fundamental problems with the recycling shower. In summary, BBHUK says that it became clear to Mr Porter during the course of discussions with Mr Christy and the other employees of Cintep AU during that visit that, contrary to what had been stated by or on behalf of the Petitioners in the discussions leading up to the August 2014 agreements, the recycling shower required very substantial further design and development work and that there was no guarantee that the product would ultimately be commercially viable. This is disputed by the Petitioners.

13. Following that visit, Mr Porter prepared a report dated 3rd November 2014 which set out Mr Porter's allegedly serious reservations about the recycling shower in terms of compliance with UK legislation, production issues, and costs. The Petitioners say that this report was not shown to, or seen by, them until it was disclosed during these proceedings in April 2019. BBHUK did not follow a suggestion in Mr Porter's report that a feasibility study be undertaken.

14. The Petitioners dispute the commentary and findings in Mr Porter's report. They say that in 2014 the recycling shower was in the research and development stage and that the funding committed by BBHUK under the Subscription Agreement would have been used to complete research and development so that the recycling shower could be brought to a state in which it could be manufactured and sold commercially.

15. BBHUK says that in around early to mid-November 2014 its nominated directors of the Company decided to cease all further spending on the joint venture. During a Company board meeting held on 14th November 2014, Mr Riley on behalf of BBHUK, proposed an indefinite extension to the longstop date of 8th August 2015 by which BBHUK was required to provide the initial £1 million of funding to the Company under the Subscription Agreement.

16. Subsequently, on 25th November 2014, Mr Hance sent an email to the Petitioners and others, communicating BBHUK's decision to cease investment in the joint venture. The Petitioners say that BBHUK breached the Subscription Agreement by, inter alia, unilaterally withdrawing funding of the Company.

17. On BBHUK's case, it took a commercially sensible and reasonable decision to postpone its funding commitments indefinitely after the fundamental problems with the recycling shower came to light, in circumstances where no reassurance or explanation as to the viability of the product was forthcoming from the Petitioners. BBHUK says that on 5th November 2014, Mr Christy declared his intention to resign indicating an intention to walk away from the project.

18. The Petitioners disagree. On their case, acting in its capacity as major shareholder and investor, BBHUK wrongly and in breach of contract unilaterally withdrew from its contractual funding commitment and wrongly and unfairly prejudicially used its nominated Directors to block the Company from pursuing its commercial objective and its legal rights against BBHUK.

19. The Petitioners allege that BBHUK, by itself and through its nominee directors (Mr Hance and Mr Riley), seriously and grossly mismanaged the Company's business in a way that destroyed its commercial vitality, and that they conducted the affairs of the Company for ulterior purpose.

20. BBHUK disputes this and says that a misleading impression of the status of the Petitioners' product was given in pre-investment negotiations and that the product was, in truth, seriously flawed and not commercially viable.

21. The Petitioners further allege that BBHUK has:

(a) excluded the Petitioners from management of the Company;

(b) (in breach of the terms of the Subscription Agreement) failed to enter into the Shareholders' Agreement and permit the Company to pursue its legal rights in this regard;

(c) failed to comply with certain provisions of the 2006 Act; and

(d) at a Company General Meeting convened on 15 November 2017, blocked the Petitioners' proposed resolutions to compel the Company to

> "*take such legal action…as is reasonably required to obtain redress from [BBHUK] for breach of the subscription agreement*"

and to appoint Mr Christy as a director of the Company.

22. The Petitioners assert that the matters complained of have caused them to suffer a loss of rights associated with, and a diminution in the value of, their shares in the Company. The principal relief claimed is an order requiring BBHUK to purchase the Petitioners' shares in the Company at a price to be determined by the court, and on the basis set out in the prayer (without prejudice to the parties' rights in due course to seek such directions as appear appropriate on any valuation).

23. BBHUK asserts that the Petitioners effectively invite the Court to second-guess the commercial decision of the Company's Board, in 2014, to suspend any further investment in a project that had been over-sold by the Petitioners; despite the Petitioners acquiescing in that suspension at the relevant time and despite the fact that the Petitioners have, in any event, suffered no prejudice. BBHUK accordingly denies causing unfair prejudice. The claimed relief is denied.

THE CAST LIST

24. The following is a brief introduction to the people and the companies who appear in this judgment.

25. Peter Brewin, the First Petitioner. Following a Short Service Limited Commission as an officer in the Royal Engineers, he studied engineering at Cambridge University and then Industrial Design Engineering at the Royal College of Art ("RCA") and Imperial College London. While at the RCA, he developed the novel re-circulating (or recycling) shower technology used in the recycling shower and co-developed other technology which lead to the development of a company called Concrete Canvas. He spends most of his time on the Concrete Canvas business. Both projects have however won design and business awards and he is the holder of multiple patents. Along with Mr Christy, Mr Brewin founded Cintep AU of which he was non-executive director. On incorporation he became, and still is, a director of the Company. He holds 5% of the Company's issued share capital.

26. Nicholas Christy, the Second Petitioner. He is a Chartered Management Accountant, having trained with KPMG in London and worked on and with "Clean Technology" companies since 2000. These have been what he calls "early stage, turnaround, or rapid growth" companies. He has held more than 40 board appointments, as either director or company secretary, in the UK and Australia. He moved from the UK to Australia in 2007 and along with Mr Brewin he founded Cintep AU in 2009 to develop the recycling shower. He was its Chief Executive Officer. He was appointed as a director of the Company on its incorporation but resigned on 14th November 2014. He holds 12.62% of the Company's issued share capital.

27. David Hance. Mr Hance has been a director of BBHUK since 28th May 2009. He has extensive experience in the sanitaryware industry having worked in that business since 1987. He has owned or been involved in many such businesses. He founded Crosswater Limited in 1998 to market bathroom fittings. This company merged with the Bathroom Brands business which had been founded by Mr Riley and Tim Powell (A). The merged company is BBHUK which, until 28th March 2015, was known as Crosswater Holdings UK Limited. BBHUK is a distributor of bathroom products and has experience of taking bathroom products through the regulatory approvals process. Mr Hance is thus an experienced businessman and, in particular, has experience of UK water standards and regulations. Mr Hance was appointed as a director of the Company on incorporation and is still a director.

28. Patrick Riley. Mr Riley is also an experienced businessman. He started working in the bathroom industry in 1989. In 1991 he started his own company, Bathstore.com (which he co-founded with Nico De Beer), and of which he was CEO until 2000, and thereafter, and until 2004, a non-executive director. In 2003, Bathstore.com was sold to Wolseley Group, and in 2005 he co-founded (with Tim Powell (A)) what is now known as the Bathroom Brands business. He was the CEO of the Bathroom Brands business from 2005 to 2018, and oversaw its growth into a successful distributor of high-end bathroom fittings. He still remains involved with the Bathroom Brands group as a non-executive director of certain group companies. He also oversaw Bathroom Brands' merger with the Crosswater Group which was founded by Mr Hance. He is also a director of the Company and has been since its incorporation.

29. Nico de Beer. Mr de Beer is another experienced businessman who co-founded Bathstore.com with Mr Riley. He joined Bathroom Brands in 2012. He was a director of BBHUK and also of the Company from its incorporation until his resignation on 14th

November 2014.

30. Tim Powell (A). There are two Tim Powells who feature in this case. This Mr Powell is an Australian associate of Mr Riley who was a director of various companies in the BBHUK group. He is based in Australia and has experience in the sourcing of products and in product development in the bathroom fitting industry.

31. Christopher Gee. He is a Chartered Engineer and Member of the Institution of Mechanical Engineers. For most of his career he has worked on the design and development of electromechanical products that are connected to the mains water supply (e.g. hot drinks equipment and showers). He thus has over 25 years' experience of product development and the relevant regulatory standards. From 2002 he worked for some years at Aqualisa Products Limited ("Aqualisa") (which is a company that develops and then markets electronic shower technology and products) as Technical Director with responsibilities for research and development, customer service and quality assurance. It was at Aqualisa that he came across Mr Porter (see below). From February 2007 until 2014, he was the Chairman of the Bathroom Manufacturers Association Technical Committee. The BMA is the UK trade association for manufacturers and providers of bathroom products. As will be seen, for a period in 2014 he was a consultant to Cintep AU assisting it in its development of the recycling shower. From October 2014 he was employed by Aspen Pumps. He holds a small number of shares in the Company.

32. Glenn Porter. Mr Porter is an engineer. He began his career as a production engineer making turbine blades for the aerospace industry. He then moved into the design and development of consumer goods where he worked for about 20 years. This included seven years at Aqualisa Products Limited. During his time at Aqualisa, he managed the research and development teams for shower products. From 11th August 2014 until September 2017 he was employed by BBHUK. Since October 2017, he has been working as an Engineering Consultant elsewhere in the bathroom industry.

33. Chris Conway-Lamb and Matt Dyhrberg. These are two Australian engineers who, until November 2014, worked for Cintep AU and were closely concerned with the development of the recycling shower. They each hold a small number of shares in the Company.

34. Alex Hill, Phil Capon and Dean Hayden. These are three English engineers whom Mr Porter had known from his time at Aqualisa. They all had considerable experience in the design and development of bathroom products. They were employed by the Company from 13th October 2014. Their employment was effectively transferred to BBHUK in November 2014.

35. Tony Formica. An Australian who was a director of Cintep AU.

36. Tim Powell (E). The former finance director of BBHUK based in England.

37. Paul Caneparo, Michael Coughlin: These gentlemen are directors or former directors of BBHUK. Mr Coughlin is also a former director of the Company.

THE FACTUAL BACKGROUND

Introduction

38. When considering the oral evidence given by the various witnesses at the trial, both parties reminded me of the well-known words of Leggat J (as he then was) as to the weight to be placed upon documentary evidence and the fallibility of oral evidence: GESTMIN SGPS SA V. CREDIT SUISSE (UK) LTD. [2013] EWHC 3560 (Comm.), at [15-23]. At

paragraph 22 he concludes:

> *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 a 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.*

39. Thus, the following (of necessity lengthy) recital of the facts is taken as far as possible from the copious quantity of contemporaneous documentation which consists largely of email communications between the various characters involved. Where necessary I have referred to, and taken account of, the evidence (both written and oral) of the various witnesses who gave evidence to me.

40. Also where necessary, I have made findings of fact where there was conflicting evidence of events.

Events leading up to the Heads of Terms dated 8th August 2014

41. The Petitioners are the inventors of patented technologies for use in a ground-breaking water recycling shower (the "recycling shower"). In brief, the recycling shower takes a small volume of water in from the mains and reuses it in real-time by collecting water from the shower tray, cleaning, reheating and recirculating the water to the showerhead on a short and continuous loop. The process is intended to save a significant volume of water and energy compared to a conventional shower.

42. The Petitioners incorporated Cintep AU in September 2009 in order to develop and commercialise the recycling shower. Mr Christy was and is domiciled in Australia. As Mr Christy pointed out in his witness statement, between 2009 to 2014, Cintep AU had: built up and developed a small but talented and dedicated team of engineers to develop the recycling shower; won multiple international awards (including the BSI Sustainable Design Award, a Dyson Award and a British Standards Institution Environmental Design Award); received AU$ 2.4 million in external government grants and funding; successfully developed four iterations of the prototype recycling shower, including bespoke componentry for the system; and undertaken extensive testing, with, he described, promising results.

43. From late 2013, into early 2014, Cintep AU set about raising capital to fund the further development of the recycling shower so as to bring it to market. An Information Memorandum was prepared, which was nearing its final draft in early 2014. The intention at that stage was to raise capital by listing the company on the Australian Small Scales Offering Board ("ASSOB").

44. The Information Memorandum was prepared in early 2014. It was a relatively lengthy document (running to nearly 100 pages including appendices). It contained the following passages:

(a) Under the heading Executive Summary, the following was stated:

Cintep has developed the most energy and water efficient shower in the world…CINTEP's first product is an electric recycling shower system with digital control that safely clean, heats and reuses shower water in real time. It delivers a luxury flow rate using 70% less water and energy…CINTEP has fully working tested proto types. Subject to further funding, the first product is anticipated to be ready for production in four months and manufacture of the first units is planned for December 2014…"

(b) In paragraph 4.1 the following is stated:

CINTEP has made significant progress developing the product. The first proof-of-concept prototype was completed in May 2012 and a number of subsequent prototypes have been used to test candidate components, gather performance data and further refine the design.

(c) In paragraph 4.4 the following passage appears:

The bulk of the remaining technical development work involves detailed mechanical and electrical systems design to transfer the functional prototypes to manufacture

(d) In paragraph 6.1, under the heading "Phase 1-development (12 months)" which is described as:

expected take one year and will result in a finished manufactured product

the following is stated:

During this phase CINTEP will finalise the production design, tooling design and testing program, finalise and contract suppliers, obtain BEAB and WRAS certification (for UK compliance of electrical and water systems respectively) and Watermark (Australian Certification) and implement the first batch production run of the E1000 (Early Adopter) recycling shower

(e) Finally in section 10.1the following passage appears:

Previous funding of $1.68M was raised through a combination of sale of equity ($77k), competition prize money ($630k), grant funding ($720k) and R&D tax incentives ($250k). This funding was invested in developing the existing technology to the level of a pre-production prototype.

45. The clear impression given is that, at that time, Cintep AU had produced a pre-production prototype which could result in a production model ready for sale by the end of 2014. This was not in fact the case.

46. However, in evidence Mr Christy said that this was only a "final draft" of the Information Memorandum which was "signed off" on 3rd February 2014 but then immediately "pulled" (as he put it).

47. Although Mr Campbell on behalf of BBHUK eschewed any direct reliance on the Information Memorandum, a copy of it was sent by Mr Christy to Mr Powell (A) of BBHUK under cover of an email dated 17th April 2014.

48. In early 2014, Cintep AU was seeking distributors for its products in various markets including the UK. It sent out a pro forma letter signed by Mr Formica stating it was seeking a distributor one copy of which, dated 4th February 2014, was addressed to and received by Mr Hance at BBHUK.

49. The letter of 4th February 2014 stated, amongst other things:

CINTEP's product is an electric recycling shower system with digital touch screen control that safely cleans, heats and reuses shower water in real time. It reduces water and energy consumption from showering by 70% with no reduction in flow rate at the showerhead. CINTEP has won awards including the world's largest clean technology competition, The Green Challenge, a Dyson Award, British Standards Institute Environmental Design Award, and was one of Popular Science Magazines 2012 inventions of the year.

The letter invited further contact by phone and enclosed a draft non-disclosure agreement. On 19th February 2014, following introductory emails and calls, BBHUK signed a non-disclosure agreement with Cintep AU.

50. Following an initial telephone conversation on or around 24th February 2014, in an email dated 25th February 2014, Mr Formica introduced Mr Hance to Mr Christy. In the mail he stated:

Thanks for the call last night, it was great to hear more about Crosswater and your customer service achievements and fantastic sales growth. As I mentioned last night Nick Christy will be in London in a couple of weeks from the 10th to the 20th of March, and again from the 31st March to 4th of April. I know he has a few meetings already booked in for that time so I'll let Nick arrange a suitable time to visit directly with you.

Perhaps more importantly, Mr Formica also said this:

I'd also like to flag some things that I'd like you to think about from your knowledge of the UK shower market and how we might best approach them if we were to work together to develop the market in the UK…
One of the steps that will need to be done prior to sale in the UK is to obtain all the appropriate product certifications for power, water, efficiency etc. (CE, WRAS, BREEAM, etc.). Does Crosswater have the ability to help us with this process?

Thus the email from Mr Formica made clear that the recycling shower had yet to acquire regulatory approval and certification in the UK.

51. In his email in response dated 10th March 2014 (in which he responded in red print directly to Mr Formica's text), immediately underneath the passage set out above, Mr Hance stated:

"We have all the knowledge and expertise you need for CE approvals, WRAS and KIWA-I will introduce you to these guys too."

In his evidence, Mr Hance sought to gloss this comment by stating that BBHUK did not have experience of designing and manufacturing products to be compliant with the regulatory requirements. Whilst that might have been true, there was no such qualification apparent from his email of 10th March 2014.

52. In March 2014, Mr Christy travelled to the UK. On 3rd April 2014, he met with Mr Hance at BBHUK's premises to discuss BBHUK becoming Cintep AU's UK distributor. At the meeting, after discussing the technology, it was apparently Mr Hance who expressed his wish to invest in the recycling shower.

53. On 4th April 2014, without the Petitioners' knowledge, Mr Hance sent information about the recycling shower (including the Information Memorandum) to Mr Porter, who was then in the process of applying to work at BBHUK. This followed a meeting between the two men at BBHUK's offices at which Mr Hance had told Mr Porter that BBHUK was contemplating an investment in the recycling shower. Mr Hance said he would send Mr Porter some information about the product and asked for his "high-level thoughts" on it. In evidence both Mr Hance and Porter agreed that Mr Hance wanted Mr Porter's expert

view on the product. They both also accepted that Mr Hance wanted Mr Porter's views because he had significant safety compliance and testing experience. According to Mr Porter, Mr Hance also as good as offered him a job at that meeting.

54. Mr Porter responded in an email on 6th April 2014. He stated as follows:

> *I read through the information you sent and I've attached my thoughts on the CINTEP system. There's some bits missing from the information they sent and some of their sums don't add up but the basic proposition looks sound. I think they underestimate the task of getting it into production and through a rigorous testing and compliance programme.*

In the attached document, under the heading "Summary" Mr Porter states:

> *This looks a good opportunity to get into something potentially very good at an early stage. The product has a good story and good high profile endorsements which will sell well in the Eco market. However, it's completely unproven at the moment and therefore high risk. Turning a prototype into a reliable production product isn't simple and this is a complex product. I suspect it will not be available for sale until late 2015 as it looks like they have a lot still to do… Testing needs to be very thorough and be conducted on a number of production units to ensure warranty claims are kept to a minimum.*

Under the heading "Production", Mr Porter states:

> *The picture is a prototype. What stage are they at? From the look of the controller prototype they're still got a long way to go to productionise. Their website says "ready in Early 2015" but that doesn't necessarily mean that it will be ready for the UK market. Assuming they're at final working prototype stage at the moment, have a decent amount of resource (say, 2 mechanical design, 1 electronic, 1 software), they have no significant compliance or reliability issues and manufacturing is already sourced in Asia somewhere;*

Under the heading "Pathogens" he states:

> *WRAS have regulations on the taste of potable water that limits the materials that can be used to carry water in a shower. If the material imparts any change to the taste of the water, you can't use it. I don't know if WRAS would consider exceptions because of the use of recycled water or if the recycling process purifies the water to such an extent that there's no taste contamination.*

Under the heading "Compliance and Reliability Testing", he states:

> *I think it needs discussing with WRAS to see which test standards comply. It's breaking new ground so I don't expect the water regulations to be applicable as they are.*

55. Prior to the last two passages, Mr Porter had set out in tabular format a series of dates in two columns: one under the heading "Est Completion (optimistic)" the other "Realistic Completion". The "Available for Sale" date in the first column is May 2015. The equivalent date in the "Realistic Completion" is November 2015. These dates were of course based on the four assumptions set out in the paragraphs immediately above the table.

56. Thus, with his experience, Mr Porter appears to have been alive to the potential problems of bringing a prototype through development to production. In answer to questions from Mr Lewis, Mr Porter accepted, as indeed is the case, that anyone reading his response (which would of course have included Mr Hance) would understand that the recycling shower was ground-breaking technology which came with a risk that it might not succeed as a product and indeed might not gain regulatory approval. Indeed he accepted that anyone reading his response would realise that current regulatory standards might have to be amended to allow this new technology to come to the market. He accepted that, even

if the product did work, it was, on his then estimation, 18 months away for production.

57. It is also quite clear, and indeed accepted, that, at that stage, Mr Porter was seeking employment at BBHUK. He continues:

> *In terms of what I think I could bring to Crosswater, I would say this is an example of the level of detail I get into. This is based on a brochure, imagine what I'm like with a full technical spec.*
>
> *What else would I bring?*

He then sets out a list of attributes which include:

> *I have Technical knowledge:*
>
> - *Bathroom Industry- taps & showers:17 years experience of designing and developing consumer goods*
> - *Production engineering - I've set up and debugged production lines in the UK, China and Malaysia*
> - *Quality control and quality issue resolution*
> - *Compliance and testing*
> - *Cost reduction*

He goes on to state that:

> *I'm already on very good terms with Chris Gee which would help with CINTEP*

And that:

> ***When sales in the digital market justify it, I can get a Crosswater digital shower developed, probably using external design resource rather than trying to develop an in-house team. This could be manufactured offshore to give much better margins than the current offering.***
>
> ***I can also work with CINTEP to bring their recycling shower to market in the UK and possibly Europe.***

58. Thus, although he denied it in oral evidence (asserting, as stated, that he had effectively been offered the job already by Mr Hance) it rather looks like Mr Porter was at the same time as providing his expert views on the recycling shower, "pitching himself" to Mr Hance as an experienced engineer who could significantly assist in bringing the recycling shower to market in the UK. That is certainly how Mr Hance saw him and indeed why he sought his views.

59. On 7th April 2014, Mr Hance sent an email to Mr Porter acknowledging receipt of his material and asking for "a day or two to digest both" the email and the accompanying document. In evidence he stated that he had read both.

60. It appears that Mr Hance was impressed with what he was hearing about the recycling shower. He sent an email on 5th April 2014 to Mr Christy in which he stated:

> *We were all blown away of honest* **[sic]** *about the discussions we had-its right up our street, and I have already a plan in my mind to promote and assist you in the development on the marketing side… On a personal note I want to invest - as I think Pat will too. I have 5 kids and 2 Grand Sons and that is where my funds go most of the time - but I can probably raise £500K should you satisfy some of my burning questions.*

61. He proposed to Mr Riley that they personally invest in the business. Mr Hance believed the investment opportunity to be an "*iPhone moment*" that would revolutionise the industry.

62. In response to Mr Hance's enthusiasm, on 5th April 2014, Mr Christy sent to Mr Hance an email with further information regarding Cintep AU and the recycling shower. He explained that Cintep AU wanted to raise some AU$ 4-5 million. In the email also stated:

> *I know you said to Tony Formica that you like to work in Hancey time, which basically means "get it done yesterday"*

63. On 11th April 2014, Mr Christy met with Mr Hance at BBHUK's premises. Mr Christy sent an agenda for that meeting by email which focussed on BBHUK becoming a distributor. Mr Christy states that at that meeting he answered Mr Hance's questions as to the stage of development of the recycling shower technology. However, at the meeting Mr Hance again raised the possibility of BBHUK becoming an investor rather than a mere distributor.

64. Mr Hance then sent two chasing emails to Mr Christy on 11th and 13th April 2014 both communicating his enthusiasm for the project and expressing his appetite to be involved. In the second one he wrote:

> *I have mailed Pat over the weekend and told him we are on the verge of something special.*

65. In mid-April 2014, Mr Hance spoke to Mr Riley about the recycling shower. According to the latter, such was the former's enthusiasm, he described the product as potentially "an iPhone moment" for the shower industry.

66. Mr Hance also at that time asked Mr Tim Powell (A) to visit the Cintep AU's premises in Brisbane. In his email of introduction dated 15th April 2014, Mr Powell wrote to Mr Christy:

> *For me the purpose of the meeting is to see your operation, understand your story, the product, and see if there is anything we can do together.*

67. In preparation for this meeting, on 17th April 2014, Mr Christy sent Mr Powell a link to the Information Memorandum. However, in his covering email Mr Christy pointed out that the document was not up to date. He stated:

> *Chris Gee David and Martin Baker (and also a number of other shower companies we have spoken to) think that our timeline of launching the product is overly ambitious and should be pushed back from January 2015 to about October 2015. Additionally they, and a number of potential investors and advisor I have met in the UK in the last month, believe that we need a bigger cash buffer from the current fundraising…I don't like sending out documents that require updating but I am conscious that you and I have one day when I get back before you are gone for 2 weeks and this is the fastest way of bringing you up to date.*

68. On 22nd April 2014, Mr Hance wrote a letter committing BBHUK to distribute the recycling shower in the UK. It said:

> *I'm writing to confirm Crosswater's commitment to distribute CINTEP's recycling shower technology throughout the UK.*
>
> *I am the founder and Chairman of The Crosswater Group and have built the business into the UK's leading premium bathroom retailer by bringing innovative and quality designs to market. Our vision for the future of UK bathrooms remains unsurpassed and we take great pride in creating original designs that combine good looks with premium function.*
>
> *CINTEP's recycling shower system embodies the same principles and we look forward to building a lasting partnership with CINTEP to bring their recycling shower technology to market in the UK.*

The letter continued:

> *We are also prepared to support CINTEP with their current capital raising and will invest in CINTEP to help them launch their first product. We believe that CINTEP's technology has the potential to change showering across the world, not just in the UK, and we are excited to be part of their journey.*

69. In an email dated 27th April 2014, Mr Christy wrote to Mr Powell (A) as follows:

> *We are 90% of the way through building our next prototype (Alpha 4, which should be the last Alpha before a release candidate). Alpha 4 has not yet been run hot and therefore*

under high pressure loads, which is giving Chris (our CTO) some concerns about doing that tomorrow. The plan is to show you Alpha 3 running and talk you through Alpha 4, which will be fully functional when you get back from the UK.

Thus Mr Powell (A) could have been under no illusions as to the state of progress of the product at that date.

70. He visited the Cintep AU's premises in Brisbane on 28th April 2014. He spent approximately three hours there. Following his visit, Mr Christy sent an email to Mr Hance in which he said:

> *We met with Tim Powell this morning for 3 hours and it was a useful meeting. Tim obviously has a lot of experience of the realities of sourcing and making products and it was useful to get his input.*
>
> ***Product Design Ideas***
>
> *The main action item that we got from him was that he needed to have a clearer idea of what Crosswater would be selling in the UK. The prototypes that we have in Brisbane are functional but are not saleable products and obviously don't reflect the finished article.*

As Mr Christy stated in evidence, Mr Powell (A) was an engineer who understood that there was a lot still to do to get a product ready for production and sale.

71. Indeed, Mr Powell (A)'s view, as reported back to BBHUK, was not positive. It was recorded in a note prepared by Mr Hance for the BBUK Board meeting on 24th June 2014. In this note Mr Hance states as follows:

> ***Tim Powell is of the view that this is a high-risk research and development play, is not in our core business, and Bathroom Brands should not invest in Cintep. Nico, Patrick and I agree with this. It is truly a very high risk investment - that may yield nothing over the next few years - or be a real winner!***

72. On 19th May 2014, Mr Christy exchanged email correspondence with Messrs Hance and Canapero regarding the challenges posed by UK water regulation of "*greywater*" reuse. In an email to Mr Christy, copied to Mr Hance of that date, Mr Canapero stated:

> *Meeting standards like WRAS or KIWA will also be important as will TMW2 or 3 as these are legal requirements for contract work.*

73. Also on 19th May 2014, Mr Christy emailed Mr Hance about an approach he'd had from the Guardian newspaper. He said:

> *I've just been contacted by the Guardian who want to write an article on us for their sustainable business section. The deadline is this Friday so I suspect it will go out at the weekend or next week. These opportunities don't come up that often so we should consider whether we name Crosswater in the article as our distributor. We can talk about this on Wednesday but wanted to give you a chance to think about it and maybe talk internally about the pros and cons of going public*

The response form Mr Hance was positive, if not emphatic:

> ***I think it's essential. Our commitment is there 100%***

74. During a visit to BBHUK's UK premises, on 23rd May 2014, Cintep AU's Technical Director Chris Conway-Lamb had further discussions with Mr Canapero and Mr Hance. In an email to Mr Christy, Mr Formica and Mr Gee the next day, Mr Conway-Lamb described the meeting. He said:

> *I had a good meeting with Crosswater yesterday. It was pretty informal but very useful I think in that it gave us all a chance to get to know each other a bit and share our excitement about the project. We had a chat in a meeting room after which David took me over to the new facility…*

There was clearly a discussion about water quality as, under the heading of "In the meeting room", Mr Conway-Lamb states (inter alia):

> *...brief discussion of water quality-Paul asked how good is the water we put out (worse, as good, better than what goes in? Drinking water?) I went into some detail of the filtration and pasteurisation, I gave a brief overview of the good results we've had so far and the basic strategy; pursuing a robust scientific test programme to satisfy ourselves of system safety and, via market research, user acceptance before presenting to standards bodies.*

75. At BBHUK's request, Mr Christy travelled to Hong Kong and met with Mr Riley, Mr Hance and Mr De Beer at their hotel on 30th May 2014. The meeting took place around the rooftop pool of the hotel. After a two-hour discussion about Cintep AU and the recycling shower, Mr Hance and Mr Riley committed, in principle, to invest AU$ 5 million. Mr Christy in his witness statement describes Mr Hance and Mr Riley leaving briefly so that the latter could have a cigarette, he then states:

> *After about ten minutes, Mr Riley and Mr Hance returned. They did not sit down. Mr Hance just stood next to me and said, "We will do it" and held out his hand to me again. I responded, "Do what?" and he replied, "the full five million". I remember blinking and shaking my head and said, "are you sure?" and he smiled and said "yes, the full five million". I shook his hand. I think we all went and got another drink.*

Mr Hance recalls that, at the meeting Mr Christy stated that Cintep AU had cash flow problems and that Mr Riley offered to lend £50,000 to the company to keep it afloat until further funding was acquired.

76. In his witness statement, Mr Riley asserts that at that Hong Kong meeting:

"my impression from Mr Christy was that the Product was very close to being able to launch on the market"

When quizzed about this in cross examination, he went further and stated that he believed that Mr Christy had actually said that the recycling shower was close to launch. I'm afraid that I do not accept that evidence. Firstly, it is not the recollection of either Mr Christy or Mr Hance neither of whom mention such a statement being made. Secondly, as described above, Mr Riley's evidence in chief (given in his witness statement) differs from that in cross-examination. Given the case put by BBHUK, one would have thought that, if such a clear statement had been made, then it would have featured prominently in Mr Riley's witness statement. The suggestion that he had made such a statement at the Hong Kong meeting was not put to Mr Christy in cross-examination. Finally, an assertion that the recycling shower was "very close to being able to launch on the market" is directly contrary to the evidence of Mr Christy and, more importantly, to what is stated in the contemporaneous documents. I find that no such statement was made by Mr Christy and nothing said by him at that meeting could reasonably have given that impression.

77. In an email dated 31st May 2014, (apparently drafted on his flight home) Mr Hance requested more documentation and information. The email stated:

> *Can we have the following, in no particular order:*
>
> *Existing shareholders agreement*
> *Contact list of all shareholders and IP creator*
> *Detail of your solicitors acting on your behalf for this transaction and your IP one too.*
> *Floatation pack*
> *Product information including all patents and registration numbers.*
> *Potential competitors*
> *Projected cash flow requirements for our investment Employment contracts of board members*

Costing of Beta 1 if available ,and Alpha 3 and 4 too.
Initial design images you shared and consider worthwhile to develop
Would it help if we gave you £50k now to help you through the interim period before we sign?
As time passes we will add to these

78. The Guardian article about the recycling shower was published on 2nd June 2014. On that date Mr Hance sent another email to Mr Christy stating:

I'm so looking forward to what I believe is the best opportunity that I have personally - I knew it the day I read your original email to me.
Have you considered the £50K assist fund?

Mr Christy made the information which had been requested by BBHUK available via a cloud-based file-sharing system, "OneHub". It is Mr Christy's evidence that, of the 85 documents, Mr Powell (A), Mr Hance and Mr Riley, between them, opened only 10 of them. Mr Hance in his evidence did not challenge this assertion.

79. On 3rd June 2014, Mr Hance contacted Mr Christy by email, referring to the Guardian article and the relevant EU regulatory standards. The email stated:

In preparation for this statement ....for the Guardian statement

"The product needs to be compliant with three sets of EU standards before the UK distributor Crosswater can market it. This is the final hurdle to investment. It's a classic case of chicken-and-egg; compliance requires funding, yet until compliance is achieved, investors are wary."

We need to be WRAS TMV and CE compliant in the UK
What EU standards can you advise me on in addition to the UK ones?

To my mind this clearly indicated that Mr Hance was aware that regulatory water standards had to be met before the recycling shower product could be brought to market.

80. In the meantime, BBHUK had sought accountancy advice as to whether any investment in Cintep AU or the recycling shower could be subject to "R&D tax relief". In two emails dated 3rd June 2014, partners in the firm of HW Fisher Accountants had advised that it was possible for BBHUK to claim this relief provided that it could be demonstrated that any investment by BBHUK had either created or attempted to create "an advance in overall knowledge or capability through the resolution of technological uncertainty". BBHUK could, in that case, potentially benefit from tax relief of up to 225%.

81. Given BBHUK's offer of funding and apparent enthusiasm, Cintep AU at this stage ceased its efforts to seek alternative capital through ASSOB listing in Australia.

82. On 6th June 2014, Mr Gee (who at that time was in Australia working on water standards with the Cintep AU team) emailed to Mr Hance an explanation and diagram showing seven regulatory standards that the recycling shower would have to meet, and how Cintep AU planned to do this. In the email Mr Gee stated as follows:

> *I've been asked by Nick to give you some clarity on the recycling shower and European Directives. Like everything to do with standards and approvals it's never as clear and simple as it should be. The Guardian article states the product needs to be compliant with three sets of EU standards - well actually it is 7! I attach a chart I used to brief the technical team, which shows the EU Directives and how they link with the specific requirements for the UK. To put a more positive spin on it, the requirements for the recycling shower is no different to a Digital or Electric shower* ***except in the area of water recycling****. My knowledge of these requirements will speed up the approvals work. Work will need to be done to demonstrate that the product is treated appropriately in Part L of the Building Regulations (Conservation of fuel and power). I am in the process of arranging meetings with the Building Research Establishment to understand what needs to be done.*
>
> *I hope this clarifies the situation. Please contact me if you have any further questions*

(emphasis added)

83. In an email in response on the same day, Mr Hance stated:

> *Thank you very much for the briefing - we have a challenge ahead to meet the criteria but I know we have the team to deliver.*
>
> *As you are probably aware now Glenn is joining us in August and he will be tasked with this process - I hear you say the "A- Team" is back! so Im sure you two will be working closely again to bring clarity to the approvals position.*

Importantly, to my mind, this email was copied by Mr Hance to Mr Porter.

84. Again, it is difficult to see from these exchanges how either Mr Hance or, for that matter, Mr Porter could have had any impression that the Cintep AU team thought that obtaining regulatory approval for the product was going to be simple or easy.

85. Also on that date, Mr Riley, who had engaged IP lawyers, Kempner & Partners, to act on behalf of BBHUK, sought information on Cintep AU's IP rights to the recycling shower. Mr Christy provided this information by giving access to the "OneHub" site.

86. In an email sent early in the morning on 12th June 2014 (Australian time) Mr Christy wrote to Mr Hance:

> *All good here - just pulling together all of the information to finish the investment documents for you guys. If you haven't figured us out yet (I think you have) we are VERY thorough, so things take time but get done properly. We have a cashflow forecast that runs out 5 years, by month, and is a complete model of the business - it's 160 pages of A4 if you print it out. We have been updating that for new information following*

Chris Gee's visit last week which impacted development costs (they went up), unit cost (that went down) so we had to tweak the model a little to get a sensible cashflow forecast and spread your investment over 18 months.

Mr Hance responded:

All wonderful news !

I am proposing we take a short cut option on the IP checking !

The sooner you get that detail - which I know will be superb - the better !

87. On 13th June 2014, Mr Christy sent Mr Hance and Mr Riley, amongst others, a detailed report on Cintep AU's competition including their main rivals, Orbital Systems. One of the points made by the Petitioners is that Orbital Systems have since proceeded to raise capital (in 2017) at a valuation of some US$124.8 million. They say that Orbital Systems' accomplishments support the conclusion that the recycling shower was indeed a viable proposition and was, as at 2014, the leading product in an emerging market.
88. On 13th June 2014 Mr Brewin spoke to Mr Hance for the first time.
89. On 16th June 2014, Mr Hance caused the Company Secretary of BBHUK to circulate to the Board, which included himself, Mr Riley and Mr De Beer, the note headed "Note of 24th June Bathroom Brands Board Meeting". Part of the text of that note has already been set out. It contained reference to Mr Powell's warning about the risky nature of any investment in the recycling shower.
90. On 23rd June 2014 Mr Christy sent an email to Mr Riley attaching draft heads of terms for the proposed investment by BBHUK. The proposal at that stage was for an investment of AU$5 million by BBHUK in exchange for a 40% stake in the business. In the text of the email Mr Christy referred to "two big delays at our end" one of which was:

    Letting Chris Gee, who joined us in March, visit us to work with the technical team and for them to review the entire development and production plan using Chris Gee's experience and knowledge. Confusingly there are 2 Chris's - Chris Gee (manufacturing and operations) and Chris Conway-Lamb (Technical and Product Development). Chris Gee is now back in the UK but will be here for all of August and will probably move here for 6 months from October to be part of the development team. The 2 Chris's are taking me through the details of what they have been working on tomorrow and then I will incorporate that in the final document. When we started this process, before I met you, we assumed that we would raise money through ASSOB in a series of smaller rounds, each with its own document. We expected that the ESOP and the revised plan would be worked into the documents incrementally over a period of months. Now that you are investing the whole $5M in one go, we don't want to make a series of revisions and want to get as much done as possible and agreed with you now so that we can get on with development ASAP

91. A detailed technical development plan was at that stage being prepared by Mr Gee and Mr Conway-Lamb.
92. A draft Heads of Terms was uploaded by Mr Christy to the "OneHub" site on 27th June 2014. Mr Christy sent an email to Mr Riley explaining the purpose of the document which was to be sent the following week. The email stated:

    I've uploaded the amended heads of terms to OneHub and also provided some of the other requested documents. You will see in the heads of terms that I have pushed some of the dates back on the ESOP and cashflow forecasts. We had two tasks we expected to finish this week, the ESOP and the

> *development plan, both have thrown up an issue that we need to take an extra day or two to resolve….*
> *With the development plan I have asked the 2 Chris' to put more supporting detail in as I think there are a number of things you may want to talk through when you are here (UK standards, water quality and tooling risks). We also have a review booked for this on Monday. The development plan is one of the major costs within the cashflow and I want to make sure it's been properly thought through before it's finalised.*

93. In the meantime, at the BBHUK Board meeting on 24th June 2014, and despite the terms of the note prepared by Mr Hance containing Mr Powell (A)'s comments on the recycling shower (the contents of which were apparently endorsed by both Mr Riley and Mr de Beer), it was decided that, nevertheless, the company BBHUK (as opposed to the individual directors) would invest. Mr Hance said this was because:

> *We nonetheless thought that it was a good opportunity because if it worked, it could be revolutionary.*

The Board Minutes record that Mr Powell (A) attended the meeting by phone from Australia and that Mr Hance's note was taken as read. In the following discussion, it was recorded that:

> *NDB [Mr De Beer] stated that it was very high risk and so not an investment for the Company. TP [Mr Powell] stated that in his opinion it would be at least two years before the product would be ready for the market.*

In answer to questions in cross examination, Mr Hance stated that the BBHUK decision to invest was taken after a "very in-depth conversation".

94. Thus the decision by BBHUK to invest was taken by the Board in circumstances in which it was clearly aware of both the risk that the product might not successfully be developed and the time required before it could be brought to market even if it could.

95. On 1st July 2014 Mr Porter had dinner with Mr Gee. According to Mr Gee, they had a general discussion about the recycling shower project. Mr Gee explained to Mr Porter that his (Mr Gee's) role would be to work with the Australian team to develop the existing prototype into one that could be scaled up for production, to help choose a manufacturing partner and to ensure that all the standards and approvals were obtained. On 2nd July 2014 Mr Porter sent an email to Mr Hance informing him of the meeting. In that email, Mr Porter said:

> *I had dinner with Chris Gee last night and he filled me in on CINTEP. There's a lot to do but I've offered whatever assistance he needs in getting the product into production…There's a lot to be done in terms of compliance and reliability testing. I'm looking forward to getting stuck in properly.*

96. On 7th July 2014 Mr Brewin and Mr Gee met Mr Hance and Mr Riley at Mr Riley's home. According to Mr Brewin, at that meeting he explained to Mr Hance and Mr Riley what the current development plan looked like and that the current estimate was that the first products would be ready for market in 2016. Mr Riley and Mr Hance both asked if the product could be brought to market more quickly. They were, he said, "interested in the fastest route to market". According to Mr Brewin, Mr Riley wanted the product to be on the market within 12 months. There was a discussion as to how that might be made possible, by, for example: outsourcing some of the research and development and manufacturing; hiring more engineers, and working on aspects of the development plan concurrently. There was also, according to Mr Brewin, a discussion about the technical risks involved. He explained that there was always technical risk in a project at this stage but that the key technologies: hydro-cyclones and pasteurisation were all pre-existing and "well characterised" and therefore, whilst there would be challenges,

he thought it likely that they would be able to overcome the technical challenges to the product reaching market provided there were sufficient resources. He was asked in cross examination whether he told those from BBHUK that it would be hard to get regulatory approval for the recycling shower. His answer was:

> *I don't think we put it in terms of it would be very hard to overcome, but I think we made it clear that it was something that had to be overcome.*

There was also a discussion as to the importance of the product being first to market in order to maximise profitability. It was agreed that Cintep AU would look at ways of saving time in the development plan if greater resources were to be made available.

97. Mr Gee recalls that, at the meeting, Mr Riley and Mr Hance were excited by the opportunity that the recycling shower represented. He was aware that they had not been involved in this type of research and development project before. He says that he made it clear to Mr Hance and Mr Riley that there were still "unknowns" and distinctly recalls explaining to them that there were challenges to address in relation to standards and approvals for which there were plans in place.
98. It was suggested to Mr Gee in cross-examination that, at this meeting, Messrs Hance and Riley made it clear that they were only interested in investing in a product that could be put into production relatively quickly. Mr Gee did not accept this. He insisted that it was made clear at the meeting that there was research and development work that had to be done and that the work had been planned out.
99. When he was asked about the meeting in cross-examination, Mr Hance said that, whilst he recalled that it had been what he called a positive meeting, he could not recall the finer detail of the conversation.
100. Mr Riley recalls only slightly more detail. He said that he expressed a wish that the product should be brought to the market within a year and was told that this was impossible. He was "not sure" whether Messrs Brewin and Gee spoke about the regulatory position. He accepted that there was a "lot of discussion" about hydro-cyclones and pasteurisation but he had no recollection, he said, of Mr Brewin telling him that there was always a technical risk in this project. He said that Messrs Brewin and Gee said that they would go away and work on a revised timeline for the product development.
101. The discussions are reflected in the emails sent within the Cintep AU team, Mr Brewin, Mr Christy, Mr Conway-Lamb and Mr Formica, the next day. Mr Gee wrote:

> *Patrick, and to a lesser extent Dave, are worried that we will not be to market first. He challenged us strongly to reduce the time to market. He could not understand why it will take until the end of next year to launch the product if we have a working prototype. I didn't do a great job explaining why it will take the time we are predicting. We agreed to consider options to speed up the project. They agreed that we must not compromise product quality but accepted that product cost might gave to flex. Patrick acknowledged that more funding might be required in the future and so there is a possibility that we could suggest a larger, more expensive, technical team.*

In response Mr Brewin provided his thoughts. He said:

> *As Chris said we need to produce a plan to condense the time to market, even if this ends up optimistic we should shoot for the shortest route. They made it clear that they believe we will need another funding round (and that this would be ok) but are concerned about the time to market and production cost, more than investment cost. Therefore, cost overruns will be more acceptable than time overruns, hence we should take a well-resourced approach, where there is the opportunity to save time. Having said that I feel it would definitely be a mistake to ask for more investment at this stage…They are keen to get a prototype in their new facility, this could be helpful but we need to be careful that it is useful (testing in UK conditions of a pre-production unit) and does not become a distraction: testing earlier unreliable prototypes and needing to provide technical support from Aus - cheaper and faster to send the test rig to*

Brisbane.

102. This concern that the product be brought to market as soon as possible was reflected in an email exchange between Mr Hance and Mr Christy on 8th July 2014. Mr Hance wrote:

> ***Pat and I are both concerned on the time line of bringing this to market and I want to discuss with you how we accelerate the process.***

In response Mr Christy wrote:

> ***That message was fed back loud and clear from Chris and Pete and we spent this morning here looking at the plan and looking for opportunities to take time out. One big opportunity is to speed things up now - the sooner we start, the sooner we finish. We had worked on a "kick off" date of 1st October based on moving into a larger building then and adding people from then on. We have changed that to look at adding a second building instead (there are 6 brand new empty buildings on this business park), which we could do almost immediately funds arrive and could then start building the team now. One of the tasks that has taken time in the last month was for the 2 Chris' to work out the skill sets and numbers of people that they need to add. That's now done and we could start advertising for people on Monday.***

In response Mr Hance wrote:

> *That's more like it - we can build this together on Hancey Time. It's the only way so we get in the market as soon as we can, but in total control*

"Hancey Time" is a reference to Mr Hance's constant desire to get things done as soon as possible, and was understood by everyone as such.

103. In further response to this, Mr Gee sent an email on 8th July addressed to Mr Hance and Mr Riley in which he stated:

> *The message on timescales has been taken on board and we are developing a "stretch" plan which will bring the product to market faster. We will get back to you soon.*

The reference to a "stretch plan" is to a shorter timetable which could be achieved "at a stretch". This is the timetable envisaged in Mr Brewin's email dated 7th July.

104. Following a further conversation between Mr Hance and Mr Christy on 9th July, under cover of an email dated 10th July 2014 sent to Mr Riley and copied to Mr Christy, Mr Brewin sent what he described as a "Technical Development Plan" in the form of a GANTT Chart. In the email Mr Brewin stated:

> *As discussed earlier have spent some time this week with Chris Conway Lamb and Chris Gee interrogating the project plan for getting from where the technology is to production. I believe the attached is a realistic achievable plan. The key dates are Feb 2015 when the Pre Production Prototype will be complete, these can be supplied for use as demonstrators in the UK and November 2015 when the first product should arrive in the UK.*

An examination of the GANTT Chart shows the following key dates: (i) the first tranche of funding is provided on 1st August 2014; (ii) the recruitment of a technical team continues until early December 2014; (iii) what is described as "Product Technical Development" continues until May 2015; (iv) the provision of the "P2 pre-production prototype" (designed for manufacture) is by 7th May 2015; (v) the period for "third party approvals" commences in late July 2014 and ends in August 2015; (vi) the "WRAS certificate" is shown as being granted in August 2015; (vii) the final product is shown as being available from 3rd November 2015.

105. In his evidence Mr Brewin stated that he was clear from his discussions with Mr Riley

that the latter was aware that the revised development plan was "aggressive" and that no outcome could be guaranteed. He described the Development Plan as "the best possible realistic achievable plan".

106. A few hours prior to that email being sent by Mr Brewin, the same GANTT chart had been sent as an attachment to an email sent by Mr Gee to Mr Conway-Lamb and copied to Mr Christy and Mr Brewin. In that email Mr Gee has stated as follows:

> *Put simply it is taking a month to start to mobilise the bigger team, 10 months to design the product and 6 months to ramp up for manufacture with some significant concurrency between each set of activities. The time required in design is because we do not have a release candidate that works properly yet and we need to investigate solutions to the current design deficiencies i.e. there is some innovation and clever thinking required on the critical path.*
> *I have these concerns: -*
> *• I still fear that the plan will not be accepted by the investors. It's basically what I told them last week when we included an early adopter launch in December 2015. The back end of the project is now so compressed it makes no sense to add this back into the plan.*
> *• We need to lay onto our plan the launch timetable we received from Crosswater and make sure we are able to deliver to them what they need, (images, prototypes) at the appropriate times.*
> *• There is now no field trial. This is a significant risk. They could be reintroduced after Trial build 1 but probably they will not be up and going until very close to launch.*
> *If we are to meet these timescales we need to consider different approaches.*

107. BBHUK place particular emphasis on these emails and in the GANTT chart attached to them. Mr Brewin accepted in cross-examination that Mr Gee's email painted a different picture to that in his own email to Mr Riley.

108. On 23rd July 2014, and in preparation for the visit by Mr Hance and Mr Riley to the Cintep AU premises in Brisbane, Mr Christy sent six separate documents as attachments to separate emails. In the first of these emails he stated as follows:

> *In order for us to meet the development plan we have already started recruitment and have identified potential additional buildings and would like to receive the first tranche of funding by 10th August if possible.*
> *We can go through the details of the forecasts when you are here - the model we use for forecasting is flexible and will let us run "what if" scenarios. If there are specific scenarios that you would like us to model before you get here (additional countries, higher/lower volumes etc., delays in getting to market) let me know what they are and I will set them up before you get here.*

109. One of the documents sent by Mr Christy as an attachment was one entitled "Sales Opportunity Document". This was 16 pages long and included the following passage under the heading "Executive Summary":

> *CINTEP has compiled a 3 year plan, of which the first year should be adopted as the forecast for the next 12 months. In the 3 year forecast, sales start in the UK & Australia in December 2015.*
>
> *Breakeven sales quantities are 211 showers per month when first product is available in December 2015.*

Another of the documents was the "Cintep Technical Development Plan" which was 10 pages long. This contained the following passages:

(i) Under the heading "Executive Summary" the following was stated:

The planned development schedule considers that funds are available by mid-August 2014 in order to begin building the technical team in September 2014. It is projected that the product will first be available at the start of February 2016 as a special limited release for early adopters and then as a general release in April 2016.

(ii) The table beside that passage set out a total cost of technical development of AU$3,288,000 which included AU$203,000 as "Costs for gaining approvals" and AU$565,000 as "Prototyping costs including water testing". This latter figure was broken down in section 3 to comprise "$468k on prototyping and $97k on independent microbiology and water testing"

(iii) The GANTT Chart sent by Mr Brewin on 10th July is in section 2 as "Schedule".

(iv) In section 5, under the heading "Assumptions and Risks" there was a table with four columns and four rows. The first column set out the category of risk; the second column set out the "Assumption"; the third column was headed "Risk" whilst the fourth column was headed "Risk Mitigating Factors". There are two relevant rows:

a. Under the Risk heading "Water Quality" the Assumption was stated to be:

The system proposed in the patent is capable of producing water at the showerhead of a quality which the company is confident will be safe in all reasonable conditions.

The Risk was stated to be:

The proposed system does not produce water at the showerhead of an acceptable quality under all conditions. Delays are encountered as the system is reviewed and, if necessary, revised.

The Risk Mitigating Factor was:

Testing laboratories will be engaged at an early stage to provide independent assessment of the system

b. Under the Risk heading "Regulatory" the Assumption was stated to be:

Regulatory approvals can be gained in the expected timeframes.

The Risk was stated to be:

Product meets opposition from regulators. Regulators do not work efficiently and delays are introduced which are beyond the company's control.

The Risk Mitigating Factor was:

Technical development strategy will place an emphasis on solutions which provide the least contentious case for compliance with existing standards. Engage experienced compliance engineers early in the development process. Start discussions with regulators early in the development process.

110. The Petitioners rely on this document and its contents.

111. Mr Hance accepted in cross examination that he had read "most of" these documents although he said that he had skim-read some of them. He also sent five out of the six documents (including the two referred to above) to Mr Porter on 9th August 2014.

112. In cross-examination, Mr Porter accepted that, reading these documents, a number of things were clear. One would assume, he accepted, that there was not, at that time, a fully functioning pre-production prototype of the recycling shower ready to go into mass production. He also accepted that it was clear that the plan in relation to compliance with water regulations was for Cintep AU to hire a specialist and open dialogue with

WRAS but that this had not yet occurred.

113. In an email sent to Mr Christy later that day, Mr Hance wrote:

> *This is extremely useful.*
> *Initially as your document suggests the main route to market will be via specification, and in many instances there can be an 18-24 month period before work starts*
> *As we have discussed before, a working sample/prototype needs to be a priority for our new UK showroom-so lets discuss this next week*

This would, to my mind, indicate that Mr Hance thought that at that time there was not yet such a prototype.

114. On 30th July 2014, Mr Hance, Mr Riley and Mr de Beer visited the Cintep AU premises in Brisbane. The visit was planned to last two days but in fact the visitors only stayed for approximately three hours on the morning of the first day. During the visit they saw the four prototypes and took a shower in the latest one, Alpha 4. They saw the shower workings laid out on a flat surface and Mr Dyhrberg controlling the shower from a laptop. Mr Riley says that he did not realise that this was the case. Mr Hance says that he tasted some of the water that was coming from the shower head. He recalls that it did not taste pleasant but was rather "soapy". Mr Riley also took a sip. The Cintep AU team also explained that they did not yet have the correct filter.

115. Mr Christy said that it was pointed out to the visitors that the current prototype required two engineers to control it via a laptop computer and that development was needed to turn it into a packaged, reliable and safe product. Other than regulatory water quality challenges, it was also pointed out that a rushed product launch could cause other safety issues. In cross-examination, it was put to him that he did not in fact say this. He insisted that he did. I accept his evidence in this regard not least because it is consistent with the contemporaneous documents.

116. Perhaps indicative is what Mr Christy says was Mr Riley's reaction when faced with the proposed two-day programme prepared by the Cintep AU team for the visitors. Mr Riley dismissed it as "bullshit" and the BBHUK team returned to their hotel after three hours leaving Mr Christy to prepare a breakdown of the AU$5 million BBHUK investment into five tranches of AU$1 million each.

117. Mr Christy says that on 31st July 2014 he had a series of phone calls with Mr Hance and met with Mr Hance and Mr Riley. He says that he again tried to impress upon them the nature and extent of the research and development work that had still to be undertaken.

118. The clear impression one gets is of the Cintep AU team trying to point out to the BBHUK team the potential problems of bringing the product to market but struggling to make the BBHUK team understand this in the face of the latter's obsession with having a saleable product as soon as possible.

119. This is reflected in a chain of emails sent by the Cintep AU team to each other. In one of these, sent by Mr Christy to Mr Conway-Lamb, Mr Brewin and Mr Gee, he says as follows:

> *Short answer is they are stuck on not understanding the R&D. They are worried they will put the money in with no guarantee of outcome, they are concerned that in a year we may not have moved forward at all and it becomes a bottomless pit.*
> *They are convinced that finding a manufacturer and outsourcing the design work to them with a guaranteed set of delivery terms, probably in exchange for equity, is the way to go.*
> *They have said that if we insist on our plan, they are walking.*
> *They have suggested a 2 month period where we go and look at factories and agree on the one to work with. Then, once they have done that, they will invest.*

I'm planning on going back to see them this afternoon if they are amenable to it.

"They" can only be a reference to Messrs Hance, Riley and de Beer. In response Mr Conway-Lamb wrote this:

> ***…It's not all doom and gloom but it's certainly not the outcome we'd been hoping for! As Nick mentioned, Crosswater seem genuinely convinced that partnering with a factory will basically solve all our problems (actually their problems because they think it's all too risky at the moment) since that factory ought to be able to run with it from here - that's basically their stance! Specifically, they don't think we can get to the P1 prototype stage by ourselves.***
> ***I think we still have a chance with Crosswater if we find a compromise, i.e. make some factory visits right now as they are asking, but mix that up a bit with some of our own hires and possibly some other engineering consultancy…***
> ***To be blunt, I think that suggestion indicates that they still fundamentally don't get what our product is or the R&D it requires.***

120. There is another email chain dated 2nd and 3rd August 2014 sent by the Cintep AU team to each other. In an email dated 3rd August 2014 sent by Mr Conway-Lamb to Mr Christy and Mr Brewin, Mr Conway-Lamb has added comments to an earlier email dated 2nd August from Mr Christy. The email reads as in part as follows (with the comments added by Mr Conway-Lamb are underlined):

> *If I break down what happened last week, it was the following:*
>
> - *They like the product a lot*
> - *They liked the shower experience a lot (they were very impressed with the flow, feel and water quality)*
> - *They think that we have a fundamentally sound engineering team. <u>They raised concerns about Matt & Gareth (though not based on any actual technical work!) but I think we leapt to their defence quickly and strongly enough for CWH to realise these guys are important.</u>*
> - *They don't like the plan to develop the product. <u>Namely, they question our ability to grow quickly enough into a team that can tackle it properly.</u>*
> - *<u>I would add that they never really demonstrated an understanding of the R&D nature of this product. I think this is our biggest risk with securing them as investors</u>.*
>
> *They don't like the development plan for two reasons:*
>
> *1.They think it has too much risk in the following areas:*
>
> - *Risk that we can't ramp up fast enough (can't find the right people, in the right place at the right time)*
> - *Risk that the project over runs because of delays in finding people and inevitable HR issues from a bigger team. <u>Again, I would add that the biggest ACTUAL risks are two-fold; recruitment and uncertainty inherent in R&D (including standards approvals). They are right to identify the former, but latter is just as big a risk and only reduces somewhat (if at all) with their idea to outsource more of it.</u>*

- *Risk that we end up with obsolete people and stuff at the end of the project. <u>And I don't think this is very relevant as it's still cheaper to deal with those issues if you have them internally than to pay someone external to remove them from the get-go</u>.*

2. They think it is going to take too long because we are obsessed with getting a perfect product.

In retrospect we all agree that they are definitely correct on point 1 (too risky) <u>(see above)</u> but incorrect on point 2 (desire for perfection), we aren't aiming for perfect, we are aiming for acceptable reliability, economical filter life and safety that we can prove is reliable.

121. Again, the clear impression one gets is that the Cintep AU team, whilst keen to secure the investment, were trying very hard to impress on those from BBHUK that this was still a research and development project with no guaranteed outcome. The BBHUK team were, on the other hand, keen to bring the product to market as soon as possible. BBHUK were proposing that the Development Plan timeline could be shortened by outsourcing certain aspects of the process. This was doubted by both Mr Conway-Lamb and Mr Brewin. Nonetheless, and despite these reservations, Cintep AU did some research with a view to identifying potential outsourcing manufacturers and R&D consultants.
122. It also appears that, at around this time, and due to the evident differences in approach, there were also further negotiations with a view to BBHUK becoming a distributor, as originally envisaged, rather than an investor.
123. On 4th August 2014 Mr Brewin had a telephone call with Mr Riley. The latter said his main concern was the ability of the Cintep AU team to deliver a product quickly. He was also concerned about the lack of oversight which BBHUK would have if the development of the product remained in Australia. It was concluded that, in order to assuage Mr Riley's concerns, it would be better if development of the product was relocated to the UK. However Mr Brewin pointed out that such a move would inevitably cause disruption and delay to the product development timetable. Mr Riley was content with any further delay provided product development was relocated. There was discussion, Mr Brewin said, about a possible three-year development timetable. In cross-examination he accepted that this was the "worst case scenario".
124. There followed a phone call between Mr Christy and Mr Riley on 5th August 2014. An agreement in principle for BBHUK to invest in the recycling shower was reached. This is reflected in an email sent by Mr Riley to Mr Hance and Mr de Beer on that date. It reads:

Just finished a call with Nick. This is where we are up to. He seems positive, and we will chat again tomorrow. I think he will ask for more - the answer is no!

P

<u>BL Gibraltar</u>

Pay £60,000 for any IP that Cintep has

Settled via £50,000 repayment of loan to PR plus £10,000 to Cintep

NC to sign over his IP rights on patent for heat exchanger

PB to sign over his IP rights on patent for vortex

BBL Gibraltar to confirm to NC & PB that if there is no product being manufactured by 31.12.2017 that they can have their IP back on payment of £1 each

Licence to NewCo to use patents to develop the product, with the right to rescind the licence if no product has been manufactured by 31.12.2017

Crosswater

Set up NewCo
Pay £40,000 to Cintep for working model plus spares delivered to CW
Pay NC, Chris & Matt to move to the UK (PR to take tax advice here)
Agree salaries & bonuses (based on milestones) for NC, C & M
Set aside an area for NewCo staff to work
build a test area for the product development
NewCo to have 5 board members NC, PB, PR, DH & NdB
CW to do accounting & marketing & help with sales
Fund all staff and product development
33.33% shareholdings for NC, PB, C & M, Tony, if not employed for any reason have to sell shares back (no sales = nil value)

125. Following this, Mr Christy produced a document headed "Cintep/BBL New Proposal at 5th August 2014". He sent this to Mr Brewin. Mr Brewin amended it and then, in an email dated 5th August 2014, sent the amended document to Mr Riley with a copy to Mr Christy. In the email he said:

Hi Patrick,
The original is based on Nick's notes from his call with you, the tracked changes are our thoughts. Would be grateful if you could send us a tracked changes copy with your comments before the call.
Look forward to speaking at 10.30am (SA Time), Nick will arrange the Skype conference call.

The document itself, as amended by Mr Brewin, contained the following passages:

The new proposal is:

1. *Bathroom brands Limited {BBL) Gibraltar buys the two patents for GBP60k (this should be another NewcoGIB and ownership should mirror NewcoUK) or we should set up a NewcoGroup company which owns 100% of both and shares are issued in NewcoGroup. New IP generated should be assigned to NewcoGIB.*

Offset against the GBP50k loan

GBPl0k to CINTEP

2. *BBL licenses the patents to newco (needs to be for the patents life and NewcoGIB undertakes to fund all maintenance and defence costs for first 3 years.*

**If first product is delivered in 2015 royalty is 3%*

**If first product is delivered in 2016 royalty is 5%*

*_*If first product is delivered in 2017 royalty is 7%*
Seems odd to mix tax minimisation strategy with incentives. Incentives should be controlled by remuneration of execs?
**If no product is launched by Newco UK by 31 December 2017 patents can be repurchased by NC and PB from BBL Gibraltar for GBPl each or if .BBL fails invest fa minimum of £3M] over 18 months.*

3. Newco UK formed and buys existing prototypes from CINTEP for GBP40k, which is shipped to Dartford - NC To confirm outstanding cost to wind up CINTEP will be £50k (£40+10k).
4. Newco UK employs NC, CCL, MD and GC for sterling equivalents of their Australian salaries in first year, subject to annual review from 1 January 2015
5. Board of Newco to be PR, DH, NdB, NC, PB OK
6. Relocation packages made available to speed transition TBC
7. Dedicated area built above transport area in CW facility in Dartford, allocated to CINTEP {approximate area 200m2}. OK
8. HR, Admin, Finance, Marketing support all provided by Crosswater - OK FoC Y 1-3?
9. Equity to be distributed 1/3rd "CINTEP" 2/3rds "Bathroom Brands"
10. If BBL fund tooling and Working capital they keep 2/3rds, if factory absorbs tooling and working cap, they get half of the CW holding, then
    - CINTEP 1/3
    - cw 1/3
    - Factory 1/3...

Put option requested for NC in 2 circumstances:

1. NC dismissed by board as CEO and relationship has deteriorated; NC can exercise option for shareholding to be bought back for the agreed valuation below. This removes the potential for a significant dissenting shareholder (I'm not likely to be difficult but if the relationship had soured and I hadn't performed, I wouldn't want to hang around and I'm pretty certain they wouldn't want me hanging around) It lets the business move on and frees up equity to be used to incentivise a replacement. It also guarantees NC a minimum return for 5-7 years input, investment of all savings and 3 years with no salary at all.

2. NC or immediate family member (partner or step daughter) diagnosed with a terminal illness.

126. This formed the basis of the Heads of Terms that were eventually signed on 8th August 2014. There are two points to note. The first is that there appears to have been express discussion about the dates on which "first product is delivered" with different royalty payments to be made depending on whether this was in 2015, 2016 or 2017. There was a buy-back provision relating to the re-purchase of the patents if the new product was not launched by 31st December 2017. The second point is that there also appears to have been a discussion around the possibility of Mr Christy leaving the Board.

The Heads of Terms and formation of the Company

127. Heads of Terms were signed on 8th August 2014. They are on "Crosswater Holdings UK Ltd" headed paper. They were drawn up by Mr Riley and signed by him and Mr Hance for BBHUK and by Mr Brewin on behalf of Cintep AU.

128. They contain the following terms:

The new proposal is:

1. No Newco Jersey - NewCo UK now does everything (see pt 4).

2. Newco UK acquires all IP including Know How and Trade Marks from CINTEP, for a payment of GBP 60k.
GBP50K Loan repaid to Patrick Riley by CINTEP
GBP10k to remain in CINTEP to service winding up costs.
3. Newco UK will fund all maintenance costs for the period it holds IP and all actions necessary will be taken by all parties to ensure the company benefits from Patent Box legislation.
4. NewCo UK is created with shareholdings in proportion to the Equity Table 1 below. Initial equity spilt to be Crosswater 75.5% and 24.5% across existing CINTEP shareholders, with a non EMI options scheme to be created for NewCo UK employees including ***PB.***
Options to be issued as set out in Table 1, exercisable for 0.0001 p/share at any time after 2 years, with a 7 year window to exercise. A sale or flotation of the business to be treated as a crystallising event allowing immediate exercise of options.
Shareholders agreement and/or memorandum and articles of association to require 85% agreement for the passing of special resolutions
5. Newco UK buys existing prototypes and other development equipment, software licenses and other assets from CINTEP for GBP52k and makes a loan of GBP65k to enable an orderly transition of staff to the UK. It is understood that when Cintep is wound up Newco UK will be the last creditor to be made good and a high proportion of this loan will be need to be written off, this risk is part of the asset sale price and is the consideration for improvements, know-how and any other IP generated up to the completion of the winding up of Cintep which will also be transferred to Newco UK.
6. NewCo UK to develop the product.
7. If no product is launched by Newco UK by 31 December 2017 patents can be repurchased by NC and PB from Newco UK for GBP1 each.
8. CW will invest a minimum of £1M into NewCo UK in the first 12 months from signing this agreement and will continue to fund Newco UK responsibly above this threshold to enable it to get the first product to market and achieve breakeven within 3 years.
Any amount spent on modifications to CW building for CINTEP to count towards this amount as will relocation and salary expenses of transferred staff and Prototype Purchase in 5 above.
If equity has to be sold/ given away to get Newco UK to break even it comes out of the Crosswater share. Provisionally it is expected that the Factory will gain 1/3 equity from Crosswater shareholding.
9. Newco UK employs NC, CCL. MD and GC for the greater of the£ equivalent to their Australian salaries or the market rate in the UK.
10. Board of Newco UK to be PR, OH, NdB, NC, PB. NC to be Managing Director. [Quorum of 4?)
11. Relocation packages made available to speed transition TBC following discussion with NC, CCL. MD and GC.
12. Dedicated area built above transport area in CW facility in Dartford, allocated to CINTEP (very approximate area 200m2).
13. H R, Admin, Finance, Marketing support all provided by Crosswater -There will be an annual charge, but CW will ***waive*** *this for 3 years if the service can be provided without adding extra staff.*
14. Once the shower is developed Newco UK will contract with distributors/manufacturers and sell all the products - showers filters new

products via the distributor in the UK, and will contract with the distributor/manufacturers and sell all the products - showers, filters, new products via distributors for sales outside the UK

There then followed a table setting out the proposed shareholdings in the new company followed by this:

Founders anti-dilution provisions:

NC cannot be diluted below 10%

PB cannot be diluted below 5%

If NC dismissed by Board 3-6 months from First Product Launch then he will have the option to sell his entire shareholding to BBL for £1M.

129. To unpack this a little, the structure of the deal reached was as follows:

(i) The future business and product development of the recycling shower would be conducted through a new UK company set up for that purpose.

(ii) The new company would buy the prototypes, intellectual property rights, know-how and any trademarks from Cintep AU which was to be wound up.

(iii) BBHUK was to make an immediate payment to Cintep AU which was to be used as follows: £60,000 to purchase the equipment and rights; £50,000 to repay Mr Riley's loan; £10,000 towards the cost of winding up Cintep AU.

(iv) The Australian staff were to transfer to the UK company and relocate to the UK.

(v) The shareholding in the new UK company was to be as follows: 75.5% to BBHUK with the remainder to the existing Cintep AU shareholders including Mr Christy and Mr Brewin whose shareholding could never be diluted to less than 15%.

(vi) There was to be a Shareholders Agreement to which BBHUK would be a party.

(vii) Mr Christy and Mr Brewin were to be granted options to allow them to acquire further shares.

(viii) The Shareholders Agreement and Articles of Association of the new UK company were to provide that no special resolution could be passed unless 85% of the shareholders approved it.

(ix) The Board of the new UK company was to consist of Mr Christy, Mr Brewin, Mr Hance Mr Riley and Mr De Beer.

(x) Mr Christy was to be Managing Director of the new UK company.

(xi) BBHUK was to invest a minimum of £1 million into the new UK company to fund the development of the recycling shower within the first year following the date of the agreement.

(xii) BBHUK was, thereafter, to continue to put funds into the new UK company "to enable it to get the first product to market and achieve break even within 3 years".

(xiii) If Mr Christy was dismissed from the Board of the new company "3-6 months from First Product Launch" then he could compel BBHUK to buy his shares for £1 million.

(xiv) There was a longstop date, 31st December 2017, by which date, if the recycling shower had not been launched onto the market, Mr Christy and Mr Brewin were to be able to purchase back the right to any intellectual property for the price of £1.

130. In answers to questions in cross-examination, Mr Hance accepted that, from the date of the Heads of Terms: BBHUK was effectively in a joint venture with the Petitioners; they would have to act in good faith towards each other; there would be a free flow of information between the parties; all of Messrs Christy, Brewin, Riley and de Beer as well

as himself would be involved in the management of the business. In his witness statement Mr Riley asserted that there was a joint venture and that he treated Mr Christy "as a partner".

131. It is significant to my mind that, whereas the agreement contained a specific longstop date by which the recycling shower was to have been launched onto the market, there was no target date for the product launch apart from that. Indeed Mr Hance accepted in cross-examination that no launch date for the product was ever contractually stipulated. When pushed, Mr Riley stated that the omission of any such launch date was, with hindsight, "an error in the contract". However, it was he who had drafted the terms. I have no doubt that, if the prospective product launch date was ever as important as BBHUK now says it was, then Mr Riley was well capable of inserting a term to that effect and indeed would have done so.

132. Mr Porter formally started working for BBHUK on 11th August 2014. Thus, as he accepted, at all times his job was to have the best interests of BBHUK in mind. He was not, however, aware of the exact contractual relations between BBHUK and the Petitioners or Cintep AU. He also accepted that there was a lack of clarity as to his exact role vis-vis the Company and Cintep AU.

133. On 9th August 2014 Mr Hance had sent to Mr Porter copies of five of the six documents which had been sent to him on 23rd July by Mr Christy. The documents sent by Mr Hance included both the "Technical Development Plan" and the "Sales Opportunities Document". Mr Porter accepted that, if one read these documents, a number of things were clear:

   a. One would not assume that Cintep AU had, at that time, a fully functioning pre-production prototype ready to go into mass-market production.

   b. Cintep AU had a plan with regards to water regulation compliance. This was to: hire a specialist; collect the necessary information; and then open a dialogue with WRAS.

   c. However these steps had not yet been undertaken: the necessary dialogue had not started.

134. On 12th August 2014 Mr Porter sent an email to Mr Gee announcing his employment with BBHUK. In that email he made some comments about and sought some information on the recycling shower. He stated as follows:

> *As you can imagine I've got a lot of questions so it might be an idea if you just give me a broad stroke update and we can start batting stuff about. I've seen a project plan which is very aggressive and seems a bit out of sequence -DFM after tooling sign off? Prototyping will take 4 weeks at least. I think there's about another 3 months to add to that plan and it would still be aggressive and without contingency or field trials. I think the estimate of the production cost is off in places but I'd need to see the part drawings or specs. Set up and tooling costs seem in the right ball park.*
> *A few questions to kick off;*
> *Is there a working prototype and test data?*
> *What's the latest on production site?*
> *Has anyone done a DFMEA to drive the DVT?*
> *Have you had much out of WRAS yet?*

Mr Porter was thus apparently well aware that the proposed project timetable was optimistic and was asking about it. It is BBHUK's case that there was no adequate response to this request for information from Mr Gee or indeed from anyone else at Cintep AU. The actual response from Mr Gee was in an email dated 13th August 2014 in which he stated:

> *Great to hear you have started at Crosswater.*

I'm on holiday at the moment so I'd prefer to contact you in a couple of weeks if you don't mind.
I have added Nick Christy (CEO of CINTEP), to the circulation of this note because I know he is interested in making contact. He is looking forward to meeting you in September when he visits the UK.

135. The Company was incorporated on 12th August 2014.

136. The Articles of Association include the following provisions:

(i) Article 18(d):

For the purposes of passing a special resolution, holders of more than 85% (by number) of shares eligible to vote must vote in favour of the resolution for it to be passed.

(ii) Article 28:

Any Notice of a meeting of Directors (either verbally or written) shall be given to all the Directors and shall include the business to be conducted and if any business conducted which has not been notified to any Director who was absent then the decision in respect of and such business shall not be valid unless the subsequent vote of the absent Director has been counted except where the requisite quorum was not present. This shall also apply where a Director has waived any notice to a meeting but has not been notified of the business to be conducted at the meeting of Directors.

(iii) Article 34:

Where any interest of a Director arises which may reasonably give rise to a conflict with the interests of the Company. The Directors may authorise any such matter or arrangement, if not previously authorised, (where the Director would otherwise infringe the duty of a Director under Section 175 of the Companies Act 2006), to avoid any conflict in which the Director has, or could have, a direct or indirect interest that conflicts or possibly may conflict with the interests of the Company. Where any such matter or arrangement is authorised by the Directors under this Article, the Director who is subject to a conflict of interest may only be counted as a part of the quorum of the meeting, where there are less than three Directors appointed to the Company or subject to article 14(6) and article 14(7) of the Model Articles.

137. On 20th August 2014, the Company, Mr Brewin and Mr Christy entered into the Shareholders' Agreement. It was signed by Mr Hance and Mr De Beer on behalf of the Company. This agreement contained the following terms:

(i) In clause 2 under the heading "Business of the Company" it provided as follows:
The business of the Company shall be the acquisition, development and commercialisation of technologies, including such technologies relating or ancillary to clean technology.

(ii) In clause 3.1 under the heading "Conduct of the Business" it provided as follows:
Each of the Shareholders agrees to exercise its, his or her respective rights hereunder and as a Member of the Company (insofar as it, he or she lawfully can) so as to ensure that:-

3.1.1 the Company performs and complies with the terms and conditions under this Agreement and complies with the restrictions imposed upon it under the Constitution; and

3.1.2 the Business is conducted in accordance with sound and good business practice and the highest ethical standards; and

3.1.3 the Memorandum & Articles of Association of the Company are amended to set the requirements for passing a Special Resolution as being more than 85% of votes cast;

3.1.4

(iii) In clause 3.2 under the heading "PROMOTION OF THE BUSINESS" the following was provided:

The Shareholders acknowledge and agree that unless and until the Shareholders by special resolution agree otherwise, the business of the Company shall be confined to the Business.

Subject to the provisions of this Agreement, the Shareholders understand and agree that the Company shall use all reasonable and proper means to maintain, improve and extend the Business.

(iv) In clause 3.5, under the heading "Composition of the Board" it was provided as follows:

3.5.1 The board of directors shall comprise three members nominated by Crosswater and Peter Brewin and Nick Christy each so long as they hold shares in the Company.

3.5.2 The managing director will be Nick Christy so long as he is a member of the board;

(v) Clause 4, under the heading "Finance for the Company", provided as follows:

It is anticipated that Crosswater will provide finance to the Company of at least £1 million over the twelve months from the date hereof and that, in return therefore it will be issued Shares of the Company representing not less than 75% of the total issued share capital of the Company all pursuant to the terms of Crosswater's Subscription Agreement with the Company. It is further anticipated that Crosswater will enter into an Agreement of Adherence.

(vi) Clause 5.2, under the heading "Deed of Adherence for New Shareholders" provided as follows:

In the event any Shares are issued and allotted to any party who is not already a Shareholder, it shall be a condition of the terms of the subscription that the party subscribing for Shares pursuant to this Clause 5 shall enter into an Agreement of Adherence to this Shareholders' Agreement

138. The clear intent evidenced by this document, consistently with the Letter of Subscription described below, was that BBHUK would enter into a separate agreement with the Company and with the Petitioners, referred to as a Deed of Adherence, to comply with the terms of this Shareholders' Agreement.

139. Pursuant to the terms of a "Subscription Letter" dated 22nd August 2014, BBHUK subscribed for shares in the Company. By the terms of the letter, which was signed by Mr Hance on behalf of BBHUK, it paid the Company some £112,000, and agreed, inter alia as follows:

1. We will make further contributions into the Company of not less than GBP1,000,000 between the date of this Subscription Letter and 8 August 2015 of which the sum of GBP65,000 shall be paid contemporaneously with the subscription price for the Shares, with the intention such sum shall be on lent to CINTEP Pty Limited, an Australian company, to assist it in its orderly winding up.

2. After 8 August 2015 we will pay the cost of getting the Product to manufacture, any such costs to be provided by us either by way of further contribution to capital or by way of additional share capital or a combination of the two and will continue to fund the Company's business for a year following first manufacture of the Product, either by way of loan or guarantee or other means, as the Board of Directors of the Company shall determine. "Product" for these purposes means water recycling showers...

4. We undertake to provide the Company with human resource administration, finance and marketing support (together "Services Support") on the basis that the costs of providing Services Support will be without charge for the first three years following the date of this Agreement if the Services Support can be provided without

adding extra staff, subject thereto and after three years we will make an annual charge on a reasonable basis for the promotion of such services.

5. We will enter into the Shareholders' Agreement dated 20 August 2014 by way of Deed of

Adherence as soon as practicable following the allotment and issue of the Shares to us.

140. The Petitioners complain, and it is accepted, that BBHUK never entered into any such Deed of Adherence and never otherwise bound itself to the terms of the Shareholders' Agreement. This is despite chasing emails sent on 22nd and 26th August 2014 by Mr Christy to Mr Chaplin at BBHUK.

141. By an Asset Purchase Agreement dated 23 August 2014, made between the Company and Cintep AU, in return for a payment of £112,000 and an additional loan of £65,000, the former acquired from the latter "the Technology" and all the other assets of the latter. The "Technology" was defined as:

> *all know-how, patents, IP licenses, trademarks, designs or other intellectual property relating to the recycling of shower waste water owned, licensed or used by CINTEP and as are more particularly, but not exclusively, described in Schedule 2 hereto*

Clause 3.3 of this agreement provided as follows;

> *CINTEP shall arrange for shipment to Newco at its registered office of all prototypes models and other equipment used by CINTEP In connection with the Technology and the system for recycling shower waste water.*

Events following the agreements and leading up to Mr Porter's visit to Brisbane

142. Despite the clear terms of clause 3.3 of the Asset Purchase Agreement, it was subsequently agreed that the best course of action was not to ship the prototype straight to the UK but to keep it in Australia for a further few months, until after Christmas, to allow it to be worked on there. In an email dated 28th August 2014 Mr Christy explained to Mr Porter why this was so. He said:

> *If we send you the prototype we have, you can't run it without our guys (bad for you) and we don't have a system to work on here which slows us down (bad for us. If we make a second prototype identical to this one and ship that, you still have the issue that it's not easy to run at your end (bad for you) and we just got diverted doing something that isn't on the critical path (bad for us).*
>
> *The "best" decision is to do slightly more development to make the system run off the touchscreen, make the next prototype like that and install that in Dartford ASAP. That way we move forward on the critical path (good for everyone, you get a demonstration unit (good for you) and we still have a system that we can work on here whilst we transition to the UK (again, good that development doesn't stop). The extra development work involves more coding for the control system and some mechanical development, necessary so that the coding is part of the development process rather than just for demonstration. This is our current development priority so that Dartford gets a working unit ASAP.*
>
> *We are still in the process of working out when that will be and that's probably a decision we can reach in the UK when Chris and I are there in 2 weeks. Obviously if we get the Aqualisa guys on board and can bring them up to speed and involve them in it, that's probably the best way to do it and familiarise them with the system all at once.*

143. One of the stated reasons for the retention of the prototype in Australia was the fact that Mr Christy had, in early October 2014, arranged with the University of Queensland to carry

out a water quality testing programme at its facilities in December 2014 which programme would be paid for by the cosmetics company L'Oréal. As he explained in evidence, the money for this was coming from L'Oréal in Japan and thus the work could not be carried out in the UK.

144. This agreement to retain the prototype in Australia until after Christmas 2014 is further reflected in an email sent by Mr Christy to Mr Hance on 8th October 2014 and in the response to that from Mr Hance. In the first of these Mr Christy stated:

> *The decision we had made was to keep stuff here until just before Matt and Chris move to the UK.*

Mr Hance, in response, stated that the plan to keep the equipment in Australia "made sense" to him.

145. The reference to the "Aqualisa guys" in the email of 28th August 2014 is to three former Aqualisa employees known to him: Alex Hill, Phil Capon and Dean Hayden. In late August 2014, Mr Porter had, without reference to Mr Christy or Mr Brewin, approached these people with a view to them working for the Company. In his email to which the email set out above was a response, Mr Porter had referred to them:

> *I spoke to Dave about packages yesterday after I told him what the guys were looking for. His view is that we need to wow them a bit so he's happy to give them what they were looking for. This is what we agreed;*
> *Dean £50k*
> *Phil £60k*
> *Alex £60k*
> *And he was happy to go with 25 days holiday rather than 21 to match what they're on now.*

146. Whilst Mr Christy did not complain about the fact that these people were eventually employed by the Company, he did feel that it was wrong that Mr Porter, who was an employee of BBHUK and held no position at or on behalf of the Company, should have made the approach without reference to him, who was after all the Managing Director, or to Mr Gee. He made the point in an email to Mr Hance dated 28th August 2014 in which he said:

> *Can we have a chat tonight about the Aqualisa guys? I was cc'd on an email by Glenn overnight saying that he was planning to hire them as Crosswater employees and he would deal with the contracts.*
> *Which surprised me (and Chris).*
> *Chris needs to be the one who makes the hires and to make sure that they fit into the overall plan to market as fast as possible.*
> *They also need to be employed by CINTEP Development Limited to match up with the intent of the deal and to make the R&D claims maximised…*
> *We are keen to hire them and to do so quickly but Chris needs to drive it and we need to hire them into CDL.*

Mr Hance accepted these criticisms as he replied by email stating:

> *Totally agree Nick and to be honest I think Glenn has probably got his CWH hat on and is using that as a generic term for all of us - apologies.*
> *As you say it's ultimately your call - you - Nick.*

147. Mr Porter said that he saw his role as "technical oversight of the [recycling shower development] project" although there is no evidence that this was formally agreed by either Mr Christy or Mr Brewin. His increasing involvement is evidenced by a document, which he called a "brain dump", which he sent to Mr Conway-Lamb and Mr Christy under cover of an email sent on 28th August 2014. The "brain dump" document consisted of comments made and questions raised under 9 points. In point 3 "Compliance" he said this:

> *… WRAS approval will be more difficult as we have to show that we are returning the recycled water to potable standard or at least convince them that the water is safe. The taste test applied to potable water might be negotiable if we can show*

the water is safe and convince WRAS of the benefits of the shower. We need to start the conversation with WRAS as soon as possible. We will need to buy BSI standards and membership may be beneficial.

It is thus fairly clear that, at that stage, Mr Porter was both aware that there was a potential issue with ensuring that the recycling shower would be WRAS compliant (in that under the relevant regulations it was required to produce potable water) **and** that WRAS had not hitherto been approached. In cross-examination Mr Porter said that he expected that there was already some dialogue with WRAS ongoing at that time and that he expected Mr Conway-Lamb to respond to that effect. I'm afraid that I do not accept this evidence. It is directly contrary to the passage in his document set out above. If he had genuinely thought or expected that there was already dialogue between Cintep AU and WRAS, then he would have written something completely different or, at the very least, asked neutrally as to what stage the dialogue had reached. Further, as set out below, Mr Porter made no comment on receipt of Mr Brewin's email of 15th September 2014.

148. In point 6, under "Project Plan" Mr Porter said this:

There's some sequential errors and the plan is very aggressive. I would look at a launch into early adopters in March 2016 with a roll out to specifiers in June but without seeing a prototype it's hard to gauge exactly how much work is still required to get the design to production. There's no contingency and the project is likely to suffer a development hiatus between August and October.

Thus he was concerned that the development timetable set out in the documents sent to him by Mr Hance on 9th August 2014 (which provided, in GANTT chart in the "Technical Development Plan", for the product to be available on the market from November 2015) was too optimistic or "aggressive". He thought that a date for the product launch in March 2016 was more realistic.

149. There was a meeting in the BBHUK offices on 15th September 2014 attended by Mr Christy, Mr Brewin, Mr Hance, Mr Dyhrberg, Mr Conway-Lamb and Mr Porter. What was discussed is reflected in the email exchanges which followed.

150. Following the meeting, Mr Brewin sent a lengthy email to Messrs Christy, Dyhrberg, Conway-Lamb and Hance. He asked that it also be forwarded to Mr Porter. In it he said the following:

Was great to meet you Glen, it is clear your knowledge and experience in industry will be invaluable. I am glad we were all able to have a robust discussion upfront this morning as I felt this enabled the productive day that followed. Very important that Nick and Chris have the freedom to lead, it has to be their responsibility to make the final decision on hiring staff and capex spend within the budget, but at the same time you will support with your extensive industry experience, challenge their assumptions and report to the Crosswater board. Great work recruiting Phil, Alex and Dean from Aqualisa this is a fantastic head start.

Thus whilst congratulating Mr Porter for the recruitment of the three former Aqualisa employees, he was gently reminding him that Mr Christy and Mr Conway-Lamb were in charge of the project. This is perhaps consistent with what Mr Porter told me were his impressions at the meeting. He said that he thought that Mr Christy and Mr Conway-Lamb were protective of their roles and were not comfortable with any oversight from BBHUK.

151. Mr Brewin's email then continued with what he described as "my thoughts/notes" the third of which was as follows:

We need to clear on our approach to certification. WRAS and electrical approvals are mandatory and will be the on the critical path, we need to open a dialogue with WRAS as soon as possible to avoid delays, are there any others we have to have at launch? Potentially, other approvals we can run concurrently

and can if necessary be gained after launch. Given the international opportunity it seems we should aim for approvals in other countries (US, Aus as rapidly as possible following the UK launch) this will be important both to allow a rapid expansion but also as by opening the dialogue with other regulatory bodies it will give us the opportunity to potentially influence the standards for a recirculating shower which will be a barrier to competitor entrants. It may be that this is an area where we need to recruit someone to focus on it within the next 6 months.

On a fair reading of this, in particular the words referring to having to "open a dialogue with WRAS as soon as possible", one could not think that such a dialogue had already started. Mr Porter accepted this in cross examination. There is no evidence that Mr Porter expressed surprise at this statement at the time. He told me in evidence that he did not "engage with" the statement. Be that as it may, on a clear reading, this was Mr Brewin clearly stating that there had, as yet, been no engagement with WRAS.

152. Mr Christy responded to this in a chain email sent to the recipients of Mr Brewin's email as well as Mr Porter. Mr Christy said this:

Excellent summary. Thanks.

My only comment is that there is an additional +2 months in the timetable for P2 development as Glenn's experience is that this will take 6 months not 4. This means a total increase of 11 months from the old timeline:

+3 for UK move

+3 for approvals post production not pre.

+2 for P2 development as original estimate of 4 not realistic based on experience

+3 contingency as there are always unforeseen issues in a complex project

This is total of +11 months on the original date of 1st week of Nov15 now becomes end Sept 16

Thus it is clear that there had been a discussion at the meeting of the time likely to be required before the product might be ready for the market. Following Mr Porter's input, and at least partly because of the proposed move of product development to England, it had been agreed to extend the product development timetable by 11 months with a view to the product coming onto the market in September 2016 rather than the date of November 2015 set out in the previous GANTT chart. This is consistent with what Mr Brewin stated in evidence.

153. Mr Hance responded to these emails with one of his own on 16th September. He signalled his agreement by stating simply:

All points covered here. I am happy with the route forward.

154. This was in effect confirmed when, on 30th September 2014, in response to a request from Mr Hance for an "updated timeline", Mr Conway-Lamb sent to Mr Hance a further revised GANTT chart which showed the "Products Available" date as 29th September 2016.

155. In the meantime, Mr Powell (E), who in his emails is described as the "Group Finance Director" of BBHUK, was expressing concerns about exactly how BBHUK was going to meet its funding commitments to the Company. There is an email exchange dated 23rd September 2014 which (relevantly) starts with Mr Powell (E) saying this to Mr Hance:

Crazy-we have created a new Facilities Mgr position (which I still don't think will be full time 52 weeks a year) and now a £18.5k maintenance agreement! I'm thinking how are we going to create the money to fund Cintep!

Mr Hance responds:

Don't panic. Cintep will do great

Mr Powell (E) responded:

I know but we've got to find the cash to fund Cintep through it's development- that won't be easy.

Mr Hances reply is as follows:

Nick raised 30k yesterday and a promise of a probably 100k (euro) next year. Have a chat with him

"Nick" is a reference to Mr Christy. The "30k" is a reference to the L'Oréal funding.

156. It is thus clear that, at that time, Mr Powell (E) was expressing concerns about the ability of BBHUK to meet it funding commitments to the Company. Mr Hance, whilst it might appear that he was not as troubled at Mr Powell (E), did not seek specifically to reassure him about the financial position of either BBHUK or the group of which it was a member.

157. This concern at BBHUK's cash flow situation at this time could be said to be grounded in certain documents:

(f) The BBHUK Management Accounts or "Consolidated P&L Summary" for September 2014 which shows that actual sales (of £3,744,389) were below the budgeted figure (of £4,695,093) by £950,703. It also showed that the company had an overdraft (a negative figure for "cash at bank and in hand") of £1,931,565.

(g) The Management Accounts for October 2014, whilst it saw the actual sales (of £6,031,580) exceed the budgeted figure (£5,569,933) by £461,648, shows that the overdraft had increased by £1,026,222 to £2,957,786.

(h) The November 2014 equivalent show that sales at £5,555,985 which was £283,677 above budget and the overdraft down to £2,063,580.

(i) There is a document setting out the "Cash on Hand" figures for the calendar year up to November 2014 which shows that, as at November 2014, against a budgeted negative figure of £51,125, the actual figure was a negative one of £2,063,580.

Thus, whilst there is no suggestion that BBHUK was in any way insolvent, the Petitioners submit that this shows that it was having cash-flow difficulties in late 2014. This appears to be confirmed by another e-mail from Mr Powell (E) to, amongst others, Mr Hance and Mr Riley in which he enclosed the Management Accounts for October 2014 with the following comments:

Accounts attached for October. Doesn't make good reading with the sale costs offsetting the great sales performance, first month of Cintep costs…and lower sales in contracts.

I think when we have the post review of the sale, the profit impact, source of sale products included and costs incurred all need to be considered as we place the business under great strain but haven't had the upsides in profit you would expect.

158. It is suggested by the Petitioners that the fact that the BBHUK finances were "under great strain" at the time may be the reason, or one of the reasons, for what occurred subsequently. Mr Hance and Mr Riley were both questioned about this and both strongly denied that BBHUK was in any financial difficulty at all at the time or that this would have formed any part of the motivation for wishing not to fund the Company. However, in cross-examination, Mr Hance accepted that Mr Powell (E) was the person whose job it was to keep an eye on the day to day finances of BBHUK and would be the person to whom questions about the financial position of the company would be directed. I suspect that the truth was as set out in Mr Powell (E)'s emails but that this was not something that greatly troubled either Mr Hance or Mr Riley at the time.

159. In the meantime, Mr Christy was negotiating salary packages with Mr Conway-Lamb and Mr Dyhrberg in the expectation that they and their families would be relocating from Australia to the UK. He was also proposing a salary package for himself. Mr Christy agreed, in principle, Mr Conway-Lamb's and Mr Dyhrberg's annual salary at £85,000, and requested £100,000 for himself. He sent details of these proposals to Mr Hance in an email dated 14th October 2014 in which he said:

I'm conscious that the salaries are high. The salaries are higher to mitigate the biggest risk in an international relocation, which is that the partner is unhappy…This removes immediate pressure on the partner to get a job, or if they find one, to stay in it if they don't like it. Without friends and family as a support network, that is hard to deal with and the burden then falls on me, Chris or Matt which puts us under pressure and affects our performance. If this turns into a long term assignment, this salary will be reviewed and eventually aligned with a local salary in years 4 and 5.

160. Mr Christy had discussed these figures with Mr Conway-Lamb and Mr Dyhrberg without consulting the other member of the Company's Board. This, he now acknowledges, was a mistake. Mr Hance and Mr Riley in fact thought the offers were too generous. Their concern is expressed in an email from Mr Hance to Mr Riley by which he forwarded Mr Christy's email to him. Mr Hance stated:

We need to discuss this whilst together. I'm not comfortable with some of it.

Mr Hance and Mr Riley shared their concerns in a telephone call with Mr Brewin, who agreed with them.

161. The response from Mr Hance to Mr Christy, in an email dated 20th October 2014, expresses some annoyance. He stated:

I have thought about this and discussed your mail in detail with Pat.

In essence you have breached the heads of terms with regards to what was agreed regarding all three salaries — we both find that unacceptable and not in the spirit of the deal.

The going rate for engineers is £65K,but we are willing to pay CCL £75K and Matt £80K.

The going rate for an MD is also not £100K for the size of Cintep that is making no money, so we are willing to pay you £80K

All of these salaries are above what you currently earn in OZ.

Although it was not explored in evidence, the reference to the "heads of terms" must be to paragraph 9 which stated:

Newco UK employs NC, CCL. MD and GC for the greater of the£ equivalent to their Australian salaries or the market rate in the UK.

162. On receipt of this, Mr Christy apologised in an email in which he stated:

Thank you for the email. I apologise if you feel I acted out of line with the spirit of the agreement – that wasn't my intent and I apologise unreservedly for that.

I will discuss this with chris today and with my family this evening. I'll talk to Peter tonight and will let you know when we can talk to Matt.

I understand this isn't a negotiation but I can't speak for others until they have had time to digest it.

From a personal perspective that is more than generous. Thank you.

In evidence Mr Christy accepted that he had handled the salary negotiations badly. He said that this was something he regretted.

Mr Porter's visit to Brisbane

163. These emails overlapped with a visit to Cintep AU's premises in Brisbane by Mr Porter and the three former Aqualisa engineers, Mr Hall, Mr Capon and Mr Hayden, who had formally started working for the Company on or around 13th October 2014. The visit was scheduled to last, and did indeed last, from 19th until 29th October 2014. The visit was intended to allow the English engineers to familiarise themselves with the recycling shower prototype and technology with a view to working on the development of the product as

part of the Company's expanded team.

164. Immediately prior to his departure from the UK, Mr Porter had an email exchange with Mr Hance which, with hindsight, seems rather prescient. On 17th October 2014 Mr Hance wrote to Mr Porter:

> *Ok great so lets keep the pressure on them to deliver*

In an email in response, Mr Porter wrote:

> *I'm in the airport bound for Botany Bay. I'll keep chasing while I'm away. Anything I need to know for the trip? Any last advice?*

In a further email sent two hours later and in response to the brief email from Mr Hance (in which he simply stated: Stay Calm! Safe Travels!") , Mr Porter stated:

> *Haha! I'll do my best boss. Want me to bring the prototype back? Nick said we don't need the container and everything they are shipping will go in January but if we want it I'll get it crated and sent.*

The response form Mr Hance was:

> *See how you go when you are there*
> *See what the Guys think as it would be good to have it in the UK*
> *Stay Calm !*

There is no hint in any document I have seen which would indicate that the bringing back of the prototype, as Mr Porter suggested in his email, was a premeditated plan. The fact that it was suggested in light-hearted exchange with Mr Hance and the latter's reaction would tend to suggest that it was not.

165. The four English engineers arrived at the Cintep AU premises on 19th October 2014 and spent 8 working days there. The premises were relatively small, being over two floors. They met with and had presentations from and discussions with, the Australian team (Mr Christy, Mr Dyhrberg and Mr Conway-Lamb). There was a formal series of demonstrations, presentations and slideshows and a wider-ranging series of less formal discussions.

166. So far as Mr Christy was concerned, despite detailed and "challenging" discussions, the visit appeared to be going well. On 24th October 2014, he sent an email to the Company Board: Mr Hance, Mr Brewin, Mr Riley and Mr De Beer. The terms of the email had been specifically approved in advance by Mr Porter. Mr Christy wrote:

> *We just finished the first week of education and integration for the whole team. It's been a very productive week all round and Glenn and I jointly wanted to send you a short update.*
>
> *The new guys have, as expected, picked things up very quickly and there have been a lot of challenging discussions from both sides. Almost all concerns centre around three issues: water quality, safety and reliability. The fundamentals of performance, design and control systems everyone seems comfortable with decisions made to date and intended direction.*
>
> *Today was something of a breakthrough day I felt, with an explicit recognition that "we are all a team" and whilst it's a large challenge, this is an exceptional group to address it with. Glenn and I have agreed to work on water quality standards together and a spent a full day on this today, working together very productively. I certainly enjoyed it and felt we covered a lot today in quite a short time.*
>
> *We are all meeting on Sunday for a social get together and then start active work on product development on Monday for a full week together.*
>
> *Let me know if you have any specific questions, otherwise I hope you all have a great weekend, see you in 2 weeks*

The clear impression one gets from reading this email is of positive progress. There had been some "challenging discussions" in particular about how the recycling shower might meet water quality standards but these challenges could be overcome. This is not an email

sent by someone who is under the impression, or has been told, that his product is unlikely ever to work.

167. Mr Christy in evidence did accept that the English engineers had, in the course of the visit, raised concerns about whether the recycling shower could produce potable water and that this could have serious implications for the sale of the product in the UK. However he stated that this had always been a concern and was one of which the Cintep AU team was already aware.

168. In a similar vein is an email dated 29th October 2014 from Mr Conway-Lamb to Messrs Hill, Hayden, and Porter copied to Mr Christy and headed "Actions from product spec review meeting". This sets out a series of agreed targets and actions with no hint of any lack of progress or that any problems were insuperable. In his evidence Mr Porter accepted that this email of 29th October 2014 showed a "cooperative approach".

169. However, unbeknownst to Mr Christy, Mr Brewin or any of the Australian engineers, Mr Porter and indeed the three English engineers, had been reporting back to Mr Hance and Mr Riley. The tone of these reports was almost wholly negative.

170. In an email sent to Mr Hance in the morning (Australian time) of 23rd October 2014 (and thus at a time when he had been at the Cintep AU premises for three days) Mr Porter, under the heading "Update", stated as follows:

> *Well the good news is that everyone is getting on ok even if the guys have completely got the measure of Nick. The bad news is the product. The first issue is legislation. Water standards say it has to be potable water out of the shower and you can't use grey water for washing even if it's processed. Look up the Aquacycle 900 that's what it takes to get grey water to a standard where it can be used in cisterns and washing machines.*
> *Then there's the prototype where they've managed to prove the heat exchanger but the filters last 10 showers. Even ignoring the water quality issue they're a long way off production and they're pretty naive about how long things take and how much they cost.*
> *Lastly there's the savings. A family of 4 would get through 8 filters a year, add to that the difference in cost per kWh between electricity and gas and a normal mixer is cheaper to run.*
> *Sorry to be the bearer of bad news but I don't think it's workable. I'll write up a full and detailed report to explain all the above when we're done here and the guys have had a chance to put their thoughts down*

171. Mr Hance's response was:

> *Sounds like a fatal message. I am interpreting that its not worth pursuing any more?*

Mr Porter responded:

> *I have very serious reservations. There seem to be a lot of issues that are potential showstoppers.*
> *What I suggest is I do a full write up tonight and I ask the guys to add a few paragraphs for a second opinion. Then you, Pat and Nico can review and decide what you want to do.*

172. Mr Porter stated that his key concerns were: the stage of development of the product; the fact that the prototype was not fully functional; the fact that it did not appear to be removing chemicals from the water; whether the product would ever be cost-effective for consumers; the risk that the product would never comply with UK water standards.

173. Later that day, as he had promised, Mr Porter sent a more detailed report to Mr Hance under cover of an email copied to Mr Riley but again not to either Mr Christy or Mr Brewin. He also enclosed with that email copies of reports prepared by the three engineers, Mr Hall, Mr Capon and Mr Hayden. Despite the fact that these three were employees of the Company, and not of BBHUK, these reports were also never shared with Mr Brewin or Mr Christy, despite the fact that they were both on the Board of the Company of which

Mr Christy was Managing Director.

174. Mr Porter's email stated:

> *I asked the guys to give me their own views without conferring so you will get some slightly different viewpoints. It's been a long day so I apologise if some of the English is ropey. There's always the nagging doubt that we're missing something but I've attached the WRAS guidance on reclaimed water systems which are pretty clear that water for showering needs to be class A.... We'll carry on regardless unless we hear otherwise from you*

In his enclosed report, which is 4 ½ pages long, Mr Porter says this:

> *There are a number of issues with the CINTEP recycling shower. The most critical is that the current UK legislation on grey water requires that showering is done in Class A potable water and that Grey water, even after treatment, can only be used for toilet cisterns, gardens, washing machines (clothes only) or car washing.*
> *Financially the payback for the consumer isn't viable due to the cost of gas being much lower than electricity in the UK, the low cost of water and the high cost of filters.*
> *The prototype is simply a proof of principal model and a long way from being production ready. While it adequately demonstrates the heat exchange system, the filtration and pasteurisation system doesn't work as intended. The filters only last a handful of showers before failing. The cost estimate on putting this into production is low and estimates of the time it would take to develop are significantly underestimated...*

He produced a calculation that purports to show that, even if it worked, the recycling shower would be more expensive to run than a "normal" shower heated by a gas boiler. In the course of cross-examination, Mr Porter conceded that this calculation was wrong in that he had underestimated the amount of water that the recycling shower was intended to recycle (70% as opposed to the 30% in his calculation). He insisted however that, even if corrected, his calculation still showed that the shower heated by the gas fired boiler would be marginally cheaper to run. The Petitioners do not accept the accuracy of Mr Porter's calculation. Under the heading "Product Development", he wrote this:

> *I've only seen the original project plan from our meeting in Dartford. Based on the information I had then I thought 2 years would be an aggressive development plan. Given what I know now, disregarding for a moment the water quality issues, it would take significantly longer to bring to market. The plan I saw lacked detail and this shows in how they have developed the product. Chris, Matt and Gareth are all bright but have never developed a consumer product before. You can't fault the mechanical engineering analysis of the heat exchange system but they have been completely blindsided by compliance, design for manufacture, product liability issues, development process and prioritisation of issues. They've focused on the interesting stuff at the expense of the critical issues.*

Under the heading "Conclusion" he stated:

> *Unless there is a significant change in UK water regulation and the cost of energy and water, it is hard to see how this product is viable. The product cost and RRP are too high and the compromises for the consumer are too great. It costs more to run than a shower running from a gas fired boiler and the project development costs would be significantly higher than originally thought.*

It's a good idea but not one that can be implemented in a practical, legal and safe way.

175. This is a damning conclusion which is, to my mind, at odds with the positive tone of the email sent the next day by Mr Christy to the Company Board (recited above), the terms of which Mr Porter had approved. Mr Hance and Mr Riley are being told that: (i) the product will take much longer to bring to production than envisaged; (ii) it will be more expensive to operate than a normal shower; (iii) it probably will not, in any event, work in that it will not be able to meet current UK water safety standards.
176. In cross examination Mr Porter accepted that he had come to the conclusion, within three or four days of the visit, that the recycling shower was not going to work. He also accepted that he had not said as much to the Cintep AU team.
177. Mr Porter's report was never shown to Mr Brewin or Mr Christy who only became aware of it when it was disclosed in this ligation.
178. In cross examination, Mr Hance accepted that, having received Mr Porter's negative report, he should have challenged the more positive tone in the email of 24th October from Mr Christy. He accepted however that he did not do so.
179. Mr Hill's report was just over a page in length. He concluded:

In summary while the prototype demonstrates some of the capabilities required in a recycling shower, crucially it doesn't demonstrate a system which will meet the current legislative framework. Therefore it cannot form the basis for the development of a product until the key questions regarding user safety and compliance are answered. This will require considerable additional and costly development work, which will inevitably result in a significant delay to the project with no guarantee that a commercially viable product will come out of the end of it.

180. Mr Capon's report was two pages in length. It concluded:

There are clearly many technical challenges yet to be resolved within this project before the design can be progressed to the next phase of development. Alongside this, it would seem a risky strategy to continue to allow the technical limitations to dictate the product specification with respect to water quality. As it stands the success of this product relies heavily on finding a loophole or a relaxation of current water quality legislation and this must be clarified to allow the specification to become fixed. Regardless of the outcome on legislation, it's clear that a significant amount of time above and beyond the initial estimations, will be required to progress this project to completion.

181. Mr Hayden's report is 2 ½ pages long and concludes as follows:

There has been a lot of good, sound and innovative engineering, but Cintep seemed too have missed or swept under the carpet some paramount issues and challenges that should have been looked at as a main priority. The product is complex and I would expect given the current status anywhere between 3-5 years development time with a very high investment cost. The payback does not stack up and is a commercial risk in its own right. Predicated sales are high and with a retail of £3500? I would also seriously challenge some of the cost and energy savings published. Gas vs electric. Many homes have combi boilers. New builds and sustainable homes there may be a lot of scope. Sustainable homes etc.

182. Thus the three engineers were effectively "singing from the same hymn sheet" as Mr Porter. Their reports were never shown to either Mr Brewin or Mr Christy. This is despite the fact, as stated, that they were in fact employees of the Company of which Mr Christy was Managing Director and Mr Brewin a Director.
183. In a subsequent email of 23rd October 2014, Mr Porter stated:

I'm a little out on a limb down here. I've given you and Pat an honest assessment of where we are and what the issues are. There are solutions to some of the engineering issues but to make a product that is safe, legal and commercially

viable will, in my opinion, require changes to current legislation and electricity prices. I'd rather you knew that now than 6 months down the line. It's not something I do lightly or a conclusion I've rushed to.
I can understand Pats frustration but if I'm not here to give that opinion, what am I here for?
At present I have no control at all over the project. Cintep see me as "the compliance guy" for some reason. If I suggest to Chris he may want to change his approach to something, I'll get the whole "Chris has to run the project his way" thing again. Nick simply won't accept that any of his figures are wrong. I've had my trip extended and put up with a huge amount of abuse on this project and taken it all for the greater good. At the moment it feels like a bit of a thankless task. Anyway, enough of the whinge. It's nearly time to get up. Please reassure Pat that I am spending today looking for loopholes in the water standards with Nick. We'll carry on and do the job to the best of our abilities and maybe discuss this further when I'm back.

184. The reference to "Pats frustration" is to the reaction of Mr Riley to the earlier email from Mr Porter summarising his views. Whilst Mr Hance in his email (recited above) had thought Mr Porter had conveyed a "fatal message", Mr Riley, in an email of 23rd October 2014, appeared to be much more positive. He said this:

I don't accept this!!!
a) We can get regulations changed
b) we can supply other markets
c) we know the filters need work on

In a subsequent email sent by Mr Riley in response to that from Mr Porter enclosing the four reports, he said this:

My reading of this is rather different!!!
I think we can get this approved - because there is a step change in technology (pasteurisation)!!

It is to my mind worth noting that the thrust of these emails from Mr Riley is entirely consistent with what the Petitioners say they had been telling BBHUK about the stage at which development of the recycling shower had reached and the potential need to have UK water regulations changed. In evidence, Mr Porter said that he had received a phone call from Mr Riley to the same effect: telling him to "crack on we can make this work" and "don't give me problems give me solutions". Mr Riley's evidence is to the same effect.

185. Despite Mr Riley's view, Mr Hance appears to have been more pessimistic. In an email to Mr Porter he said this:

Pat has some vision, which I appreciate fully - just not sure if we can influence any of the key points required for change!

186. Mr De Beer's view was expressed in a subsequent email sent by Mr Hance to Mr Porter on 24th October in which he said:

Nico called me to say that in his view the regulations covered the storage of "grey "water prevented reusing it within the shower and in his view all we are doing is circulating water that has been used to shower in. Something similar to a whirlpool system. Is this a consideration to get around the standards.

187. Mr Porter responded:

I've spent the day going through standards. They're both clear and conflicting! Nick is also of the opinion that it's not grey water as it sits in the system. I can see

that point but the conflict is that WRAS state that shower water needs to be wholesome and whirlpools are dosed with chlorine.

Nick and everyone else knows this an issue that needs to be resolved quickly.

If I'm honest I care less about the standard and more that it's safe and I'm more concerned by chemicals than bacteria.

We're working on the issues and there's some acceptance here that the task is bigger than they thought which is reassuring.

188. This reflects the fact that, on 24th October, Mr Christy had made contact with Professor Tom Stephenson of Cranfield University with a view to discussing water standards with him. In addition, on that date, Mr Porter had separately contacted Paul Taylor, an experienced engineer, on 28th October 2014, to discuss the relevant English water safety regulations. Mr Porter had written:

I'd be interested in your thoughts from a number of perspectives;

Firstly, we're recycling water in real time. Is this greywater? Do we have to return it to wholesome water at the showerhead to comply with the water standards? Is there a compromise position that would consider the system to be a closed loop and allow us to produce something less than wholesome water at the showerhead but that could be demonstrably safe?

For what it's worth, Mr Taylor eventually responded on 3rd November 2014:

The questions you raise go straight to the fundamental issues when using grey water in any installation…It's an interesting topic and one that the Water Industry needs to have a discussion about as without some relaxation of the existing stance, the re-use of so called grey water will be limited to toilet flushing and watering the garden.

It may be a good idea to meet up and have some further discussions.

This would seem to confirm the view that, as the Petitioners state, there was a debate to be had around water regulation and the extent to which the present rules could be changed or circumvented to accommodate new technology such as the recycling shower.

189. On 28th October 2014 Mr Christy sent another email to Mr Hance which reflected a positive view on how the visit of the English engineers was progressing. He said:

This week is going well. Glenn and I made a lot of headway on water quality standards and I have a meeting setup with Tom Stephenson on 10th November for 2 hours. Glenn is seeing the BMA next week and will also follow up with NSF. Everybody is happy with the work we did and is now comfortable that we have adequately understood the water quality challenge and that we have a good plan to deal with it….

The rest of the week to do list for work is:

• Finalise the specification of the launch product

• Complete a DFMEA (Design Failure Modes and Effects Analysis) to identify risks that need to be designed out

• Review the BOM (Bill of Materials)

• Review the Project Plan

• Start individual design tasks

Looking forward to talking later.

190. In the meantime, Mr Christy was writing on 24th October 2014, to Mr Powell (E) effectively asking for further funds from BBHUK in order to facilitate the winding-up of Cintep AU. As this is relied on by BBHUK, I will quote the email in full:

Ok -Tony and I have been through the plan to Closure and what I need to do is:

-Recharge the salaries for the staff coming across from September onwards (including September). We will do this as a monthly invoice this will include Gareth for September and October as we originally expected him to come across. Post resignation his costs will be absorbed here.
-This leaves more money available later on in Australia for closure activities that aren't relevant for the UK company and therefore won't be recharged (e.g. dilapidations, paying out undertaken leave that: won't be transferred to the UK company, liquidators fees etc.).
-Tony and I think that we have a chance of getting 2 "wins" before closure:

- *Export Market Development Grant of about $20k*
- *R&D Tax Incentive balance pre deal about $40k*

-The cost: of doing this will be Tony's time which is $1.1‹ per month and will add a maximum 6 months (and therefore $6k) to work through. We can't find out if we will get the R&D money until July next year. If we can get those two wins then that will actually pay back some of the CDLUK Loan of $65k — which is income in the UK budget that isn't reflected and therefore an upside. I'd say 50% chance we can win these but it's worth trying.
I hope that makes sense, let me know if you have any questions?

191. At the same time it appears that, following the discussions about the salaries on offer, Mr Dyhrberg, certainly, and Mr Conway-Lamb were having second thoughts about re-locating to the UK. There was an email exchange with Mr Christy on 29th October 2014 which followed a phone call between the two men. Mr Dyhrberg wrote:

Thanks for your call just now. This is as far as I got this morning, and I haven't had a chance to re-visit it and is therefore incomplete, but most of the broad issues are covered. Some could have additional explanation put against them. I thought I would send it to you, just for the record it pretty much covers what we talked about this morning.

He then continues:

Nick phoned me on the Saturday to say that the deal was done, and that the salary deal was:
(a) current AU salary in UK or UK equivalent, whichever was greater mention it only once: my AU salary includes superannuation)
(b) all relocation costs to the UK
(c) one family set of return flights to AU per year.
My sentiment to Nick was that on the face of it, it appeared a reasonable deal, but that I would have a very hard time selling a move to the UK to Karen…
In early team discussions about the move to the UK, we were asked to consider what deal would be required to get us to the UK. Karen and I spent a significant amount of time over a two week period researching to gain a thorough understanding what it would mean for us financially to live in the UK, with consideration for matters
such as…

He then lists a number of factors, (a) to (h), the last of which is:

(h) and my feeling that Crosswater may not be prepared to provide the necessary ongoing support for a R&D project with a large amount of uncertainty (this feeling was based-on my observations of the negotiations around technical resourcing and project timeline that occurred when the Crosswater Board visited AU)
The package we came up with provided an adequate level of risk mitigation in our mind, that when balanced against the opportunity etc. of being involved with the product and the potential additional financial benefits (shares etc.) made it an 'OK proposition. We saw it as been cost neutral to us.

He concluded:

> *Every engineer that has looked at this project (in particular Phil and Alex) predict a development timeline of 3 years*

192. The reference to Karen is to Mr Dyhrberg's wife. The reference to "the package we came up with" must be a reference to the level of salary originally agreed with Mr Christy and proposed by him to Mr Hance which the latter rejected. The reference to "Phil and Alex" is to two of the English engineers, Mr Capon and Mr Hill. Whilst it is clear that the rejection of the salary level was an important factor in Mr Dyhrberg's reluctance to relocate to the UK, it is also clear that there were significant family reasons which made him reluctant to move.

193. Mr Christy's response was:

> *Thanks Matt-very logical and consistent with all of our conversations. If Karen wants to call me at any point, that's also fine.*

Mr Dyhrberg in turn responded:

> *If Crosswater had come back for a discussion on the package we would be in a very different position right now.*

To which Mr Christy replied:

> *Yes but similarly if I had spoken with Dave in the first place we wouldn't be here either 50/50 - but yes it's all been handled badly.*

194. Thus it is clear that, at the time Mr Christy, as he acknowledged in evidence to me, had accepted that he had handled the salary negotiation badly and that this may have had an impact on the willingness of Mr Dyhrberg to relocate. However it also seems clear that Mr Dyhrberg had not at that stage completely ruled out a move to the UK, otherwise there would have been no reason for Mr Christy to offer to speak to his wife.

195. In his evidence Mr Christy said that he had a conversation with Mr Hance in which he told him that, if the then salary offer to Mr Dyhrberg was not improved, then he (Mr Dyhrberg) would probably not want to relocate to the UK. The offer would not have to be improved by very much however. Mr Hance had told him, he said, that it would not be good for the project if Mr Dyhrberg did not relocate. He would, he said, speak to Mr Riley and see if the offer could be improved. Mr Christy said that he had a subsequent conversation with Mr Hance on 29th October 2014 in which the latter had said that he had spoken to Mr Riley and that he felt that a bonus system could be put in place which, subject to the attainment of certain targets, could make up the difference between what Mr Dyhrberg expected and what the Company was currently offering. Mr Christy told him that, provided what was offered was reasonable, then he was almost certain that Mr Dyhrberg would relocate. I accept this evidence as it appears to be consistent with the contemporaneous documents which, as stated, appear to show that whilst Mr Dyhrberg was disappointed by the outcome thus far of the salary negotiations and was reluctant to relocate to the UK, he had not completely closed his mind to that prospect.

<u>The removal of the prototype from Australia</u>

196. However, something else of immense significance occurred on 29th October 2014. In an email sent at 16.56 UK time, Mr Hance instructed Mr Porter to remove the prototype recycling shower and associated equipment from the Cintep AU premises in Brisbane and arrange to have it shipped to the UK. His email said this:

> *This maybe a challenge but we need to ship all the relevant products and documents before you leave Cintep*

Can you arrange for a container to be delivered and loaded before you go?
If not send via LCL on pallets
Confidentially Matt is not coming as we have not met his expectations on salary and Nick's woman is also not coming as we are not paying Nick enough either!
So we need to box clever and get what we need from Cintep before you leave

197. This was a decision made by Mr Hance alone although he had spoken to Mr Riley before he sent the email to Mr Porter. Mr Hance had neither consulted nor given any prior warning to either Mr Brewin or Mr Christy, the latter of whom was of course the Managing Director of the Company whose property the prototypes were. Mr Porter was not of course an employee of the Company but of BBHUK. It was also, as Mr Hance knew, directly contrary to the previous agreement made between him and Mr Christy to keep the equipment in Australia until after Christmas.
198. In his evidence Mr Hance says that he took the decision because he felt that it was in the Company's best interests to have the prototype in England given that he had been told that Mr Dyhrberg was not going to relocate and that he (Mr Hance) thought that Mr Christy might not come either. However he accepted in cross-examination that the decision to relocate the prototype should have been agreed with Mr Christy and that he had "made a mistake" in doing as he did.
199. I do not accept that Mr Hance had been told that Mr Dyhrberg was definitely not relocating. As stated, I accept Mr Christy's evidence as to the conversations which he had with Mr Hance on that topic. It may be that Mr Hance had formed the view that Mr Dyhrberg was unlikely to come to England or that he was unwilling to increase any salary offer to persuade him to come, however I do not accept that Mr Christy at that stage told Mr Hance that Mr Dyhrberg was definitely not coming.
200. In his oral evidence Mr Riley said that, in addition to the concerns about the unwillingness of the Australian team to relocate, he had an additional concern at the time. This was that, because Mr Christy had asked for additional funds from BBHUK for the winding-up of Cintep AU, then there was a risk that Cintep AU, being short of funds, was not paying the rent on its premises and that the landlord would repossess. I do not accept that evidence: it was not contained in his witness statement and is nowhere reflected in any of the contemporaneous documents.
201. When pressed, Mr Riley did accept that there ought to have been a Board meeting of the Company to sanction the removal of the prototype and that it was wrong that Mr Brewin was not informed.
202. Mr Porter did not question the instruction from Mr Hance. He responded by email

I'll keep it to the stuff we actually need for development. Prototypes, PCs and paperwork. I'll leave printers and any unnecessary crap behind and save on the shipping

203. Mr Porter simply arrived in the Brisbane office in the morning of 30th October 2014 and informed the staff that he had instructions to remove the prototypes and equipment to the UK. Mr Christy describes arriving at the Cintep AU office on 30th October 2014 and Mr Porter taking him aside for a private chat. He told him that Mr Hance had instructed him to immediately package up the prototypes and essential equipment and ship them to the UK. Mr Christy was, he said, "stunned". Mr Porter did as instructed. He and the English engineers dismantled the prototypes and put them and the associated equipment onto pallets and into crates which they had arranged to be delivered.
204. The reaction was described by Mr Porter in an email sent to Mr Hance in which he said:

Well that went about as well as can be expected. Nick wasn't really surprised, he was nervous when he came in and I think he knew he'd overplayed his hand. He was actually very reasonable and helpful.

Matt [that is Mr Dyhrberg] *had a bit of a tantrum and packed up all his stuff, personal tools & monitors etc and went home saying tomorrow is his last day. Chris questioned if it was legal and Nick told him that we owned all the CINTEP assets. Gareth was fine, he's leaving anyway (although it turns out that his parents are another shareholder).*

I went through with Nick what's worth taking. There's not a lot…

In all I think there's only 2 pallets and 2 crates. There's a local company that should be able to supply them so get them delivered tomorrow morning along with some shrink wrap and packing materials. Chris and Matt aren't going to help but Matt said he'd disconnect the mains to the prototypes and make them safe-that's as far as he'll go. Chris will remove some of his personal stuff from the boxes of bits. It should only take us a couple of hours to pack everything up. Should be ok to collect tomorrow PM...

Nick's going to ring you this afternoon. He wanted to talk to Tony Formica and Peter Brewin. He was more deflated than anything else. I kind of expected him to come out fighting but he didn't at all and was actually pretty helpful.

Anyway, we're on our way back tomorrow and we'll be bringing everything worth bringing back with us...The boys are off on a bit of R&R. They're fine, if a bit shell shocked.

In his evidence, Mr Porter accepted that Mr Conway-Lamb and Mr Dyhrberg might have felt "slightly offended and aggrieved" by his actions. He also accepted that everyone "was in a state of shock" at what had happened. As he stated in the email, Mr Dyhrberg effectively resigned on the spot in response.

205. Mr Hance's reaction, as expressed in an email sent in response, was jubilant:

Fabulous well done!

Will call Nick now!

He then sent an email to Mr Riley in which he stated:

Mission accomplished Pat!

Mr Riley responded to this:

Great!!

Can you confirm with Glen that the pallets MUST be picked up before our chaps leave!!!

206. The reaction of Mr Christy and Mr Brewin was quite the opposite. As Mr Christy puts it in his witness statement, in his view, it "*was a truly disastrous move*". He says that he felt *"betrayed and appalled"*. His reaction at the time was recorded in an email sent by Mr Hance to Mr Riley following a phone call between Mr Hance and Mr Christy:

Not gone down well with Nick

He's just called it an irrational decision!

Not sure any of them will be coming now -Nick sleeping on it

None of this could have come of much of a surprise to either Mr Hance or Mr Riley.

207. Mr Brewin's reaction when he found out was equally concerned, particularly when it came to the effect on Mr Dyhrberg and Mr Conway-Lamb and the future development of the recycling shower. He says he was "*appalled*" and that it was an "*incredibly destructive*" decision an "*act of vandalism*" which was a "*tragic mistake*". In his view it put Mr Dyhrberg and Mr Conway-Lamb off coming to the UK.

208. In an email sent on 30th October 2014 to Mr Riley and Mr Hance, he said this:

Having Glen walk in today and tell them to pack everything up and ship it to the UK today (when there was already a plan of what to ship and when in place) understandably has left Matt and Chris feeling as though arbitrary orders are

being delivered second hand from on high. Matt who was wavering and who I am sure was pretty much persuaded to move to the UK has handed in his notice as a result.

Chris's phone number is 00 61 451 170 118, from his perspective decisions are being made without any consultation on a project he is supposed to be managing. He has now lost confidence and believes that if he relocates to the UK he will be caught without authority to manage his own team and stuck playing politics. For him it will not be about money, he could very easily get a higher paid job in Brisbane or a comparable or better paid job in the UK (my view). His motivation is to work on an exciting project that he has already invested a large amount of passion and work in. It is critical to convince him that he will be able to have the authority to lead and deliver the project.

From my perspective I cannot fathom why you did not call me first, quite apart from this being a significant board decision, I could have sorted Nick if he was still messing around with salaries (he told me this was basically all agreed (£65k for him and Chris) bar some negotiations with Mat over job security and pension) and brought both engineers to the UK with the minimum of fuss.

The position we are in today is that we will have a prototype, 2 patents and part of the Aqualisa development team of which my understanding is only one is really a design engineer, with no credible engineer to lead the team, we have also potentially lost all the accumulated know how on this project. I cannot take on the day to day leadership myself.

Events after 30th October 2014 and leading up to the Board Meeting on 14th November 2014

209. On 30th October 2014, Mr Dyhrberg sent an email to Mr Christy and Mr Formica in which he expressed his dissatisfaction. He said this:

With regards to the events of the past 24 hours, my understanding of the relevant information is:
-You are both directors of CINTEP Pty Ltd in Australia
-Nick is a director of CINTEP Development Ltd in the UK (CDLUK)
-Today, CDLUK is shipping all PCs and prototype hardware to the UK.
-This will remove my access to my laptop, my primary work tool.
-You have not provided any direction as to what my work arrangements will be beyond the end of today.
-These events do not align with the smooth transition to working in the UK that has been the basis of all discussions to date.
-Moving my position to the UK makes me/my position redundant (see email below from Karen)
-You have not provided any period of notice.
-I have attached a screenshot from Xero of my current expense claim.
-I have attached a screenshot from Xero of my current leave balances.

210. Mr Christy states that he had a meeting with both Mr Conway-Lamb and Mr Dyhrberg in a cafe opposite the Cintep AU premises in which they both expressed their reluctance to relocate in the light of what had happened.

211. However, it is clear that Mr Hance subsequently sought to persuade Mr Conway-Lamb to relocate to the UK. In an email dated 30th October and sent to Messrs Brewin and Riley, but not to Mr Christy, he records a telephone conversation. He stated:

Had a very positive chat with CCL
I assured him he is the lead engineer and I believe he will come to the UK
I will keep you posted

Thus it would appear, at this stage, both that Mr Hance intended to continue with the development of the recycling shower and that Mr Conway-Lamb had not, despite recent events, rejected out of hand the idea of relocation. Indeed on 3rd November 2014 he sent an email to Messrs Dyhrberg, Capon, Hill and Hayden, copied to Mr Christy, in which he said:

> *I'm very sorry that you were affected by the matters that arose on Thursday and Friday last week. The issue of shipping prototypes etc. is now almost resolved (save for some final logistics) and I'm looking forward to getting on with the technical development work.*

212. In the meantime on 3rd November 2014 Mr Porter sent what he called a "Technical Report" by email to Mr Hance. This was not sent to anyone else. It is a document of seven pages and sets out Mr Porter's detailed views on the recycling shower project. As he said:

> *This report is a review of the technical issues surrounding the CINTEP recycling shower based on the information given to us in Australia over the last 2 weeks*

The Report included the following passages:

> *This project was sold to Crosswater as a product ready to be put into production but this is not the case, it is still very much a research and development project with a limited chance of success. The prototype is simply a proof of principal model and a long way from being production ready. While it adequately demonstrates the heat exchange system at nominal conditions, the filtration and pasteurisation system doesn't work as intended and the filters only last a handful of showers before failing.*
>
> *The cost estimate on putting this into production is low and estimates of the time it would take to develop are significantly underestimated. With the project still being in the R&D phase the development costs are likely to be significantly higher and the development time much longer.*

Of course the assertion made in the first sentence of that extract is contested by the Petitioners and is one of the issues at the heart of this case. Importantly, in his evidence, Mr Porter stated that he had come to the view expressed that the project "*was sold to Crosswater as a product ready to be put into production"* from the documents which he had seen (and which were before the court) and from the discussions that were reflected in those documents. This was his own deduction from those documents and discussions. Importantly, he did not allege that anyone had ever expressly said this, or words to this effect, to him.

213. Mr Christy expressly denied that the recycling shower was ever "*sold to Crosswater as a product ready to be put into production"*. In his witness statement (at paragraph 200) Mr Christy takes issue with a number of the assertions made by Mr Porter in this report as does Mr Brewin in his second statement and Mr Gee in his statement (at paragraph 39).

214. I do not have to come to a view as to whether Mr Porter's assertions, which are challenged by Messrs Christy, Brewin and Gee, are correct or not. Neither party invited me to do so and in the absence of specific expert evidence, I am not in any event in a position to do so.

215. In his Technical Report, Mr Porter then proceeds to recommend that a feasibility study is conducted, one of the objectives of which would be to:

> *Establish with water regulators what the likelihood is of moving off the standard of water being potable. What could that standard be? What evidence would be required to show that standard was safe and that we had met it?*

Under the heading "Financial" he sets out a table comparing the annual costs of the recycling shower to that of a "standard" mixer shower heated by a gas-fired boiler. This concludes that in fact the latter would be £169.78 cheaper per year to run than the recycling shower. In cross-examination he accepted that he had overestimated the cost of the recycling shower by under-estimating the percentage of water that it recycled (he had assumed 30% when it was in fact 70%). However he did not accept the other criticisms of his figures which were levelled at him. He stated that, despite the accepted mistake, nevertheless the comparison between the two different types of shower still favoured the gas-fired boiler heated shower over the recycling shower.

216. In his penultimate section, "Product Development" he stated as follows:

> *Chris, Matt and Gareth are all bright but have never developed a consumer product before. You can't fault the mechanical engineering analysis of the heat exchange system but they have been completely blindsided by compliance, design for manufacture, product liability issues, development process and prioritisation of issues.*

He continued:

> *We need to take control of the project and put in place some firm milestones and timescales. At each of these milestones we must review the project objectively and decide if it is worth pursuing further.*

In his final section, "Conclusions" he said this:

> *This is an extremely complex, high risk project. Given current legislation, energy prices and technology it may not be viable as a product. The current state of the art in domestic greywater recycling is expensive, doesn't work in real time and doesn't provide potable water. It would require a significant leap in technology to make this leap and there is no evidence to support CINTEP having made it with their shower. However, the potential rewards are great if we can deliver a viable product at a suitable cost. Even if we only deliver a low cost greywater recycling system, it may still be worth the effort. I suggest we move forward with a tightly controlled feasibility study but commit to nothing more at this stage.*

In evidence he said that, in fact, his view was that the product had a very low chance of success as a recycling shower.

217. Given that Mr Porter was an employee of BBHUK and not of the Company and given also that the report was sent to Mr Hance and to no one else on the Company's Board, one has to assume that the "we" in his Report is a reference to BBHUK and not to the Company.

218. This is confirmed by the fact that Mr Hance sent a copy of the report to Mr Riley and Mr de Beer (but not to either Mr Christy or Mr Brewin) as an attachment to an email dated 3rd November 2014. In cross-examination Mr Hance accepted that he should have shared what he accepted was an important document with Mr Christy and Mr Brewin.

219. In his evidence Mr Hance says that the suggested feasibility study was not undertaken because the Australian team were not going to relocate and because of Mr Porter's view that there was little chance of the product being successful. Mr Hance states that he had conversations with Mr Porter about this. Mr Porter, when pressed in cross examination, at first stated that he did not share his view as to the likelihood of the product being successful with anyone else (because he did not wish anyone to pre-judge the feasibility study) but, when faced with Mr Hance's evidence, then said he could not recall having any conversation with Mr Hance although such a conversation might have taken place. This is all rather unsatisfactory. My impression is that Mr Porter, when faced with the evidence of Mr Hance

which contradicted his own, was doing his best to avoid me finding that one witness or the other was not telling the truth. In this instance however I do not think that it is necessary for me to make a finding as to who is correct.

220. On 4th November 2014, Mr Porter forwarded a copy of Mr Taylor's email of 3rd November to Messrs Hance Riley and De Beer. He indicated that he would arrange to meet Mr Taylor to discuss water regulation issues.

221. In the meantime on 5th November 2014, Mr Christy gave notice to Mr Dyhrberg and Mr Conway-Lamb separately terminating their employment with Cintep AU. Both emails stated:

> *Further to our recent conversation and in light of the decision not to transfer to the UK I am very sorry to have to give you notice of termination of your employment.*

It is thus clear that, by this date, Mr Christy was of the view that neither Mr Dyhrberg nor Mr Conway-Lamb were intending to relocate permanently to the UK. Mr Brewin's evidence was that he and Mr Christy had tried to persuade Mr Conway-Lamb to relocate but that he felt by that stage that he could not trust BBHUK in the light of everything which had occurred. He had agreed however to act as a consultant to the Company whilst a replacement was recruited. Mr Christy's evidence was that, following the removal of the prototype form Brisbane there has been a breakdown in trust between the Australian team and BBHUK. Whilst he did not try to persuade either Mr Conway-Lamb or Mr Dyhrberg to relocate permanently he did try to encourage them to do so on a temporary basis to encourage the handover to a new team of engineers.

222. On 4th November 2014, Mr Christy informed Mr Hance of his decision to resign from the Board of the Company. On 5th November 2014, he sent an email to Mr Riley asking for a telephone conversation to which Mr Riley replied:

> *I am really busy today & tomorrow. We are reviewing the reports that the chaps did in Australia. Dave tells me that you have resigned, this is a shame.*

Thus it is clear that Mr Riley neither wanted to speak to Mr Christy nor sought to dissuade him from resigning. The reference to "the reports" was to the various reports received by Mr Hance from Mr Porter and the English engineers. These were never shown to Mr Christy or Mr Brewin and it is noteworthy that Mr Riley does not offer to share them here. Nor does he offer any summary of the conclusions.

223. In response to this email Mr Christy wrote as follows:

> *Thanks. I do want to speak with you directly about my reasons for not coming, as I want to make sure I leave on the best terms with you and Dave. I want the project to succeed going forward and want to hand over as much as possible and then be available if needed in the future.*
>
> *My main reasons for wanting to step back are that without my family coming, without Matt and Chris coming, and the prospect of development taking much longer than initially thought, it is hard for me to feel the necessary enthusiasm to drive the project forward. I feel you need someone new to come in who sees it all as a new challenge rather than a rebuilding exercise - with a new start it can go well, I can't be an obstacle to that…*
>
> *Much of this could be done in the week after next week's board meeting. If we could talk and agree a handover plan as soon as possible I can start to make the necessary arrangements.*

In his evidence he explained that, in his view, the reason that the project would take "much longer than initially thought" was because of the need to recruit replacements for Mr Dyhrberg and Mr Conway-Lamb. It was suggested to him in cross-examination that the real reason for his resignation was that, following Mr Porter's visit to Australia, he had realised that the development of the product would take much longer than expected and would stretch far beyond the then projected date for the recycling shower to be brought to market. He denied this. Given the terms of his email and the fact that Mr Christy had, by that time, been working on the project for five years already, I am inclined to accept his evidence on this. Given what had happened in Australia and given the reaction of Messrs Dyhrberg and Conway-Lamb, it is entirely understandable, to my mind, that Mr Christy would feel the need to step back and let those in whom BBHUK had more confidence take on the future development of the project. The email from him was a polite and restrained way of expressing this.

224. The reference to a Board Meeting is to a Board Meeting of the Company which was due to be held on 14th November 2014.

225. In his evidence Mr Riley asserted that he thought Mr Christy had resigned because he had been "found out" and that he had realised that he could not "pull the wool over the eyes" of Mr Porter and the English engineers as to the true status and prospects of the recycling shower. Whilst that may or may not have been what Mr Riley thought, I do not accept that it is an accurate reflection of why Mr Christy resigned.

226. The attitude of Mr Riley and Mr Hance towards Mr Christy at this time is summed up in an email exchange later that day in which Mr Hance tells Mr Riley that Mr Christy wanted to attend the Board meeting on 14th November. Mr Riley responded:

> *He is welcome but has readiness already? I assume Cintep Australia is paying, otherwise I am not sure we should waste our money?*

Mr Hance's response was:

> *I will say he can join by Skype*
> *He wanted to come and shake hands and part honourably! Then he told me he owns the websites and facebook pages and other key links to Cintep social media.*
> *He's a manipulative so and so*

It is worthwhile remembering that, at this stage, although he had indicated his intention to resign, Mr Christy was still a Director, indeed the Managing Director, of the Company.

227. On 5th November 2014, in an email to Mr Chaplin and Mr Hance, Mr Riley sought a copy of the Shareholders Agreement which, of course, BBHUK was obliged to sign but had not. He was sent a copy of the document by Mr Chaplin by return.

228. It appears however that Mr Christy and Mr Riley did have a conversation. In an email sent by him to Mr Hance, Mr Powell (E) and Mr De Beer on 7th November 2014, Mr Riley wrote:

> *I have just finished a long chat with Nick.*
> *I did chat to Clive about our position yesterday, and the approach agreed was that we should do everything we have promised - and move forward on an imicable [sic] basis, if possible.*
>
> > ** The call was pleasant*
> > **We have agreed a number of items to be on the agenda for next weeks board meeting including:*

** getting the laboratory up and running*
** getting staffing up and running*
** Nick resigning as a director*
** Michael C to be new CEO (I hope you are all in agreement with this - as he will replace Nick in my mind!)*
**Me to resign - if Peter Brewin wants this - he can decide this - so we are not seen to be building up a huge board*
** Nick to be a Loreal consultant for us*

Thus it would appear that, at this stage, Mr Christy was to leave on amicable terms and the expressed intention of Mr Riley was that the existing agreement would be adhered to in order to attempt to develop the recycling shower.

229. What may have soured things somewhat is an email sent by Mr Christy on 11th November 2014 to Messrs Hance and Riley with a copy to Mr Powell (E) in which he asked for further funds from BBHUK or the Company in order to wind up Cintep AU. This request went down badly with Mr Hance and Mr Riley. In an email from the latter to Mr Hance and Mr Powell (E), he wrote:

Hi
I would have thought that this should be discussed at the board meeting?
Dave you Tim and I really need to understand this.
Tim I will buzz you later.

Mr Hance responded in an email on the same date in which he said:

Nick has a habit of trying to "sneak things under the carpet" !
As you know!

Mr Riley responded:

We need a balance to get the project moving - and not spending on Nick!!
Have the prototypes been flown over?
Tim, can you confirm that we have not paid for this (in the contract it was down to Cintep Oz)?

This might perhaps be seen to be a reference to a lack of available funds.

230. In ignorance of this exchange, on 11th November 2014, Mr Christy sent the agenda for the Board meeting of the Company which was to take place on 14th November to Messrs Riley, De Beer, Hance, Brewin and Mr Powell (E). This contained a lengthy section headed "Handover Plan". The first section of this document dealt with the recruitment of a new "Technical Lead" to replace Mr Conway-Lamb and a new development team. There was then a reference to Messrs Conway-Lamb and Dyhrberg being retained as temporary consultants to assist with the recruitment and handover. Under "Commercial" there appeared the following passage:

In addition to the technical aspects of the project there are a number of commercial issues that should also be considered as important for the medium and long term success of the project.
CINTEP's recycling shower is not the first and not the only one currently being promoted. However we have been successful in convincing companies like L'Oreal and IKEA, and organisations like the US Military, to engage in prolonged dialogue, when they have stopped talking with other recycling shower companies. We have achieved this because we have done a number of things well:

1. *We have acknowledged the risks associated with recycling shower water (particularly those that relate to pathogens) and clearly explained how we intend to deal with them reliably in all situations*
2. *We have acknowledged the challenges in getting a recycling shower through standards and regulatory approvals and engaged with the right people to demonstrate that we see the challenge*

but we intend to address it rationally and co-operatively with them, and that we have not attempted to solve this problem with money. This is a battle that has to won by logical, rational arguments supported by significant independent verification.

Both of these challenges are very hard to overcome and the natural and "safe" position for regulators, governments, large scale organisation is to refuse to believe it can be done safely and refuse to be the first to adopt the technology. If you lose their confidence and trust in you, it will be very hard to win back quickly and then large scale rapid adoption of CINTEP's shower soon after launch will be very hard to achieve.

It is vital that whoever takes over the responsibility for these conversations is able to build and keep this confidence.

One of the other items on the agenda was to the effect that Mr Christy would tender his resignation from the Board of the UK Company. The relevant passage reads as follows:

Nick Christy will tender his resignation at the board meeting and the board will need to consider potential replacements. Nick will provide whatever assistance and information is requested to help identify and / or train a replacement.

Again there is no hint that Mr Christy's departure from the Board of the Company is to be anything other than amicable.

231. In another section headed "Closure of Australian Company" Mr Christy proposed that further funds be provided to Cintep AU to fund the closure costs of that company which included sums that were due to Mr Conway-Lamb and Mr Dyhrberg as well as himself.
232. A few days prior to the Board meeting, Mr Brewin had a telephone conversation with Mr Riley in which he expressed what he described as his frustration and disappointment at what he called the "unilateral and secretive" decision to remove the prototype from Australia. Mr Riley, he said, assured him that he would personally ensure that the recycling shower made it to market. According to Mr Brewin, and I have no reason to doubt his account, Mr Riley made no mention of having any doubts about the shower's technology.

The Board meeting on 14th November 2014

233. There were no comments from any of the directors of the Company on the agenda circulated in advance by Mr Christy ("the Agenda").
234. The meeting took place at BBHUK's premises. Messrs Hance, Riley, De Beer, Coughlin and Brewin attended in person. Mr Christy attended by telephone from Australia. The meeting was relatively short, lasting somewhere between 15 and 20 minutes.
235. There is not much dispute about what occurred. The meeting did not follow the Agenda put forward by Mr Christy. It was effectively taken over (perhaps, put more pejoratively, "hijacked") by Mr Riley. Mr Christy's account of events is supported by Mr Brewin and not seriously challenged by either Mr Hance or Mr Riley himself.
236. Mr Riley began by stating that Cintep AU's invoices for the Australian team's salaries and the winding up costs would not be paid. Mr Christy pointed out that it had been previously agreed that BBHUK would fund those salaries through the Company and by refusing the money BBHUK was pushing Cintep AU into immediate insolvency. Nevertheless there was no agreement to pay them.
237. Mr Brewin also recalls that, early in the meeting, Mr Riley asked him effectively to guarantee that the recycling shower would work. Mr Brewin's recollection is that he explained that this was a research and development project with all the attendant risks but that he thought that any risks could be overcome and that it was likely to work.
238. Then Mr Riley said that he wanted to renegotiate the terms of the deals signed in August 2014. Mr Riley made two demands to Mr Christy and Mr Brewin:

    (a) Firstly, that they agree to extend the buy-back period on the patents from three to five years; and

(b) Secondly, that they agree to extend the deadline for BBHUK's first £1 million of funding to the Company.

239. In making the first of these demands, Mr Riley used words along the lines of: "I am not agreeing to any further spending if I think you are going to buy the patents back just before we finish development". Mr Christy and Mr Brewin, despite having had no prior notice of this proposal, were prepared to agree to it.

240. As far as the second proposal was concerned, Mr Brewin recalls Mr Riley using words to the effect that *"we"* (by which he took to mean BBHUK) would continue to fund the recycling shower project but had to be released from the requirement in the Subscription Agreement to pay £1 million by 8th August 2015. Mr Riley accepts that, in making this proposal for a significant change to the terms on which BBHUK was to provide funds to the Company, he gave what he accepted was an ultimatum: unless Mr Christy and Mr Brewin agreed to the terms which he was proposing, then BBHUK would cease to provide any further funds at all.

241. Mr Brewin was prepared to contemplate a change whereby the deadline for payment of the £1 million was extended by one year provided that the Company was adequately funded in the meantime.

242. Mr Christy, who was attending by phone, refused to agree to any such alteration to the contractual terms. According to Mr Brewin, Mr Riley said that Mr Christy had to agree or BBHUK would withdraw (Mr Brewin thinks that he said *"or we are out"*). Mr Christy continued, despite pressure, to refuse to agree to this proposal. He said that he would not agree to anything on the spot and stated that he had to deal with the Cintep AU liquidation urgently. This would keep him busy until the following Tuesday. He indicated that he would revert to Mr Riley then.

243. Mr Brewin's recollection is that Mr Riley apparently left it that Mr Christy had until the following Tuesday to reconsider or BBHUK would pull out. Mr Christy is adamant that, whilst he did indicate that he would respond by the next Tuesday, no such ultimatum was given in that, whilst there was a threat that BBHUK would refuse to provide funds if a revised agreement was not entered into, there was no agreement to the effect that any such refusal would be tied to his response. Mr Hance accepted in cross examination that, whilst it was agreed that Mr Christy was to revert with a response to the proposals by the Tuesday, there was no ultimatum or default position to the effect that if he did not agree to the proposed change by that date, then BBHUK would refuse to fund the project. Mr Riley was however adamant that this ultimatum was given and the position agreed.

244. Insofar as it makes any difference I prefer the evidence of Mr Christy and Mr Hance on this point. It is evident that there was a clear threat made by Mr Riley that, if Mr Brewin and Mr Christy did not agree to the proposed change to the funding agreement, then BBHUK would cease to provide any further funding. However I do not find that there was any sort of agreed position whereby, if Mr Christy did not revert by the next Tuesday, then the Company would either agree or be deemed to have agreed to release BBHUK from its funding obligations.

245. Mr Christy was then asked to confirm his resignation from the Board of the Company which he duly did. He then left the meeting. Mr De Beer also resigned from the Board and Mr Coughlin was appointed.

246. Mr Brewin recalls that there was then a discussion on the way forward and it was agreed that a new technical lead would be appointed to replace Mr Conway-Lamb. He was to work on that task and Mr Conway-Lamb was to be engaged as a consultant once the new technical lead had been recruited. This new technical lead would then be responsible for recruiting a new technical team. Mr Riley then asked Mr Brewin if he would be willing to take over the development of the recycling shower full time. Mr Brewin explained that he could not do so due to his other business commitments. He was willing, however, to put in extra time in the short term to help recruit a capable new Research and Development team in the UK.

247. Mr Riley had not shared his intention to make these proposals with anyone in advance of the meeting. None of the rest of the Board of the Company had been made aware of his intention. He appears not to have considered the clear conflict of interest that arose from his attempting to force through a renegotiation of the terms of contracts previously entered into between BBHUK and the Company, with him being a director of each company. It is difficult to see how it could possibly be in the best interests of the Company, as opposed to BBHUK, for there to be a delay in the provision of funding for the development of the recycling shower.

248. In cross examination, Mr Hance accepted that it was "utterly inappropriate" that, at a board meeting of the Company, Mr Riley had sought to renegotiate the terms of a contract between it and BBHUK.

249. Mr Riley, in his witness statement, described the requests he made as "completely reasonable" but did concede in cross examination that "it was a bit mean of me in spirit" even "childish". He said that at that stage he was "fed up" with Mr Christy and "couldn't bear to think that we would wind up the company and effectively have to pay Nick some money". He explained that:

> *"…it did not make commercial sense for BBHUK to invest £1 million up front. My thinking was that if BBHUK was required to invest the remainder of the £1 million (i.e. £1 million minus the sums BBHUK had already expended on the project) in the first year, and then it became clear at some point shortly afterwards that the project was not feasible (which, at 14 November 2014, was not only a real possibility, but the most likely outcome by far), CDL would be left holding a significant amount of unspent cash. I feared that, in such a situation, Mr Christy would claim that this cash should be distributed among the shareholders of CDL in proportion to their shareholdings, and he would, as a shareholder, be able to walk away with thousands of pounds as a result of the Product/project having failed. This would not have been fair…"*

Thus it is quite clear that, at the Board meeting of the Company, Mr Riley's focus was on protecting the position of BBHUK. He described the meeting as "a little tense". He even went so far as stating that the reason why he made no concrete proposals as to when the funding from BBHUK would actually be made was that the meeting had gone "pear-shaped".

250. It is accepted by all that there was no consensus in relation to either of Mr Riley's proposals and no formal resolution of the Board of the Company to agree to either of them. In relation to the funding proposal, Mr Riley thought Mr Brewin had agreed but he accepted that Mr Christy had not.

251. It is accepted that Mr Christy did not respond to the proposals by the next Tuesday or at all.

Events subsequent to the 14th November 2014 Board Meeting

252. It appears that after the Board Meeting Mr Christy phoned Mr Dyhrberg and informed him of the Board's decision not to pay the further Cintep AU invoices. As a result Mr Dyhrberg wrote an email dated 14th November 2014 to Messrs Brewin, Hance and Riley and copied to Messrs Christy, Formica and Conway-Lamb. He said this:

> *Nick phoned me this evening to say that it is the board's decision not to pay CINTEP Pty Ltd for the September and October invoices.*
>
> *He also said it is the board's intention to approach me and Chris directly to engage us to undertake further work on the recycling shower, and in particular to travel to the UK to recommission the Alpha4 prototype.*
>
> *In my assessment, as it currently stands I am unlikely to get paid for the work I have undertaken this month, I am unlikely to be paid for the remainder of my period of notice, and I am unlikely to be paid any leave balances at the conclusion of my notice period. Under these circumstances I*

consider that for all intents and purposes my employment is immediately concluded. That is, I believe have no further contractual obligations to CINTEP Pty Ltd as it appears unable to cover the cost of my wages. Depending on how this situation plays-out over the next few days, I will consider releasing CINTEP Pty Ltd from some or all of its financial obligations to me to minimise the damage to the directors of CINTEP Pty Ltd.

Whilst I hoped this would not be the outcome, I did consider it a possibility, and I started looking for other employment opportunities earlier this month. To that end I had a very good meeting with a recruiter this morning, which has led to a meeting with the employer on Thursday 20/11/2014. It is an very exciting opportunity, with a higher salary than I am currently earning, and I am keen to secure the position.

If no arrangements have been put in place before that meeting, I will be saying I can start immediately, and this will exclude any possibility of future work with CINTEP Pty Ltd / CINTEP Development Ltd/Crosswater Limited. The recruiter knows my current contract concludes 05/01/2015, but also that there is some uncertainty and that I could likely start earlier if offered the position, with an immediate start the ideal outcome for the employer.

I am genuinely interested in seeing the project continue and be successful, and I am agreeable to travelling to the UK to recommission Alpha4, but it would have to happen before the end of 2014, and preferably much sooner than that.

Furthermore, formal arrangements will need to be in-place before 20/11/2014, and these arrangements would need to include agreement on rate of pay, expenses, and indemnity for me for the work I undertake whilst in the UK, and all monies would need to be paid up-front before the agreed date of departure. Alternatively, I could travel to the UK as an employee of CINTEP Pty Ltd (with mutually agreeable arrangements in-place between CINTEP Pty Ltd / CINTEP Development Ltd / Crosswater Limited). This in the very least would require the payment of the September and October invoices (to enable CINTEP Pty Ltd to continue to legally operate), and an agreement to cover my wages and all expenses up until my return from the UK.

I am sincere in this offer I make. I am making it now because if an agreement is not made within the next 5-6 days, I will be moving on to other things to ensure my financial security.

I have my own opinions about the events of the past few months. No discussion with anyone about any of it will move me to alter this offer. I really do hope you accept this offer that I travel to the UK to recommission Alpha4 to allow the next stage of development to get off to the best possible start.

Thus it is quite clear that, even at this stage, Mr Dyhrberg was prepared to come to the UK temporarily to assist the Company to reinstate the prototype so that it could be worked on and developed in the future. He was simply, and entirely understandably, concerned that he would not get paid for the work that he had already done and was agreeing to do.

253. Also on that date and following the Board meeting Mr Brewin sent an email to Mr Coughlin about both Mr Conway-Lamb and Mr Dyhrberg. He said this:

Good to meet you today, hopefully we can win CCL over. He is heavily invested in the project and can see the opportunity but his concern (based on what he has seen so far) is that he will not have the authority or stability to do his job and manage the project without erratic interference and without that confidence he won't relocate his family from Brisbane. A period of stable consultancy will be a good opportunity to let him form a new opinion…As discussed I feel that as a minimum we should give them work up to their existing notice period with Cintep (Aus) and that during this time we can get plenty of value out of them. A longer period would probably also be good value…In particular using CCL to recruit his replacement or persuading him to come on board, we also want to ensure that any new team can get time with both of them in future to extract their know how as cleanly as possible.

> *Having seen Matt's recent e-mail we need to bottom out an agreement very quickly, this hopefully can be very simple apart from Aus HR law but we should try to avoid this being a hold up as we may lose the opportunity to salvage a clean handover from MD.*
> *I will prime CCL for a call over the weekend and introduce you both so you can set up a good time to have a call on Monday.*
> *For Matt I think it would be best if you e-mail him directly to set up a call. Happy to prime him first if you prefer.*

254. Thus a number of points are clear. Firstly Mr Brewin was attempting to assist the Company in making a success of the handover of the prototypes to the new development team in the UK. Secondly, he seemed to believe that both Mr Dyhrberg and Mr Conway-Lamb were prepared to come to the UK, at least temporarily, to assist. Thirdly, it is also clear that Mr Brewin appeared to think that there was still a chance that Mr Conway-Lamb might be persuaded to come to the UK on a more permanent basis.

255. The attitude of the BBHUK directors of the Company to the payment of any further sums to Cintep AU is clear from an email sent by Mr Powell (E) to Messrs Hance and Riley in which he forwards a copy of Mr Dyhrberg's email set out above. In this email, Mr Powell states this:

> *Whilst I agree that the staff of PTY should not be left high and dry over their salaries, we need to bear in mind Nick repaid his own director loans and back salaries and received a R&D tax credit receipt of £120k which was received after our deal and technically belongs to us — so my take is the actions of the directors of PTY have caused their insolvency as they really should have sought guidance from Crosswater on what (if any) recharges would be paid by us before making payments to themselves ahead of their staff.*

This email was forwarded to Mr Dyhrberg by Mr Powell (E) that day. He stated that he had been asked to do this by Mr Hance and Mr Riley. Mr Brewin was neither copied in nor informed about this contact. According to Mr Brewin, this direct approach by the BBHUK directors and the allegation made against Mr Christy upset Mr Dyhrberg.

256. Mr Dyhrberg sent a further email on 18th November 2014 to Mr Coughlan copied to Messrs Christy, Formica, Conway-Lamb, Brewin and Riley in which he reiterated the fact that his employment with Cintep AU had just been terminated and that he had just arranged a second interview for another job. Thus any offer of further employment from the Company had to come quickly.

257. Despite further contact with Mr Coughlin, no job offer was forthcoming from the Company and, on 20th November 2014, Mr Dyhrberg sent another email to Messrs Christy, Brewin, Riley and Hance copied to Messrs Coughlin and Conway-Lamb in which he said this:

> *To the board of CINTEP Development Ltd*
> *My offer of late last week was sincere, but subsequent events lead me to retract it.*
> *I have discussed this with Chris, Nick, and Peter, so they are aware of the reasons.*

258. The position in relation to both Mr Dyhrberg and Mr Conway-Lamb was summarised in a further email dated 20th November from Mr Coughlin to Mr Riley and Mr Hance. He said:

> *Further to the e-mail you received from Matt Dyhrberg this morning, I have spoken to Chris Conway Lamb today and summarise our conversation below.*
> *In Chris' view Matt will not change his mind. Both Matt and Chris have had their employment with CINTEP terminated with immediate effect as the company has been put into administration. (Matt has withdrawn from the project/work due to his personal circumstances and a desire for greater certainty of employment in the longer term than the CINTEP project appears to offer).*
> *Chris is amenable to working with us in the short term to help commission the prototype and establishing the recruitment needs for a team to develop the prototype, as well as preparing a project plan, 'issues paper' and summary business case, to help the Board make a decision about the longer*

term future of the project. He has made it clear though that he (and his family) do not see their future in the UK and they will not relocate.
Given that the lab won't be available to us/him until early December, with his personal commitments during the month and Christmas/New year, he is prepared to come over for the first two weeks of January and continue to advise and act on our behalf for the month.

259. In the meantime under cover of an email dated 20th November 2014, Mr Powell (E) sent a copy of draft minutes of the Board meeting on 14th November 2014 to Mr Riley. Mr Riley has never fully, or indeed at all, explained by what right he, as opposed to any of the other directors of the Company, was entitled to see and comment on the draft Board minutes before any of the other directors. He said it was an informal arrangement. The email said this:

Could you review these board minutes before I issue them in view of the sensitivities?
Not sure how important the two points are under section 3 as with Cintep PTY in administration they would be unenforceable anyway once that company is dissolved

The draft minutes included the following passage:

3. Amendment to the Asset Purchase Agreement dated 23rd August 2014
It was agreed by PB and NC on behalf of Cintep PTY that the timescale before a patent is handed back for a £1 be extended from 3 to 5 years from the 1st Jan 2015.
It was further agreed by PB and NC on behalf of Cintep PTY Ltd that clause 8 be waived re the heads of agreement built into the asset purchase agreement dated 23/8/14, namely that expenditure on the project be not less than £1 Million in 2015.
Confirmation of these points will be required in writing from Cintep PTY

This of course did not accurately reflect what had occurred. There had been no formal agreement or Board resolution in respect of the re-purchase of the patents, although Mr Brewin and Mr Christy had indicated a willingness to agree to such a variation. More importantly, there had been no agreement in respect of the funding from BBHUK.

260. Just after this, and on the same date (which was a Thursday), there was an email exchange between Mr Powell (E) and Mr Riley into which Mr Hance was copied. Mr Powell (E) wrote:

Did Nick Christy come back to either of you on whether he agreed to the proposal of extending the handing back of the patents for £1 after 5 years instead of 3? He mentioned in the meeting that he would reply by Tuesday? I haven't heard from him.

Mr Riley's response was curt:

I have not heard from him - so I think we are done.
Let's stop wasting our time.

261. The next day, Mr Riley sent to Mr Powell (E) his suggested amendment to the draft Board Minutes. He had made a significant alteration to what was recorded under item 3. The second paragraph read:

It was further agreed by PB that clause 8 be waived re the heads of agreement built into the asset purchase agreement dated 23/8/14, namely that expenditure on the project be not less than TP2 Nov 14 £1 Million in 2015. <u>NC was to confirm</u>

this point within 3 days, failing which Cintep Development may look to cease spending on the project

The phrase *"Confirmation of these points will be required in writing from Cintep PTY"* in the original draft had been omitted. I have underlined Mr Riley's suggested addition. The fact that this passage was not included in Mr Powell's initial draft strengthens my view (already expressed) that there was no such "3 day" ultimatum agreed or even given. Mr Riley's covering email states as follows:

How about the attached (para 3 changed)?

There is thus no suggestion that this is what he actually recalled being agreed at the meeting or that Mr Powell's original draft was not an accurate recollection of what had actually occurred.

262. Having received Mr Riley's draft Mr Powell (E) then sent a copy of the minutes as amended by Mr Riley to Mr Riley himself and to Messrs Hance, Coughlin, Brewin, De Beer and Christy.

263. In an email dated 25th November 2014 sent to Mr Brewin, Mr Christy said this:

Minutes don't match my recollection and also introduce some things that weren't discussed.

1. We didn't agree a 2 year extension, we discussed it and agreed on a one year extension. It's also a one year extension to the existing agreement which is 3 years from 22nd August 2014 not 1 January 2015. What's your recollection?

2. We didn't agree to waive the GBP1M - you said you wanted a promise that you could have your patent back if they didn't fund it through manufacturing. I said I wasn't agreeing to anything on the spot and I would provide my answer the following Tuesday. I'd assumed minutes would be out in 24 hours and this would be one of my actions. There was no mention of ceasing spending if we didn't agree to that by Tuesday - Note the minutes came out 3 days after that deadline expired. The cease spending comment was in relation to the 3 year clause given a 3 year development schedule.

This is consistent with what Mr Christy said about the Board meeting in evidence and confirms my findings as to what actually occurred.

264. On 25th November 2014 Mr Brewin responded to Mr Powell (E) with some "comments" in track changes. Under paragraph 3 he wrote:

It was further agreed by PB that clause 8 (clause 8?) ~~be waived re the heads of agreement built into the asset purchase agreement dated 23/8/11~~,namely that the deadline for expenditure on the project be not less than £1Million in 2015 be extended provided the project was funded adequately. NC was to confirm this point within 3 days, failing which Cintep Developments may look to cease spending on the project. NB PB Comment-2 and 3 were not on the agenda circulated prior to the board meeting

It was pointed out that, whereas Mr Brewin had amended the draft to record the nature of the agreement which he had been prepared to make, he had not deleted Mr Riley's inserted passage: "*NC was to confirm this point within 3 days, failing which Cintep Developments may look to cease spending on the project.*" In cross examination Mr Brewin insisted that he had not agreed that either the Company or BBHUK could cease funding the project. He was less than clear as to whether the three day time limit for Mr Christy's response coupled with the threat of funding withdrawal had been mentioned. He was clear that it had not been agreed. However, as I have already explained, I accept the evidence of Mr Christy in this regard to the effect that there was no such default deadline agreed or imposed or indeed mentioned.

265. In response to Mr Brewin's comments, Mr Riley sent an email dated 25th November 2014 to Messrs Brewin, Hance, De Beer and Christy. It read as follows:

My recollection is different.
a) I thought that I refused to put in a proviso of adequate funding so that we could not have an argument in the future
b) no-one noted that this was not in the agenda at the meeting - I think this point is not relevant
c) "Cintep Development may look to cease spending. ." should read "Cintep Development will look to cease spending . . ."
Bearing in mind that Nick has decided not to go ahead (as he did not contact us within the 3 days), I am not sure any of these changes are relevant anyway!!

266. Insofar as it differs from the evidence of Mr Christy, I do not accept that this was Mr Riley's recollection and, even if it is, I do not accept that it is accurate.
267. The next significant event is that, as Mr Hance puts it, "the BBHUK-appointed directors of [the Company] decided…to cease spending on the joint venture". Although Mr Hance states that he thought that this decision was made in the Company's best interests, I do not accept that this was the case. Whilst the decision might well have been seen to be in the best interests of BBHUK by its directors, such a decision could not possibly have been in the best interests of the Company. Mr Brewin, who was of course a director of the Company, was neither consulted nor informed.
268. On 25th November 2014 Mr Hance sent an email, from his BBHUK address signing himself as "Group Chairman", to Messrs Riley, De Beer, Powell (E), Coughlin, Brewin, Christy and Conway-Lamb. The email was copied to Messrs Powell (A) Caneparo, Formica, Dyhrberg and Porter. It read as follows:

Following a number of meetings and discussions and after careful consideration, we have decided that, with immediate effect, we will not continue with any further investment in the CINTEP project.
This decision has been reached after taking a number of factors into account, which were not entirely apparent, properly and/or fully explained or understood earlier in the year.
These include in no particular priority or order:
The current inadequate state of development of the prototype
The number of unresolved and potentially unresolvable technical and operational issues
The likely future costs of development
The likely unit price per shower
The anticipated operating costs of each unit
The regulatory and health and safety policies and standards that remain to be addressed
The likely challenging consumer reaction to the recycling shower 'offer'
The difficulties of bringing together a team to continue to work on the project and the likely timeframe for bringing a viable product to market.
As a consequence, we conclude that the project is not at a stage where it represents a sound business proposition that we can continue to invest in and support.
It is with regret that we have reached this position. We will now be considering the consequences and options arising from the current situation.
I or Michael would be happy to discuss this matter further should you wish

269. This reflected an earlier telephone call that had been made by Mr Coughlin to Mr Brewin who relayed the news to Mr Christy. It also appears that Mr Coughlin had been in direct contact with Mr Conway-Lamb as, on 24th November 2014, Mr Coughlin wrote to Mr Riley and Mr Hance:

I have spoken to both Chris Conway Lamb and Peter Brewin this morning to advise them that the CINTEP project is now not supported by Crosswater.

Chris was quite measured although disappointed, while Peter was more upset. Chris offered his support to whoever ends up taking the work forward and Peter was keen to know what the next steps were. He was going to think through the situation and will be in touch to speak to us in due course. He confirmed that he would be in London next Friday morning if we wished to meet with him.
Peter also asked if I had let Nick know and I said I hadn't and wouldn't be doing so.

270. It is not disputed that this was a unilateral decision by BBHUK to renege on its contractual commitments to fund the development of the recycling shower though the Company. It is accepted that neither Cintep AU nor the Company had agreed to allow BBHUK to do this. Neither Mr Brewin nor Mr Christy had personally agreed either. In cross-examination, Mr Hance accepted that it was a breach of contract on the part of BBHUK, which it undoubtedly was.

271. Mr Brewin had a series of telephone calls with Mr Hance and Mr Riley on 28th November 2014. From his contemporaneous notes of these calls, it seems clear that Mr Riley and Mr Hance felt aggrieved that they were out of pocket to the tune of £200,000 and that they essentially blamed Mr Christy for this position. Mr Brewin's notes include the following passage:

> *Called Patrick at 17.05, spoke for 40 minutes, refused to pay a penny towards the Cintep employees costs for the Dartford house, ranted about not a penny more and that they should ask Nick for the costs, refused to transfer the patent unless they were paid the £200k they have spent so far, feels they are the wronged party. Seems to believe that the agreement is for them to spend £1M or we get the patent back. This is not what is in the agreements. Whenever I pushed hard said I was Nicks business partner so partly responsible.*

In his evidence, Mr Riley accepted that he had said to Mr Brewin that he would only re-transfer the patents back in return for payment of £200,000. At no stage that I can tell has Mr Riley or anyone else from BBHUK resiled from that position.

272. The Minutes of the Board Meeting of Bathroom Brands PLC held in Jersey on 16th December 2014 and attended by Messrs Riley, De Beer, Powell(A) and Hance include the following passage:

> *Cintep-it was noted that the Managing Director of the Australian company was no longer relocating to the UK. DH advised that 3 Crosswater engineers travelled to Australia for 2 weeks to work with the technical engineers of Cintep. They had found it difficult to work with Nick Christy and there were a number of technical and regulatory obstacles to the shower going into production which had not been addressed. The Group had therefore withdrawn from any further involvement with Cintep.*
> *It was noted that Crosswater Holdings UK Limited ("Crosswater") had invested £200k in Cintep which allowed for the winding up of the Australian company. The £200k was written off by Crosswater in been put into liquidation prematurely and there was now a claim from the Australian liquidator which CC was dealing with.*
> *It was noted that Crosswater has 3 years exclusive rights to the patents of Cintep but it was unlikely that this would be worth anything.*

273. The Company has effectively been moribund since 24th November 2014. No further funding had been provided to it by BBHUK. No further development work has been carried out on the prototypes. It appears that BBHUK effectively absorbed the assets and staff of the Company on or around 24th November 2014. In cross-examination, Mr Hance accepted

that, in unilaterally withdrawing funding from the Company, BBHUK had effectively destroyed its commercial viability.

274. Since that date, the Petitioners complain of a number of breaches of company law.

275. From the 14th November 2014 Board meeting onwards, and despite his remaining a director, Mr Brewin was excluded from the Company's management and affairs. The Company's statutory accounts have apparently been approved by the Board but without reference to him.

276. The Petitioners also say that, since November 2014, controlled by BBHUK's nominated directors, the Company has failed to meet its statutory accounting obligations. In the statutory accounts:

   a. no reference is made to BBHUK's indebtedness to the Company;
   b. no reference is made to the prototypes and essential equipment;
   c. no reference is made to the intellectual property; and
   d. no provision is made for staff or licences.

277. In 2015 the Petitioners say they considered trying to salvage the recycling shower project. They set up a company in Australia, Reshoco Pty Limited, with that in mind. However they were not able to proceed as: they could not afford the £200,000 price which Mr Riley was demanding for the return of the patents; BBHUK had possession of the prototypes; the Australian staff were no longer available to work on the project; it was extremely difficult to procure third party funding given what had occurred.

278. Perhaps of more significance is the General Meeting of the Company which took place on 15th November 2017 at the instigation of the Petitioners. The Resolutions that were voted on were as follows:

   1. *That the company shall take such legal action (including issuing court proceedings) as is reasonably required to obtain redress from Bathroom Brands Holdings UK Limited (formerly Crosswater Holdings UK Limited) for breach of the subscription agreement dated 22 August 2014.*
   2. *That Nicholas Christy be appointed as director of the Company immediately.*
   3. *That the conduct of any such legal action pursuant to 1 above be given to Peter Brewin and Nicholas Christy in their capacity as directors of the Company.*

279. As can be seen this was a belated attempt by the Petitioners to force the Company to take legal action against BBHUK in respect of its clear breach of the Subscription Agreement in refusing on 25th November 2014 to provide the funding to the Company that it was contractually obliged to provide.

280. In an email dated 13th November 2017 from Mr Powell (E) to Messrs Hance, Riley, Chaplin, Coughlin and Powell (A), Mr Powell (E) said this:

> ***In order to be prepared for the Cintep General (shareholders) meeting on Wednesday at 11ann, it is crucial that BBHUK holds a board meeting to appoint a representative to vote against the resolutions. As I am the only director attending (you cannot ring into a general meeting), then I need to be properly approved to cast the vote. Appreciate the timing is not good for Dave and Michael but Pat, me and Clive can form a quorum***

281. The General Meeting took place on 15th November 2017. It was attended by Mr Riley, Mr Powell (E) and a Mr Matthew Reach of the Petitioner's solicitors. Mr Reach had been appointed proxy for a long list of shareholders including the Petitioners as well as Mr Conway-Lamb and Mr Dyhrberg.

282. Mr Reach's recollection of the meeting (set out in an email dated 15th November 2017 to Mr Powell (E)) and which is not contested is that:

   a. Mr Riley, as the sole director of the company present, appointed himself as Chair of the meeting.

b. Mr Powell (E) stated that he was attending on behalf of BBHUK.
c. It was accepted that Mr Reach was validly appointed as proxy for the remaining shareholders.
d. Mr Powell (E) on behalf of BBHUK which held 75% of the shares called for a poll and stated that he was voting against or blocking all of the proposed resolutions.
e. Mr Reach asked for it to be noted that on behalf of the members for whom he held proxies, he was voting in favour.

283. Thus BBHUK as majority shareholder in the Company effectively blocked any move by the Company to take action against BBHUK in respect of its, now admitted, breach of the Subscription Agreement.

284. This petition was issued on 18th February 2019.

THE LAW

285. There was not much dispute about the relevant legal principles.

The relevant sections of the 2006 Act

286. Under section 996 of the 2006 Act:

> *(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of*

287. In order to engage the Court's discretion to grant relief under section 996 of the 2006 Act, it is necessary for the Petitioners to establish that the affairs of the Company have been conducted in a manner which is unfairly prejudicial to their interests as a minority shareholders within the meaning of section 994. This provides:

> *(1) A member of a company may apply to the court by petition for an order under this Part on the ground–*
> *(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or*
> *(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.*

The necessary requirements

288. In RE: SOUTHERN COUNTIES FRESH FOODS LIMITED [2008] EWHC 2810 (Ch) Warren J analysed the elements that a petitioner under section 994 has to show in order to obtain relief under section 996. In paragraph 39 he said:

> *39. For a petition to be well- founded, it must establish (see Re Neath Rugby Ltd [2007] EWHC (Ch) 2999 [2008] BCC 390), per Lewison J at paragraph 202) that:-*
> *a. the acts or omissions of which it complains consist of the management of the affairs of the company;*
> *b. the conduct of those affairs has caused prejudice to its interests as a member of the company; and*
> c. *the prejudice is unfair.*

In paragraphs 46 to 47 he said this:

> *To succeed on a petition, the petitioner must show that the conduct complained of is both unfair and prejudicial. One element without the other will not suffice… There must be a causal link between the conduct complained of and the unfair prejudice suffered by the shareholder…*

289. I shall look at each of these elements in turn.

The "affairs of the company"

290. In the Southern Counties case, at paragraphs 40 and 41 Warren J said this:

The meaning of the expression "affairs of the company" has been considered in a number of cases. It is very broadly construed…

The principles can, in large part, be distilled from the well-known cases of Saul D Harrison & Son plc [1995] 1 BCLC 14 and O'Neill v Phillips [1999] 1 WLR 1092: a shareholder generally needs to establish one of the following:

a. A breach of the terms on which he agreed that the affairs of the company should be conducted;

b. That equitable considerations (those referred to by Lord Wilberforce in Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 at 379) arising at the time of the commencement of the relationship or subsequently, make it unfair for those conducting the affairs of the company to rely on their strict legal rights;

c. That the board of directors has exceeded the powers vested in them or have exercised their powers for an illegitimate or ulterior purpose; or

d. Some event putting an end to the basis on which the parties have entered into association with each other, making it unfair that one shareholder should insist on the continuance of the association

291. Thus conduct which can potentially be unfairly prejudicial is not narrowly confined.

Unfair conduct

292. In RE SAUL D HARRISON [1995] 1 BCLC 14, Hoffmann LJ adopted with approval the Jenkins Committee's summary of unfair prejudice. The Jenkins Committee said that unfair prejudice entailed:

"*a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely*".

293. In RE METROPOLIS MOTORCYCLES LIMITED [2006] EWHC 364 (Ch) Mann J said this (at paragraphs 52-54):

52…Most of the dispute concerned fairness. In considering how to apply that concept it is not necessary to look beyond two cases, namely Re Saul D Harrison & Son plc [1995] BCLC 14 , and O'Neill v Phillips [1999] 1 WLR 1092 . Both were cited to me by Mr Griffiths, who placed particular reliance on them. In the former case it was held:

"In deciding what is fair or unfair for the purposes of s.459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationship of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, ***the starting point in any case under s.459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association.***

*"**Not only may conduct be technically unlawful without being unfair: it can also be unfair without being unlawful**. In a commercial context this may at first seem surprising. How can it be unfair to act in accordance with what the parties have agreed: as a general rule, it is not.* ***There are cases in which the letter of the articles does not fully reflect the understandings upon which the shareholders are associated****. Lord Wilberforce drew attention to such cases in a celebrated passage of his*

judgment in Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 at 379, which discusses what seems to me the identical concept of injustice or unfairness which can form the basis of a just and equitable winding up:

'The words [just and equitable] are a recognition of the fact that a limited company is more than a legal entity, with a personality in law of its own: there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure … The [just and equitable] provision … does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.'

*"Thus the personal relationship between a shareholder and those who control the company m**ay entitle him to say that it would in certain circumstances be unfair for them to exercise a power conferred by the articles upon the board or the company in general meeting** … It often arises out of fundamental understanding between the shareholders which form the basis of their association but was not put into contractual form, such as an assumption that each of the parties who had ventured his capital will also participate in the management of the company and receive the return on his investment in the form of salary rather than dividend." (Hoffman LJ at pp 17–18).*

53. In O'Neill Lord Hoffman said (at page 1101–2):

"In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in In re Saul D. Harrison & Sons Plc. [1995] 1 B.C.L.C. 14 , 17–20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J. said in In re J.E. Cade & Son Ltd. [1992] B.C.L.C. 213 , 227: "The court … has a very wide discretion, but it does not sit under a palm tree.'" (p 1089)

"… So I agree with Jonathan Parker J when he said in Re Astec (BSR) plc [1998] 2 BCLC 556 at 558:

> *'… in order to give rise to an equitable constraint based on "legitimate expectation" what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former.'*

*"This is putting the matter in very traditional language reflecting in the word "conscience" the ecclesiastical origins of the long departed Court of Chancery. As I have said, I have no difficulty with this formulation. **I think that one useful cross check in a case like this is to ask whether the exercise of the power in question will be contrary to what the parties, by words or conduct, have actually agreed.** Would it conflict with the*

promises which they appear to have exchanged? In Blissett v Daniel the limits were found in the "general meaning" of the partnership articles themselves. In a quasi-partnership company, they will usually be found in the understandings between the members at the time they entered into association but there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract. ***A promise may be binding as a matter of justice and equity although for some reason or another (for example, in favour of a third party) it would not be enforceable in law.***

> *"**I do not suggest that exercising rights in breach of some promise or undertaking is the only form of conduct which will be regarded as unfair for the purposes of s.459.** For example, there may be some event which puts an end to the basis on which the parties entered into association with each other, making it unfair that one shareholder should insist upon the continuance of the association. The analogy of contractual frustration suggests itself. The unfairness may arise not from what the parties may have positively agreed but from the majority using its legal powers to maintain the association in circumstances in which the majority can say it did not agree: non haec in foedera veni . It is well recognised that in such a case there would be power to wind up the company on the just and equitable ground (see Virdi v. Abbey Leisure Ltd. [1990] B.C.L.C. 342) and it seems to me that, in the absence of a winding up, it could equally be said to come within section 459."*

54. Of particular importance in the present case are the following ingredients:

(i) Whether there is something in the nature of an agreement or arrangement between the parties which has not been and is not being complied with.
(ii) Whether there is something in the nature of a legitimate expectation falling short of an agreement which is not being complied with.
(iii) Whether events have moved on so that there is something falling within Lord Hoffman's frustration analogy…
(iv) The court does not administer some form of palm tree justice. The concept of fairness must be applied according to rational principles.
(v) The court looks beyond the actual contractual relationship between the parties arising out of the Articles of Association.

(emphasis added)

294. Patten J (sitting as a judge in the Court of Appeal) said this in <u>GRACE V BIAGIOLI</u> [2006] 2 BCLC 70 (at paragraph 61):

> *"The concept of unfairness, although objective in focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable."*

295. In <u>FISHER V CADMAN</u> [2006] 1 BCLC 499 Mr Philip Sales QC said this (at paragraphs 86 and 87):

"The test of unfairness is an objective one…: would a reasonable bystander observing the consequences of the conduct of those persons who have de facto control of a company regard that conduct as having unfairly prejudiced the petitioner's interests?…conduct of the de facto controllers of a company may qualify as unfairly prejudicial to the interests of a member for the purposes of [section 994] if it involves (i) a breach of the agreement between the members contained in the articles of association or (ii) a violation of such other, wider equitable constraints as may have arisen to bind the controllers…

296. Having quoted this passage, in the Southern Counties case, Warren J added (at paragraph 50):

> *I agree with what Mr Sales has said, save that, following Hoffmann LJ in Saul D Harrison, the introduction of the officious bystander is not particularly helpful. I would add that there is no difference in principle when applying this approach between the Articles of Association and any agreement between the shareholders…*

297. In RE GUIDEZONE [2001] BCC 692, Jonathan Parker J said this (at paragraph 175);

> *In the case of quasi-partnership company exclusion of the minority from participation in the management of the company contrary to the agreement or understanding on the basis of which the company was formed provides a clear example of conduct by the majority which equity regards as contrary to good faith.*

298. Mr Lewis drew my attention to the case of RE MACRO (IPSWICH) LTD [1994] 2 BCLC 354 in which (at page 404-5) Arden J had stated that mismanagement of a company's affairs can amount to unfairly prejudicial conduct provided that it is "sufficiently serious to justify the intervention by the court".

299. Mr Campbell, on behalf of BBHUK, however drew my attention two cases which, he said, exemplified the submission that, in deciding whether minority shareholders have been unfairly prejudiced, the conduct of the majority cannot be looked at in isolation. The Court has to look at the conduct of the majority in the context of the behaviour of the minority whose interests are said to have been unfairly prejudiced: conduct on the part of the majority which, viewed in isolation, might otherwise be said to be unfair, may, when viewed in the round and taking into account the behaviour of the minority, be seen to be fair, or rather not unfair.

300. The case of RE RA NOBLE (CLOTHING) LTD [1983] BCLC 273 involved a petition under a statutory predecessor of section 994 brought by a Petitioner, Anafield, a company controlled by a Mr Bailey, which had invested in the relevant company which had been formed to purchase the business previously run by a Mr Noble. Having examined the facts, the judge, Nourse J, held that whilst Mr Noble's behaviour has been prejudicial to Mr Bailey and his company, it had not in all the circumstances been unfair. This was due principally to the conduct of Mr Bailey himself. At pages 291-2, Nourse J said this:

> *I certainly think that Mr Noble's conduct, inasmuch as it resulted in the exclusion of Mr Bailey from participation in all major decisions affecting the Company's affairs, could in other circumstances have amounted to conduct unfairly prejudicial to the interests of Anafield…But in all the circumstances of this case, including many to which I have not specifically referred, I do not think that it can be said that Mr Noble's conduct was unfairly prejudicial to the interests of*

Anafield. In my judgment, the crucial word on the facts of this case is 'unfairly'. It is at this point that Mr Bailey's disinterest becomes a decisive factor. In the end…I do not think that a reasonable bystander, observing the consequences of Mr Noble's conduct and judging it to have been prejudicial to the interests of Anafield, would regard it as having been unfair. I think he would say that Mr Bailey had partly brought it upon himself. That means that there is no case for relief under s75.

301. In RE LONDON SCHOOL OF ELECTRONICS [1986] 1 Ch 211, Nourse J said this at page 222):

The conduct of the petitioner may be material in a number of ways, of which the two most obvious are these. First, it may render the conduct on the other side, even if it is prejudicial, not unfair: cf.: In re R. A. Noble & Sons (Clothing) Ltd. [1983] B.C.L.C. 273 . Secondly, even if the conduct on the other side is both prejudicial and unfair, the petitioner's conduct may nevertheless affect the relief which the court thinks fit to grant under subsection (3). In my view there is no independent or overriding requirement that it should be just and equitable to grant relief or that the petitioner should come to the court with clean hands.

Prejudice

302. It appears that the nature of prejudice under section 994 is also to be construed widely. In RE COROIN LIMITED [2012] EWHC 2343 (Ch) David Richards J said this (at paragraph 630):

Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. So, for example, removal from participation in the management of a company and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where the members have rights recognised in equity if not at law, to participate in that way. Similarly, damage to the financial position of a member in relation to a debt due to him from the company can in the appropriate circumstances amount to prejudice. The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section.

Directors duties and unfair prejudice

303. There was some discussion about the nature of directors' duties in this context.
304. In the Southern Counties case, Warren J said this (at paragraphs 51 and 53):

The…directors and employees in sufficiently senior positions…owed [the Company] fiduciary duties:

a. to act bona fide in the interests of SCFF; and

b. not (without the consent of SCFF) to put themselves in a position where there is a conflict (actual or potential) between their personal interests and their duties to [the company] or between their duty to [the company] and a duty to owed to another person.

The caveat " without the consent of the company" is important because the prima facie duties may be qualified as a result of agreements and practices made between [the shareholders]…

In relation to acting in the best interests of a company, the directors' fiduciary duty is to exercise the powers conferred on them "bona fide in what they consider – not what a court may consider – is in the interests of the company", thus the test, both under the general law and under CA 2006, is a subjective one. The question is whether the director honestly believed that his act or omission was in the interests of the company. The court does not consider that the duty is broken simply because, in the court's opinion, the particular exercise of the power was not to promote the success of the company, although it is accepted that a breach will have occurred if it is established that the relevant exercise of the power is one which could not be considered by any reasonable director to be in the interests of the company…This subjective approach does not however, entitle a director to breach the "no-profit" rule and the "no-conflict" rule simply because he thinks it is in the interests of the company to do so. Nor in my judgement, is it necessarily the case that there can, in cases of conflict, be no unfair prejudice simply because the director believes his conduct to be justified.

305. In RE TOBIAN PROPERTIES [2013] BCC 98 (at paragraph 22) Arden LJ said this:

One of the most important matters to which the courts will have regard is thus the terms on which the parties agreed to do business together. These are commonly found in the company's articles. They also include any applicable rights conferred by statute. In addition, the terms on which the parties agreed to do business together include by implication an agreement that any party who is a director will perform his duties as a director. Primary among these duties are the seven duties now codified in ss.171 to 177 of the Companies Act 2006. Under these duties, a director must act in the way which 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. There is also the well-known duty to avoid conflicts of interest and duty: a director must avoid a situation in which he has an interest which conflicts with that of the company. Six out of seven of these duties are fiduciary duties, that is, duties imposed by law on persons who exercise powers for the benefit of others. Non-compliance by the respondent shareholders with their duties will generally indicate that unfair prejudice has occurred.

The position of nominee directors

306. Messrs Hance, Riley and De Beer were directors of the Company but also directors of BBHUK. They owed their positions on the Board of the Company to BBHUK. They were in that sense, of course, nominee directors. Mr Campbell on behalf of BBHUK submitted that:

(i) Where there is a question as to whether a director of a company in a group has complied with his duty to exercise independent judgement and/or his duty to avoid conflicts of interest, the question is whether the director has complied with an overall duty to act fairly, rather than whether he has acted in the strict interests of each company; and

(ii) In cases concerning nominee directors, there will be no breach of fiduciary obligations in circumstances where it was known to all parties from the outset that the nominees could be expected to have in mind the interests of both the company in question and their nominator, provided that the business strategy favoured by them was reasonable, legitimate, and proposed in good faith. Thus in balancing a

nominee director's duty to promote and protect the interests of the company in question on the one hand, and those of his nominator on the other, the question for the Court is whether the nominee had, in good faith, taken proper account of the interests of the company, alongside the interests of his nominator, and sought to maintain a fair balance between those interests.

307. So far as the duty of nominee directors is concerned, the position was summarised by Warren J in the Southern Counties case where he said (at paragraph 67-8):

67…the position of a nominee director is, I conclude, as follows.

a. *First, he owes the same duties to the company as any other director.*
b. *Secondly, he owes his duties as a director to the company alone.*
c. *Thirdly, the company is entitled to expect from the director his best independent judgment.*
d. *However, fourthly, these duties can be qualified in the case of a nominee director just as they can be qualified in the case of any other director. In particular, such duties (except perhaps for certain core duties) can be qualified by the unanimous assent of the shareholders.*
e. *But, fifthly, it is doubtful whether, as a matter of English law, it is possible to release a director from his general duty to act in the best interests of the company.*
f. *Sixthly, even if it is possible to do so, it would require strong evidence to demonstrate that that had been done, ideally an express written agreement signed by all of the shareholders. The onus must lie on those saying that the general rule has been attenuated or, to use another word, relaxed, as a result of unanimous shareholder approval to demonstrate that such approval has been given. And, I must add, they must show the extent to which the general rule has been relaxed.*
g. *Seventhly, however, I see no reason in principle why in relation to specific areas of interest, a director should not be released from his fiduciary duty to give his best independent judgment to the company. In particular, if a director is charged with negotiating on behalf of his appointor an agreement with the company where the interests of his appointor and the company are opposed, the shareholders can unanimously agree that he may conduct such negotiation without regard to the interests of the company. But if that were to be done, it might be expected that the director concerned would, by the same agreement, be precluded from discussions of the board relating to the negotiations and certainly from voting on the issue.*

68. But whatever can be said as a matter of generality, I consider that the extent of the duties of a director in such a situation are very much fact-specific. The general duty is clear; the difficult question is the extent to which the duty is qualified. That qualification will depend critically on the context of the relationship and the particular action which is said to constitute a breach of duty.

308. Mr Lewis drew my attention to the case of SCOTTISH COOPERATIVE WHOLESALERS V MEYER [1959] AC 324 in which Viscount Simonds said this (at page 341):

nominees of a parent company upon the board of a subsidiary company may be placed in a difficult and delicate position. It is, then, the more incumbent on the parent company to behave with scrupulous fairness to the minority shareholders and to avoid imposing upon their nominees the alternative of disregarding their instructions or betraying the interests of the minority.

Lord Keith said this (at page 363):

I cannot think that where directors, having power to do something to save a company, lie back and do nothing, they are not conducting the affairs of the company, perhaps foolishly, perhaps negligently, perhaps with some ulterior object in view. They are certainly conducting the affairs of the company in breach of their duty as directors.

THE PARTIES' SUBMISSIONS

The Petitioners

309. In summary, on behalf of the Petitioners, Mr Lewis made the following case.
310. It was common ground, he said, that the Company was a quasi-partnership: that is an association formed on the basis of a personal relationship involving mutual confidence and an agreement or understanding that the members would participate in the management of the Company. Thus BBHUK, through its nominee directors, and the Petitioners were expecting to be involved in the day to day management of the Company with Mr Christy indeed being Managing Director.
311. This lead, he said, to there being a reciprocal duty of good faith between the quasi-partners, BBHUK and its nominee Directors, on the one hand, and the Petitioners, on the other, to the effect that each quasi-partner would inform and consult the other in relation to all matters material to the Company. This he referred to as the "Common Understanding". This was again common ground.
312. On the formation of the Company, both BBHUK and the Petitioners had a legitimate expectation that the Company would pursue the commercial objectives of: developing and commercialising the recycling shower for profit; in the longer term, the development and commercialisation of what he called "clean technologies". This he labelled the "First Legitimate Expectation". BBHUK accepts that the initial commercial objective of the Company as a joint venture was to bring the recycling shower to commercial production.
313. There was also what he referred to as the "Second Legitimate Expectation" which was that the affairs of the Company would be conducted in accordance with the Subscription Agreement, Articles of Association, Shareholders' Agreement and the 2006 Act, and that the Directors would act lawfully for the benefit of members as a whole, and would not breach their fiduciary duties owed to the Company. This is described as "legally incoherent" in BBHUK's Amended Points of Defence. However, it seems to me to be no more than a (trite) assertion that the parties would have expected each other to comply with their agreements, the Company's Articles of Association and the law.
314. The Petitioners allege eight instances of unfairly prejudicial conduct by BBHUK through its directors and employees. BBHUK, they say, committed or caused to be committed multiple serious breaches of their contractual obligations, the contractual and statutory obligation of good faith and their nominated directors' fiduciary duties owed to the Company.
315. The eight instances of unfairly prejudicial conduct were as follows.
316. First, Mr Lewis states, in breach of the Subscription Agreement, BBHUK failed to sign a Deed of Adherence to the Shareholders Agreement. BBHUK's nominated directors who were charged with procuring BBHUK's adherence, did nothing. In consequence, all the rights which the Petitioners should have had directly against BBHUK under the Shareholders' Agreement were lost.
317. Secondly, at the direction of the BBHUK-nominated directors, and in breach of the Shareholders' Agreement, the Company failed to implement the share options scheme thereby depriving the Petitioners of additional shares.
318. Thirdly, and in breach of the Subscription Agreement, BBHUK did not release any of the agreed funding (save for the initial subscription price of £112,000). He asserts that this was probably, in the first instance, due to short term cash flow difficulties. In any event he says, the funding delay in turn caused a delay to the recycling shower development project.
319. Fourthly, on 30th October 2014, and directly contrary to a decision taken by Mr Christy as Managing Director (which decision was taken with Mr Hance's express agreement) that the prototype recycling shower and associated equipment was to remain at the Brisbane premises until January 2015, Mr Hance instructed Mr Porter, a BBHUK employee, to pack up and immediately ship to the UK, the prototype and associated equipment. Mr Hance

did so without consulting either Mr Christy or Mr Brewin and without obtaining Board approval. This action could not have been in the best interest of the Company and could only, he says, have been in the interest of BBHUK alone. This unauthorised and precipitate action constituted not only the wrongful exclusion of the Petitioners from the management of the Company but was also gross mismanagement. It caused significant harm to the Company, by: losing the trust and confidence of Mr Conway-Lamb and Mr Dyhrberg (whose relocation to the UK and continuing involvement was crucial to the timeous development of the recycling shower); causing Mr Christy to become similarly disillusioned; potentially jeopardising a potentially lucrative co-development project with L'Oréal which had been arranged, or was in the course of being arranged, in Australia.

320. Fifthly, he relies on the behaviour of Mr Riley, of course one of the BBHUK nominated directors, at the Board meeting of the Company on 14th November 2014, when he, without any prior warning, abandoned the pre-agreed Agenda and sought, in BBHUK's interests, to renegotiate the terms of the Subscription Agreement to BBHUK's advantage. Given the fact that he was seeking to reduce the pre-existing contractual liability of BBHUK to the Company and that he was a director of BBHUK, he could not have voted on any resolution without express authorisation under Article 34 of the Company's Articles of Association. No such authorisation was sought. Further, following that meeting, Mr Riley tried to manipulate the Board Minutes to record matters which had not been agreed.

321. Sixthly, he relies on the fact that, on 25th November 2014, BBHUK unilaterally, and in repudiatory breach of contract, withdrew from the Subscription Agreement. BBHUK's nominated directors failed to take any action to protect the Company and its members and, thereafter, effectively abandoned the business which in consequence became dormant. This was, he says, contrary to, *inter alia*, clause 3.2 of the Shareholders' Agreement requiring the Company to pursue its business.

322. Seventhly, he relies on the conduct of BBHUK and its directors Mr Riley and Mr Powell (E) at the General Meeting of the Company on 15th November 2017 at which BBHUK, as majority shareholder, voted down a resolution which would have compelled the Company to pursue its rights against BBHUK.

323. Eighthly, he relies on the fact that, controlled now by BBHUK's nominated Directors, since November 2014, the Company has failed to meet its statutory accounting obligations and Mr Brewin, who is or was then still a director of the Company, was excluded from the Company's accounting exercises. He is critical of the description of these failures in the BBHUK's Amended Points of Defence as "a litany of inconsequential matters".

324. He asserts that the resultant prejudice is simple to identify. In 2014, the Company was a highly promising start-up possessed of revolutionary patented technology (and a five year history of awards, grants, engineering work and brand development). He asserts that, a competitive venture that was less advanced than the Company in 2014, Orbital Systems, is now achieving significant commercial success. BBHUK's unfair destruction of the Company's commercial vitality, the squandering of its potential, its disregard for contractual commitments and its nominated directors' statutory duties, he submits, cannot be other than prejudicial. Any value that the Petitioners might have had in the Company and the recycling shower project has been destroyed. Any rights which the Petitioners or the Company might have had against BBHUK either never existed or were rendered nugatory.

BBHUK

325. In summary, on behalf of BBHUK, Mr Campbell made the following case.

326. BBHUK accepts that the Company was a joint venture between BBHUK and the Petitioners. It is accepted that the Company is to be viewed as a quasi-partnership between these parties. It accepts that there was, between the parties, the "Common Understanding" as asserted by the Petitioners, at least until late November 2014. BBHUK also accepts that

the initial commercial objective of the joint venture was to bring the recycling shower to production "within a matter of months".

327. So far as there being any "legitimate expectation", BBHUK denies that the Petitioners ever had any legally relevant "legitimate expectation" other than that the Company would be run by its directors and shareholders in accordance with their respective legal rights and duties. In particular, it denies that there was any legal or equitable duty on BBHUK or its nominated directors to continue to pursue the Company's initial commercial objective even after it became clear that it was unfeasible.

328. At the heart of BBHUK's case is this. It asserts that it entered into the joint venture on the strength of various assurances made by the Petitioners during negotiations. In particular, in spring and early summer 2014, BBHUK was led to believe by the Petitioners that they had developed a prototype of the recycling shower which would be ready to be placed into tooling and manufacturing in or around March 2015. Thus, the fundamental basis for BBHUK entering into the joint venture was that it was led by the Petitioners to believe that, while there was significant commercial and technical risk involved, the project involved taking an advanced and fully-functioning prototype into manufacturing and through the testing required for approvals. BBHUK's case is that it was reassured by the Petitioners, by the time the joint venture was formed in August 2014, that it was realistic to expect demonstrator models to be in showrooms by February 2015, and products to be sold to consumers by November 2015.

329. BBHUK's enthusiasm to be involved in the project was engendered by these assurances and it was in reliance on them that it decided to enter into the various agreements and invest in the recycling shower project. Not only did it enter into an agreement to invest substantial sums in the Company to develop the recycling shower, BBHUK also: (i) spent substantial sums building a laboratory for the Company at its headquarters in England; (ii) made arrangements for Mr Christy and the Cintep AU engineering team to move to England; (iii) recruited the three English engineers; and (iv) loaned a further £65,000 to the Company which was loaned onwards to Cintep AU (£50,000 of which was used to repay its debt to Mr Riley).

330. However, according to BBHUK, in autumn 2014 relations began to sour and enthusiasm for the joint venture rapidly diminished on both sides. This was catalysed, on BBHUK's side, by the visit of Mr Porter and the English engineers to Australia in October 2014. On that trip, they discovered what they regarded as fundamental problems with the Petitioners' prototype. It became clear, it is said, during Mr Porter's visit to Australia that the picture presented by the Petitioners pre-investment had been significantly over-optimistic. In particular, it became clear to all involved that: (1) there was no fully-functioning pre-production prototype, but instead one that required significant development work to bring it anywhere close to functioning on a commercially marketable basis; (2) there was recognition by the Petitioners that a plan to overcome serious regulatory hurdles was needed, but none had been formulated; and (3) on any view, the product was years away from being sold to consumers. In addition to uncovering a host of technical problems of varying degrees of seriousness, Mr Porter and the English engineers also formed the view that the recycling shower product might never comply with UK water regulatory standards (which in turn would have prevented the Company obtaining approvals for sale of the Product in the UK).

331. In short, as a result of Mr Porter's visit to Australia, BBHUK discovered for the first time that, far from being on track to enter mass production in the foreseeable future, the recycling shower product actually required an enormous amount of further design and development work, without any assurance of ultimate technical or commercial viability, and on a significantly different timescale to that originally proposed by the Petitioners.

332. Far from obtaining any reassurances from the Petitioners, at this time, Mr Christy announced that he wished to leave the Company and resigned as a director, while other key members of Cintep AU staff, Mr Conway-Lamb and Mr Dyhrberg, confirmed that they were unwilling

to relocate to England to continue to work on the project. Mr Brewin, for his part, remained clear (as he had been from the outset) that he did not intend to play an active role in leading the Company or developing the Product.

333. Whilst it is accepted that originally Mr Hance had agreed with Mr Christy to leave the prototype in Australia until January 2015, the changed circumstances justified Mr Hance in making the decision immediately to remove the prototype to England. That decision was open to Mr Hance and Mr Christy had no right to veto such a decision, either alone or in combination with Mr Brewin. Accordingly, no unfair prejudice arises in respect of Mr Hance's decision. In reality, this episode represented an operational disagreement between co-directors over the precise timing of the transport of equipment belonging to the Company, to the Company's new premises in England.

334. As Mr Campbell emphasised on a number of occasions, the Court's role here is not to intervene in, or by reference to, such management disputes. The Court cannot second-guess commercial decisions made six years ago.

335. I should accept the evidence of Mr Hance and Mr Riley that they took the decision to remove the prototype from Australia to England bona fide in what they thought was in the best interests of the Company.

336. Further, I should find, Mr Campbell submits, that the decision to remove the prototype was not the major reason either for Mr Christy's decision to resign or for the decisions made by Messrs Dyhrberg and Conway-Lamb not to relocate to England.

337. Whilst BBHUK accepts that that reports produced by Mr Porter and the English engineers on and after their Australian trip were not shared with either Mr Christy or Mr Brewin, I should find that they were nevertheless fully aware of the nature of the concerns raised. I should also find that they were aware of the existence of these reports but refrained from asking for copies.

338. As to the Board Meeting on 14th November 2014, the Board met and discussed the issues, with full awareness on the part of all parties of the concerns held by the BBHUK-nominated directors. That discussion was recorded in the minutes. There was no impropriety in the BBHUK-nominated directors making proposals to change the funding arrangements: they were entitled to advance proposals in good faith and in what they perceived to be the interests of the group as a whole. Thus, BBHUK submits, I should find that Mr Riley made his proposals honestly and in good faith, based on his view of what was reasonable in all the circumstances. He had in mind, in particular, that the patent's hand-back period and the provision of the £1 million funding should match what was now the obviously longer timeline to manufacture. Specifically, I am asked to reject any suggestions that Mr Riley acted so as to advance an ulterior agenda of either: (1) saving BBHUK from cashflow difficulties; or (2) "stealing" the project from the Petitioners or the Company.

339. Alternatively, if it is established that there **were** any procedural deficiencies in the manner of the Board's decision-making, BBHUK submits that the substantive outcome, i.e. the decision to suspend funding, would have been the same regardless of whether any particular procedure was followed. As a result, any such deficiencies did not, and could not, amount to unfair prejudice.

340. I am asked to reject the suggestion that Mr Riley acted in bad faith in making amendments (at to the draft minutes originally sent to him for comment by Mr Powell (E)).

341. So far as the unilateral decision by BBHUK and/or the BBHUK-nominated directors to cease any further funding is concerned, it was accepted by Mr Campbell in closing that this, taken in isolation, was unfair and prejudicial conduct. However, he submits, it cannot be looked at in isolation. Messrs Hance, Riley and de Beer were entitled to balance the interests of BBHUK and the Company, in light of all the circumstances. Further, the Petitioners themselves were under a duty to act in good faith towards BBHUK as their quasi-partners: the relevant equitable obligations under the quasi-partnership were mutual, rather than one-way. The Petitioners were in no position to insist on BBHUK continuing to fund the joint

venture in circumstances where Mr Christy had decided to walk away from the management role that had been contemplated by the parties from the outset. Accordingly, the Petitioners were not entitled, at the time or subsequently, to insist on the strict funding obligations imposed on BBHUK under the Subscription Agreement, blind to changing circumstances and BBHUK's genuine and reasonable concerns.

342. He asks me to find that BBHUK would, even after Mr Hance's email of 25th November 2014 announcing the withdrawal of funding, have continued to support the project, if the Petitioners had indicated their agreement to the proposals put forward by Mr Riley. In fact, at this time, Mr Christy had decided that he no longer wished to be involved.

343. There is no substance, he says, to the stand-alone allegation of unfair prejudice in the form of BBHUK failing formally to enter into the Shareholders' Agreement. No complaint was made in this regard before the decision to suspend funding; and, thereafter, there was no purpose in formally adhering to a Shareholders' Agreement in respect of a dormant company. Further, in circumstances where the Company became dormant after November 2014 (and the Petitioners then broke off contact for the following three years), there is nothing in the allegation that BBHUK caused the Company not to implement the terms of the Shareholders' Agreement, for example as to the implementation of a share option scheme, or the maintenance of any relevant intellectual property.

344. BBHUK was entitled to conduct itself as it did at the General Meeting on 15th November 2017 because, in all the circumstances, the Company did not have any legal basis for pursuing a claim against BBHUK.

345. Standing back he submits that that the Court should find that, **as between shareholders**: (1) there were faults on both sides, leading up to the board meeting on 14th November 2014; (2) notwithstanding the challenges the product faced, which the Petitioners accept, were "*very hard to overcome*", BBHUK did not walk away; (3) in the context of what both parties now knew on the state of development of the product and the regulatory uncertainty, the revisions of contractual terms, proposed by Mr Riley at that meeting, were substantively reasonable in all the circumstances (as Mr Brewin recognised in principle), and it was unreasonable of Mr Christy to refuse to engage with them; and (4) ultimately, the joint venture was not wrongfully "*killed*" by BBHUK, but instead fell into abeyance because the parties were unable to agree a way to salvage their relationship, and **neither side** wished to pursue the joint venture with each other as originally agreed. The mutual trust and confidence between the parties had been lost.

346. Having cited to me the cases of RE RA NOBLE (CLOTHING) LTD and RE LONDON SCHOOL OF ELECTRONICS cases, he urged me to look at the conduct said by the Petitioners to give rise to unfair prejudice in the light of the conduct of the Petitioners themselves towards their joint venture partner BBHUK. In particular I must bear in mind the following factors.

347. Firstly, the fact that, as described above, the Petitioners were less than candid with BBHUK, in terms of the status of the product/project pre-investment. Indeed they misled BBHUK. The timeline they proposed was, in fact, never realistic or achievable. A matter of weeks after the formation of the joint venture, the timetable had already slipped to the end of 2016. BBHUK might have tolerated that slippage, but Mr Porter's visit to Australia revealed to all concerned that even the extended timeline was wholly unrealistic. This undermined the whole basis of the joint venture, as expressed in the transaction documents. Together with the other factors identified below, it is submitted that this justified BBHUK seeking a variation of its funding commitment: and made it inequitable for this to be refused by the Petitioners.

348. Secondly, whilst their instruction to Mr. Porter to ship the prototype to England was poorly handled, it was a decision made by Messrs. Hance and Riley honestly and in good faith, and not for an ulterior motive. The Petitioners have significantly over-stated the commercial impact of it. It did not cause or entitle Mr Christy to walk away from his own commitment

to the venture. In truth, it was an unfortunate incident that was a symptom rather than the cause of an increasingly distrustful relationship. This distrust had already been created by: Mr Christy's unilateral (and personally self-serving) salary "agreements" for himself and the Australian engineers; the factors set out above. In particular, to the extent that the decision to remove the prototype discouraged the Australian engineers from re-locating to the UK, their confidence had already been undermined by the (admitted) unilateral and high-handed actions of Mr Christy, in agreeing uncommercial salary and benefit packages without prior consultation with the Company's board. Thus any difficulties caused by the ultimate refusal of the Australian engineers to re-locate should be viewed as the result of fault on the part of both BBHUK and the Petitioners. Further, I should take into account that, in November 2014, BBHUK plainly sought to remedy the situation and "woo" the Australian engineers but without any obvious support from the Petitioners.

349. Thirdly, Mr Christy's decision to resign as a director of the Company and effectively walk away from the recycling shower project was not caused by any conduct of the part of BBHUK but was rather his own decision taken for his own motives. In particular, following Mr Porter's visit to Australia, Mr Christy had realised that the recycling shower project was going to take much longer than he had anticipated and that motivated his desire to leave.

350. Fourthly, he submits that Mr Riley's proposals made at the Board Meeting on 14th November 2014 were objectively reasonable and sensible in all the circumstances. Whilst they can fairly be described as an ultimatum, they accorded entirely with the spirit of the joint venture that the parties had entered into. By the date of the Board Meeting, it was obvious to everybody that the product was years away from market, if it could ever be brought to market at all. In those circumstances Mr Riley wanted appropriate adjustments to be made to the timing of BBHUK's obligations to fund. The Petitioners acknowledged that position, to a degree, by agreeing to extend the patents' hand-back longstop, from three years to five years. They could not sensibly have refused without blatantly acting against both the interests of the Company and their duties of good faith and co-operation as quasi-partners. However Mr Christy (at least) did not agree that BBHUK's funding commitment could also change in the light of the changing circumstances. No proper explanation has ever been provided for that refusal. Even if the Petitioners were to an extent "ambushed", Mr Christy did not respond to the proposals either within the three business days he had requested in the meeting, or at all.

351. Fifthly, the Petitioners' adoption of that position, as between quasi-partners, was in the circumstances inequitable.

352. Sixthly, it is highly significant that, even after Mr Hance made good on Mr Riley's ultimatum, by announcing the withdrawal of funding: (1) BBHUK remained willing to take the project forward, on the revised (and fair) terms proposed; and (2) the response of the Petitioners was to consider taking the product to market on their own.

353. Seventhly, the Petitioners' attempts to portray the BBHUK directors as acting in bad faith for an ulterior motive have failed. There is no coherent explanation as to why BBHUK would have acted as it did to deliberately sabotage the Company. In reality, BBHUK neither sabotaged the joint venture to save its cashflow, nor sought to misappropriate the Company's resources for its own benefit. The simple truth is that the Company, as a joint venture vehicle, fell into abeyance because the parties could no longer work together. That is a sad outcome, it is said, but not one that calls for this Court's intervention, years after the event.

DISCUSSION AND CONCLUSIONS

The parties' positions on the viability of the recycling shower project

354. It is worth pointing out one thing that the parties agreed that I do not have to decide.

355. As I have set out in the recitation of the facts above, Mr Porter had firm views about the prospects of the recycling shower ever successfully being brought to market. In both his email of 23rd October 2014 and in his "Technical Report" dated 3rd November 2014, Mr Porter set out his views which, in summary, were that the recycling shower project "*had a very low chance of success*".

356. Mr Christy and Mr Brewin disagreed with those views and gave evidence as to why they thought Mr Porter's conclusions were wrong. In their evidence they criticised both Mr Porter's views and his expertise. These criticisms were put to Mr Porter in cross-examination.

357. However, I am not in a position to decide who is right about this. No independent expert evidence was called and I could not, even if invited, have properly formed a view as to whether Mr Porter, on the one hand, or Messrs Christy and Brewin, on the other, were correct.

358. Further and in any event, it seems to me that the parties were correct in their assertion that I do not need to decide this dispute in order properly to determine this case.

Motivation

359. Another point worth making is this. As I have set out above, the authorities are clear that the test of unfairness is an objective one. Whether or not one introduces the "reasonable" or "officious bystander" into the equation, it is the court which decides whether the conduct of the majority and its consequences amounts to unfair prejudice and its judgement is objective in its focus. The subjective state of mind of those whose conduct is said to amount to unfair prejudice is thus irrelevant. The possible motivation behind the actions of those whose conduct is said to amount to unfair prejudice is also irrelevant.

360. The point is this. During his cross-examination of Mr Hance and Mr Riley, Mr Lewis, on behalf of the Petitioners, put to them that their actions towards the Company and the Petitioners were motivated by a number of factors: a desire on the part of BBHUK to take control of the recycling shower project; a lack of funds on the part of BBHUK to enable it to comply with its contractual funding obligations. However, in order to succeed, he does not have to show that any of the BBHUK directors of the Company had any particular motivation. Whilst it might, tactically, assist the Petitioners' case to persuade me that the conduct of Messrs Hance, Riley and/or De Beer was motivated by some ulterior motive, I do not have to come to any such conclusion in order for the Petitioners to succeed.

361. I do however bear in mind the test of whether or not a director is acting bona fide in the best interests of the company is (as discussed above) a subjective one.

Was BBHUK mislead as to the state of development of the recycling shower?

362. As will be clear from my summary of the case put by BBHUK, fundamental to that case is the assertion that, in entering into the suite of documents which formed the joint venture, BBHUK and its directors, Mr Hance and Mr Riley, were effectively mislead (my word not theirs) as to the stage of development which the recycling project had reached and the time required successfully to bring it to market. It is said that, as a result of various assurances that it received from the Petitioners during negotiations, BBHUK was led to believe that they had developed a prototype of the recycling shower which would be ready to be placed into tooling and manufacturing in or around March 2015. By the time the joint venture was formed in August 2014, BBHUK had been lead to believe that it was realistic to expect demonstrator models to be in showrooms by February 2015, and products to be sold to consumers by November 2015.

363. The case as pleaded in the Amended Points of Defence is as follows:

    a. Paragraph 4.1:

the Petitioners led BBHUK to believe that they had developed a prototype of a product that would be ready to be placed into mass manufacturing within a matter of months.

b. Paragraph 7.2:

During the course of follow-up meetings in Hong Kong and Australia, and in other communications with Messrs Hance, Riley and De Beer between around April and August 2014, the Petitioners led BBHUK to believe that: (1) they had a functional prototype of their re-circulating shower product; and (2) they would be ready-subject to obtaining external investment-to put that prototype into production within around a year

c. Paragraph 7.5:

in reliance on those assurances about the product's advanced state and commercial viability, BBHUK *agreed to a joint venture with inter alios the Petitioners, pursuant to which the* Company *was incorporated. In reliance on the Petitioners' assurances and representations,* BBHUK *made the following payments…*

d. Paragraph 7.8.7:

the product was in no fit state to enter production in the foreseeable future, let alone within a matter of months. On the contrary, it would require very substantial further design and development work, without any assurance of ultimate commercial viability

e. Paragraph 7.11 and 7.12:

Messrs Hance, Riley and De Beer were deeply concerned about Mr Porter's reports, which came at the same time as it was becoming apparent that various key members of Cintep Australia staff were not prepared to relocate to England. They raised the issues with the Petitioners, in order to give them an opportunity to provide reassurance or explanation about the technical and commercial viability of the proposal, and specifically to explain their proposed path to regulatory approval. The Petitioners were unable to provide such reassurance or explanation.

364. Before I consider whether or not I accept BBHUK's case on this, there are two points to make.

365. Firstly, I remind myself that I am not trying a case in misrepresentation. As Mr Lewis pointed out, no such case has been raised. Thus, I do not have formally to consider each of the elements which a party bringing such a claim has to prove. Rather, I am required to consider this issue as part of a consideration of whether, on the facts of this case, the conduct of BBHUK and its directors was unfairly prejudicial to the Petitioners as minority shareholders in the Company. BBHUK relies on the assurances which it says were made and the false picture which it says was thereby painted as conduct on the part of the Petitioners which explains and justifies BBHUK's own conduct. It is said that it is material conduct on the part of the Petitioners which renders what might otherwise be unfairly prejudicial conduct on the part of BBHUK not unfair.

366. Secondly, it seems to me that, in deciding whether or not anything said or done by the Petitioners did lead BBHUK to have a false impression of the stage of development which the recycling shower had reached, I must look at the Petitioners' words and actions objectively. As set out above, the test of whether conduct is unfair or not is an objective one. As Hoffmann LJ stated in RE SAUL D HARRISON [1995] BCLC 14 (at paragraph 17):

the court is applying an objective standard of fairness.

> If the test in deciding whether or not the majority's conduct is unfair is an objective one, then it would be odd if, when examining any conduct on the part of the minority said to justify the majority's conduct, the test was different. Put another way, the court has to come to an assessment as to whether, on all the facts, the Company's affairs have been conducted in a manner which is unfairly prejudicial. All the relevant facts can include conduct on the part of the Petitioners as well as conduct on the part of the Respondents. The conduct of both parties must be looked at in the same way: that is objectively.

367. The point is this: it is not enough for BBHUK to prove that Messrs Hance and Riley genuinely believed that the recycling shower was nearer to commercial production that it in fact was if there was no reasonable basis for such belief. BBHUK must show both that Messrs Hance and Riley did believe that the prototype was nearer to commercial production than it in fact was and also that this belief was engendered by words or actions on the part of the Petitioners which reasonably lead them to that view.

368. I have reached the conclusion that, even if Messrs Hance, Riley or de Beer (or any of them) did genuinely believe that the Petitioners: (1) had a functional prototype of their re-circulating shower product; and that (2) they would be ready – subject to obtaining external investment – to put that prototype into production within around a year, any such belief could not reasonably have arisen from anything said or done by or on behalf of the Petitioners. Put another way, whatever Messrs Hance Riley and/or de Beer might have thought or believed, when looked at objectively, what was said by or on behalf of the Petitioners could not have given rise to any misapprehension about the state of development of the recycling shower.

369. Thus I do not accept BBHUK's case on this.

370. It must be remembered that Mr Porter in his evidence accepted that, in arriving at the conclusion in his Report of 3rd November 2014 that the project "*was sold to Crosswater as a product ready to be put into production*", he had come to that view from the documents which he had seen (and which were before the court) and from the discussions that were reflected in those documents (see paragraph 212 above). Thus, he did not say that either the Petitioners or anyone else on their behalf had given him an oral assurance to that effect. Similarly, Mr Hance, when questioned, did not assert that his stated belief arose from any particular conversation but rather from the documents which he had seen. Mr Riley did assert that, at the meeting in Hong Kong on 30th May 2014, Mr Christy had said to him that the recycling shower product was close to launch. However, I have not accepted that evidence as accurate or truthful (see paragraph 76 above).

371. Thus, BBHUK is left with seeking to establish the assurances which it says were made from an examination of the documents and email exchanges. To my mind these do not come close to establishing that the Petitioners made the assurances which BBHUK alleges. The position is to my mind quite the opposite.

372. The Information Memorandum prepared in early 2014 could, when viewed in isolation, have given the impression that Cintep AU had a pre-production prototype which could result in a production model ready for sale by the end of 2014 (see paragraphs 44 and 45 above). However BBHUK does not assert that it actually relied on anything in that document. Further it was sent to Mr Powell (A) under cover of an email dated 17th April 2014 which flagged up its inaccuracy and the "overly ambitious" nature of the timeline set out in that document (see paragraphs 47 and 67 above).

373. The email from Mr Formica to Mr Hance dated 25th February 2014 states that regulatory approvals, including from WRAS, were still required (paragraph 50 above).

374. Mr Porter's email to Mr Hance dated 6th April 2014 and the attached summary document, clearly state that the recycling shower product is *"completely unproven at the moment and therefore high risk"*. In his view the product was 18 months away from production (paragraphs 54 to 56 above).

375. In his email to Mr Powell (A) of 27th April 2014, Mr Christy made it clear that the Alpha 4 prototype was not then functioning (paragraph 69 above).

376. In his report back to the Board of BBHUK following his visit to Brisbane on 28th April 2014, Mr Powell (A) is quite clear: the project was "a high risk research and development play". His report was specifically considered at the BBHUK board meeting on 24th June (paragraph 71 above).

377. The email sent by Mr Conway-Lamb following his meeting in the UK with Mr Hance and Mr Canapero on 23rd May 2014 clearly indicates that there had been discussions at the meeting about water quality and that Mr Conway-Lamb had stated that the current strategy was to pursue a scientific test programme and market research before approaching the regulatory authorities (see paragraph 74 above). Again, there is no evidence that Mr Conway-Lamb had indicated that these regulatory bodies, including WRAS, had already been approached, let alone given any indication that they would grant approval.

378. As I have stated, I do not accept that anything said by Mr Christy at the meeting in Hong Kong could have contradicted the clear impression as to the state of readiness of the prototype which, for example, Mr Powell (A) had gained (paragraph 76 above).

379. Following that meeting, the email sent by Mr Hance to Mr Christy on 3rd June 2014 referred to the fact that the product had to be compliant with, amongst others, WRAS standards in the UK. As stated (paragraph 79 above), this seems to me to indicate that Mr Hance was not only aware of the need for regulatory compliance but had not been lead to believe that such compliance had been obtained or was certain to be granted.

380. The email from Mr Gee to Mr Hance dated 6th June 2014 and the response from Mr Hance (paragraphs 82 to 84 above) again seem to me to indicate clearly that Mr Hance was well aware of the "challenge" of obtaining regulatory approval for the recycling shower.

381. At the Board Meeting on 24th June 2014, in addition to receiving the note from Mr Powell (A), it is recorded both that Mr de Beer thought that the project "*very high risk*" and that Mr Powell (A) thought that the recycling shower was at least two years away from market (paragraphs 93 and 94 above). It was decided that BBHUK would invest despite these warnings. The Board could not have been under any illusions as to the stage of development which the product had then reached.

382. Following his meeting with Mr Gee on 1st July 2014, Mr Porter records in his email to Mr Hance that there "*is a lot to be done in terms of compliance and reliability testing*" (paragraph 95 above).

383. The meeting on 7th July 2014 between Messrs Brewin, Gee, Hance and Riley is discussed in paragraphs 96 to 101 above. It is quite clear that Messrs Hance and Riley were keen to ensure that the recycling shower product in which they were about to invest was brought to market as soon as possible and were pressing Messrs Brewin and Gee to takes steps to speed up the development process. It is also true that Mr Brewin and Mr Gee were agreeable to considering what steps could be taken to make the process shorter. However I find that nothing said at that meeting could have given either Mr Hance or Mr Riley a false impression as to the stage of development of the recycling shower or the risks involved. The very fact that Mr Gee wrote that he "*didn't do a great job explaining why it will take the time we are predicting*" clearly indicates to me that he was at least trying to do that.

384. So far as the GANTT chart sent on 10th July 2014 is concerned (paragraphs 104 to 107 above), this was, as Mr Brewin stated, a "stretch" plan: that is one that all parties knew was as optimistic as one could possibly be. I accept Mr Brewin's evidence to the effect that Mr Riley knew that the production timetable in this document was "aggressive" and that no outcome could be guaranteed. In any event, the chart set out certain key milestones leading to the aim of the final product being available from 3rd November 2015. A moment's thought would have lead the reader to realise that, if any of the key dates was delayed or missed, then there would be an inevitable consequent delay to the end date.

385. Whilst the internal Cintep AU emails sent on that date indicate concerns being expressed as to the proposed timetable, they do not in my view lead to the conclusion that BBHUK and its directors were being misled or being fed false or inaccurate information as to the state of development of the product.

386. The six documents sent by Mr Christy on 23rd July 2014 (paragraphs 108 to 112 above), when read as a whole, do not give an inaccurate or misleading picture. Any milestone dates are stated to be dependent on certain earlier events occurring. The "Assumptions and Risks" section in the Cintep Technical Development Plan, as it says, makes clear what assumptions were being made and what risks existed which might delay or derail the product development timetable. As Mr Porter accepted, reading these documents it was clear that: there was not at that time a fully functioning pre-production prototype ready to go into mass production; dialogue with WRAS about regulatory compliance had not yet commenced.

387. I have discussed the visit to Australia on 30th July 2014 by the BBHUK directors in paragraphs 114 to 119 above. They were able to see the Alpha 4 prototype in action. They could see that it was being controlled by Mr Dyhrberg from a laptop. I accept Mr Christy's evidence that he pointed out that the Alpha 4 required two engineers to control its operation and that there were regulatory and development challenges to be overcome. As stated, it seems clear that, by that stage at least, Messrs Hance and Riley were perhaps hearing only what they wanted to hear.

388. Even so, the email chain dated 2nd and 3rd August 2014 (paragraphs 120 and 121 above) does seem to indicate that the BBHUK directors were aware that the development plan involved risks.

389. It is also, in my view, important to note that the "Cintep/BBL New Proposal at 5th August 2014" email sent by Mr Brewin specifically included proposed terms as to the product delivery date: that is when the "first product is delivered" (paragraphs 125 and 126 above). The proposed terms included an incentive for the new company to get the product to market as soon as possible. This must therefore have formed part of the discussions which lead up to that email. However, as I have pointed out (paragraph 131 above), it is to my mind highly significant that the Heads of Terms drafted by Mr Riley and eventually signed three days or so later, did not include any such term. The agreement contained a specific "longstop date" (31st December 2017) from which, if no product had been brought to market, Mr Brewin and Mr Christy could buy back their patents. It did not contain any target date by which the product was to be on the market. It would not have been that difficult for such a provision to be inserted if, as it now says was the case, BBHUK had regarded such date as significant.

390. There is nothing after the date of the Heads of Terms which is consistent with the Petitioners having given the alleged assurances:

    a. The terms of Mr Porter's "brain dump" document of 28th August 2014 (see paragraphs 147 and 148 above) in my view clearly indicate that he was aware of the need for the recycling shower to be WRAS complaint and that WRAS had not at that time been approached.
    b. The terms of Mr Brewin's email following the meeting on 15th September 2014 (paragraphs 150 to 151 above) are also clear that no dialogue with WRAS had been initiated.
    c. The decision at this meeting to extend the development timetable by 11 months so that the product was scheduled to come to market in September 2016 rather than November 2015 would tend to me to indicate that BBHUK was not as concerned as it now says about the product launch date.
    d. The terms of the email sent by Mr Riley on 23rd October 2014 (see paragraph 184 above) are, to my mind consistent with the Petitioners' evidence as to what they had been telling BBHUK about the stage of development of the prototype and the possible need for a change of water regulation in the UK.

391. Standing back, when looked at as a whole, there is in my view no evidence to support the assertions made by BBHUK as to the assurances which it says were given to its directors by the Petitioners. To my mind the evidence points all the other way. There is no doubt that Mr Hance and Mr Riley were, entirely unsurprisingly, keen to ensure that the recycling shower product was brought to market as soon as possible. It is also clear that the Petitioners and the Cintep AU engineers were equally keen to seek to facilitate this aim. It was, after all, in everyone's best interests. However, I find that there was nothing said or done by or on behalf of the Petitioners which could reasonably, or at all, be said to have amounted to the assurances which BBHUK assert were given. It may well be that, by July 2014 at the latest, Mr Hance and Mr Riley were so excited by the prospect of investing in their "*iPhone moment*" that they were only "hearing what they wanted to hear" and "seeing what they wanted to see". Mr Gee's email of 8th July 2014 and the reaction of Mr Riley to the programme prepared for the Brisbane visit on 30th July would tend strongly to indicate that. However, I find that nothing in the words or conduct of the Petitioners could reasonably or at all have mislead them.

392. Nor, for the avoidance of doubt, do I find that there was any reasonable reliance on any assurances by BBHUK or any of its directors. If, as I have held, there were no assurances given, then there cannot have been any reliance. However, I would go further and hold that, to the extent that Messrs Hance and Riley did rely on what they (wrongly) perceived to be assurances made by or on behalf of the Petitioners, then any such reliance was not objectively reasonable. They may have persuaded themselves that the Petitioners had developed a prototype of a product that would be ready to be placed into mass manufacturing within a matter of months, however any such belief was self-induced or, at least, not reasonably induced by anything said or done on behalf of the Petitioners.

393. Finally I do not accept BBHUK's pleaded case that, in late October or early November 2014, Messrs Hance, Riley and de Beer sought reassurances or explanations from Mr Christy or Mr Brewin as to the technical and commercial viability of the recycling shower, which reassurances and explanations were not forthcoming. There is no evidence to support such an allegation.

The reason for Mr Christy's resignation from the Board

394. It is submitted on behalf of BBHUK that Mr Christy's resignation from the Company's board was again conduct on the part of the Petitioners which I should take into account when deciding whether the actions of BBHUK or its directors constituted unfair prejudice. In his closing submissions, Mr Campbell, on behalf of BBHUK, submitted that I should find that there were three reasons behind Mr Christy's departure: (i) his mishandling of the salary negotiations in respect of himself, Mr Conway-Lamb and Mr Dyhrberg; (ii) his defensiveness at the views of the recycling shower project recently expressed by Mr Porter; (iii) a desire to leave it to someone else to deal with BBHUK. In short, he submitted, Mr Christy had been "caught out" in overselling the recycling shower project to BBHUK and wanted to rid himself of any further responsibility for it. This is the case that was put to Mr Christy in cross-examination.

395. I have discussed Mr Christy's resignation at paragraphs 222 to 228 above.

396. I do not accept BBHUK's case on this.

397. There is no doubt that Mr Christy was keenly aware in late October 2014 that he had handled the salary negotiations badly. He acknowledged as much. However, I do not think that this was the primary, or indeed any, reason for his offered resignation. To my mind the catalyst was the unilateral decision by Mr Hance, with the approval of Mr Riley, to remove the prototype from Australia to England on 30th October 2014. As I have recorded, Mr Christy called this a "truly disastrous move" and stated that he felt "betrayed and appalled". That is entirely unsurprising to my mind in that: he was Managing Director of the Company and had not been consulted; the decision was directly contrary to one taken earlier to the effect

that the prototype was to remain in Australia until January 2015. Mr Hance's email to Mr Riley, to my mind, accurately records Mr Christy's reaction: the move had "not gone down well with Nick" who called it "irrational" and:

> *Not sure any of them will be coming now-Nick sleeping on it*

398. I find that Mr Christy's motivation for his resignation was as he stated in evidence. Given what had occurred and the fact that his authority within the Company had been undermined, he felt that his position was untenable and that the sensible course of action was to resign rather than try to fight back and antagonise BBHUK which was, after all, contractually committed to funding the development of the product. He felt (rightly in my view) that Mr Hance "wanted me out of the picture". There had been a breakdown in trust between the parties and it would be better, he felt, for the future development of the recycling shower to be led by someone BBHUK trusted and in whom it had confidence.
399. Thus the primary reason for Mr Christy's resignation was not some sort of recognition that he had mislead BBHUK, but was, I find, rather a direct result of the BBHUK directors' unilateral decision to remove the prototype from Australia without consulting, or getting the agreement of, the Petitioners.

The reasons behind the decision of Mr Dyhrberg and Mr Conway-Lamb not to relocate to the UK

400. Another issue which was discussed in both evidence and in submissions were the reasons behind the decision of Mr Conway-Lamb and Mr Dyhrberg not to relocate to the UK as was originally envisaged.
401. I have discussed this in paragraphs 191 to 195, 198 to 199, 204, 209 to 211, 221, 252 to 258 and 269 above.
402. So far as Mr Dyhrberg is concerned, it is clear from the email of 29th October 2014, that there were at that stage a number of factors which made him reluctant to move: the salary package being offered; the significance of the move for himself and his family; his lack of trust in BBHUK. However, as I have concluded, at that date, despite his reluctance, Mr Dyhrberg had not ruled out a permanent relocation. I have accepted Mr Christy's evidence that he told Mr Hance on 29th October 2014 that an improved offer would persuade Mr Dyhrberg to relocate. I have rejected Mr Hance's evidence that he had been told that Mr Dyhrberg was not going to relocate.
403. However, it seems to me that the key here is again the events of 30th October 2014. Mr Dyhrberg's reaction to the removal of the prototype is described in Mr Porter's email as follows:

> *"Matt had a bit of a tantrum and packed up all his stuff, personal tools & monitors etc and went home saying tomorrow is his last day"*

For the avoidance of doubt, whilst I accept that Mr Dyhrberg's reaction was to walk out of the office, I do not think that the pejorative description of his having a "tantrum" is appropriate. I find that Mr Dyhrberg's reaction was entirely understandable given what had just occurred. Mr Porter's description that Mr Conway-Lamb and Mr Dyhrberg were "slightly offended and aggrieved" is probably an understatement.

404. Mr Brewin's email of 30th October 2014 to Mr Riley and Mr Hance described Mr Dyhrberg as having handed in his notice. Mr Dyhrberg expressed his unhappiness in his email dated 30th October 2014 and in his meeting with Mr Christy in the café opposite the Brisbane premises.
405. Having been given notice of the termination of his employment with Cintep AU on 5th November 2014 and having been informed by Mr Christy after the Company Board Meeting on 14th November that there would be no further funding for Cintep AU, he wrote the email of 14th November 2014 in which he still offered, subject to certain conditions, to come to the UK on temporary basis to assist in any handover. No offer was forthcoming and, having

been forwarded the email from Mr Powell (E) on 15th November, on 18th November he finally terminated his involvement with the project on 20th November 2014.

406. In those circumstances, in my view, the main if not the sole reason behind Mr Dyhrberg's decision not to relocate permanently was the removal of the prototype from Australia and the events of 30th October 2014. As a result, Mr Dyhrberg effectively "handed in his notice" (as Mr Brewin put it). Thereafter, he might well have been prepared to come to the UK on a temporary basis to assist with any handover to new engineers, but no acceptable offer was made. As Mr Christy indicated in his evidence, Mr Dyhrberg was also upset at the contents of the email from Mr Powell (E) which he viewed as accusing Mr Christy of removing funds from Cintep AU which could have been used to pay his wages.

407. Thus the real reason why Mr Dyhrberg eventually refused to relocate as planned was the behaviour of BBHUK and its directors. I find that the less than competent handling of the salary negotiations by Mr Christy had little or no effect on his decision.

408. I find that the same is true of Mr Conway-Lamb. Whilst still upset, his reaction to the removal of the prototype on 30th October 2014 was perhaps less demonstrative and definitive than that of Mr Dyhrberg. He is recorded in Mr Porter's email of 30th October as having questioned whether the removal was legal. He was said, in Mr Brewin's email of the same date, to have "*lost confidence*" and to believe that "*if he relocates to the UK he will be caught without authority to manage his own team and stuck playing politics*." Accordingly, for Mr Conway-Lamb, "*it will not be about money*". Mr Brewin continued:

> *It is critical to convince him that he will be able to have the authority to lead and deliver the project"*

I have no reason to doubt Mr Brewin's email as an accurate account of Mr Conway-Lamb's reaction to the events of 30th October 2014. It is thus clear that, whilst disillusioned, Mr Conway-Lamb, unlike Mr Dyhrberg, had not completely turned his back on permanent relocation.

409. Indeed he sent an email on 3rd November 2014 to Messrs Dyhrberg, Capon, Hill and Hayden apologising for the events of 29/30 October and discussing technical details for the transport of the prototype to England and the continuation of the development work.

410. It is also clear from the terms of Mr Brewin's email to Mr Coughlin of 14th November 2014 that he thought that it was still possible that Mr Conway-Lamb could be persuaded to relocate permanently.

411. However Mr Dyhrberg forwarded to Mr Conway-Lamb (as well as to Mr Christy) a copy of the email which he had received from Mr Powell (E) on 15th November. He was subsequently contacted by Mr Coughlin who attempted to persuade him to come to the UK. The position at that date is set out in Mr Coughlin's email of 20th November 2014.

412. However, the decision by BBHUK to cease to provide any further funding to the Company appears to have effectively killed off any further discussions.

413. As with Mr Dyhrberg, I find that the principle reason for Mr Conway-Lamb's reluctance to relocate was the events of 30th October 2014. Whilst he might thereafter have been persuaded to relocate temporarily or even permanently, any further discussion with him was curtailed as a result of the unilateral decision of BBHUK to cease funding.

The matrix of obligations

414. I have set out the details of the relevant agreements in paragraphs 127 to 141 above. It seems to me however that it is important to bear in mind the following.

415. It is accepted that the Company was a quasi-partnership; a joint venture between BBHUK and the Petitioners. The latter brought to the partnership the patents, the prototypes, their knowhow and experience; the former brought primarily the funding and its experience of marketing bathroom products.

416. It is thus accepted that each of the quasi-partners was to act in good faith towards the other. Further, each quasi-partner had an expectation that they would be involved in the day to day running of the Company's affairs. Thus, despite the fact that the Petitioners were minority

shareholders, it is clear from both the Heads of Terms and the Shareholders' Agreement that both the Petitioners were to be on the Board and that Mr Christy was to be the Managing Director of the Company.

417. The object of the Company was initially to be the further development and marketing of the recycling shower product.

418. This was reflected in the fact that under the Company's Articles of Association, an 85% majority was required to pass a special resolution and the agreement that the shareholding of the Petitioners combined would never be diluted to below 15%. The Heads of Terms provided for them to be able to acquire further shares via a share option scheme.

419. BBHUK was contractually obliged by the Heads of Terms and the Subscription Letter to put funds into the Company to support the further development of the recycling shower project: at least £1 million on or before early August 2015; further funds thereafter to enable the recycling shower to be brought to market within a three year period.

420. BBHUK was contractually obliged to enter into a Deed of Adherence to the Shareholders Agreement.

The allegations of unfairly prejudicial conduct:

(1) The failure of BBHUK to sign a Deed of Adherence to the Shareholders' Agreement

421. The Petitioners complain that BBHUK failed to sign a Deed of Adherence to the Shareholders Agreement. It is said that, as a result, the Petitioners lost valuable rights. BBHUK accepts that it did not enter into such an agreement. Its defence appears to be that there was no purpose in formally adhering to a Shareholders' Agreement in respect of a dormant company and that any rights that the Petitioners might have had were rendered nugatory by the fact that the Company effectively became dormant on and after November 2014.

422. There is no doubt that BBHUK was obliged by the Heads of Terms and the Subscription Letter (or a combination of the two) to enter into a Deed of Adherence to the Shareholders' Agreement. It was an obligation owed to the Petitioners under the Heads of Terms and to the Company under the Subscription Letter. However even if, contrary to my view, BBHUK was not technically obliged as a matter of contract to adhere to the Shareholders' Agreement, it clearly ought to have done so, in my view, given the duties it owed to the Petitioners, its quasi partners in the Company. To fail to do so was, in my view, unfair conduct on the part of BBHUK being in breach of its duty to act in good faith as part of the joint venture.

423. Had BBHUK agreed to be bound by the terms of the Shareholders' Agreement then it would have obliged itself to comply with those terms and in particular clauses 2.1.2, 3.2, 4 and 5.4. Further, the Petitioners as parties to the Shareholders' Agreement, would have had a direct remedy against BBHUK for any breach of these terms. In particular they would have had an immediate and direct remedy against BBHUK under clause 4 for its subsequent failure to provide the funding promised to the Company. That would have enabled them to take direct proceedings against BBHUK without, for example, having to try to persuade the Company to do so or, eventually, to issue this petition.

424. In my view therefore the failure by BBHUK, for whatever reason, to enter into a Deed of Adherence to the Shareholders' Agreement was unfair conduct which has caused prejudice to the Petitioners who have lost rights that they would otherwise have had against it.

(2) The failure to implement a Share Option Agreement

425. Clause 5.4 of the Shareholders Agreement obliged to Company to put in place an Employee Share Option Plan on or before 1st January 2015. Such a scheme was also envisaged in the Heads of Terms. No such scheme was put in place, perhaps unsurprisingly as in the event the Company effectively became moribund on 25th November 2014.

426. Whilst a failure to implement such a scheme may have been unfair conduct on the part of BBHUK, I do not think that the failure has by itself caused prejudice. That does not mean

to say however that, if it comes to it, the ability of the Petitioners to obtain extra shares under such a scheme will not be relevant when the court comes to consider possible remedies. It is simply that, by the date by which any share option scheme would have had to have been implemented, due to the events which had occurred any such shares and the rights under such a scheme would have been worthless in any event.

(3) <u>The removal of the prototype from Australia on 30th October 2014</u>

427. BBHUK accepts that Mr Hance's instruction to Mr Porter to ship the prototype from Australia to the UK on 29th/30th October 2014 was done: (i) without any prior consultation with the Petitioners; and (ii) contrary to the previous agreement that had been made with Mr Christy to delay shipping until January 2015. However it seeks to justify the decision and its subsequent implementation by asserting that:
    a. The Petitioners have overstated the impact of the decision on the proposed L'Oréal funded testing programme and the attitude of Messrs Conway-Lamb and Dyhrberg to permanent relocation.
    b. The decision was taken in good faith by Mr Hance and Mr Riley in the best interests of the Company.

428. I do not accept this.

429. As I have described already and as accepted, the decision to remove the prototype was taken by Mr Hance with the agreement of Mr Riley without any consultation with, let alone the agreement of, the Petitioners one of whom was, pursuant to the terms of the Heads of Terms and the Shareholders' Agreement, the Managing Director. It was a clear breach of the understanding between the quasi-partners on which the Company was founded: the Petitioners were excluded from a key decision which was made and implemented without their agreement and against their wishes.

430. I do not accept the justification put forward by BBHUK for taking the decision. I do not accept Mr Riley's account that he was concerned that Cintep AU was unable to pay its rent. I do not accept that Mr Hance had been informed that Mr Dyhrberg was not going to relocate. I do not accept that the visit of Mr Porter and the English engineers had revealed to BBHUK that it had been misled by the Petitioners as to the state of development of the recycling shower.

431. In short, I do not accept that, in making the decision to remove the prototypes from Australia, the BBHUK directors, Mr Hance and Mr Riley, were genuinely acting in what they thought was the best interest of the Company. I do not really think that they gave the interests of the Company the first thought. I think they were entirely motivated by what they thought was in the best interests of BBHUK as the company which was obliged to fund the further development of the project. I do not think that any director of the Company, had they given it a moment's thought, could genuinely or reasonably have thought that the peremptory and unilateral decision to remove the prototype without the agreement of the Company's Managing Director or the Board, contrary to the prior consensus and at a time when negotiations with Mr Conway-Lamb and Mr Dyhrberg were at a delicate stage, could possibly have been in the best interests of the Company.

432. I do not think that the position of Messrs Hance, Riley and de Beer as BBHUK nominee directors can make any difference. As Warren J emphasised in the passage from the <u>Southern Counties</u> case cited above, the primary duty of a nominee director is, as with any other director, still to the company of which he is a director. If the duty of a nominee director towards the company is to be qualified then, as Warren J emphasised, it must be done in the clearest possible terms and with the assent of the shareholders. There was no such qualification here. In fact, it seems to me that the position here was quite the opposite. Given that the Company was a quasi-partnership and given the duty on BBHUK to act in good faith towards the Petitioners, it seems to me that, far from being able to prioritise the interests of BBHUK, in carrying out their duties as directors of the Company, Messrs Hance,

Riley and De Beer had not only to have regard to the best interests of the Company itself, but they also had to have regard to the interest of their quasi-partners, the Petitioners.

433. To say, as Mr Hance did, that he had "made a mistake" is a gross understatement. I agree with Mr Christy that this was "a truly disastrous move". It undermined the entire basis of trust and confidence on which the quasi-partnership was based. It undermined the authority of Mr Christy. It was the major reason behind the decision of Mr Conway-Lamb and Mr Dyhrberg not permanently to relocate to the UK. It was the major reason behind Mr Christy deciding to resign from the Board. It automatically entailed further delay to the product development timetable. These were matters which clearly affected the Company in an adverse way. It was also in my view gross mismanagement of the business of the Company which, by itself, is unfairly prejudicial conduct.

434. In my view it precipitated the events which were shortly to follow.

435. Thus in my view this is the clearest of examples of unfairly prejudicial conduct on the part of BBHUK and it directors Mr Riley and Mr Hance. The conduct was clearly unfair to the Petitioners. It caused them prejudice not only because it was clearly contrary to their expectations as to how the business of the Company was to be run but also because it had the adverse impacts on the Company and its business which I have highlighted above.

(4) <u>The conduct of the board Meeting on 14th November 2014</u>

436. I have discussed the events at the Board meeting on 14th November 2014 in paragraphs 233 to 251 above.

437. At that meeting:

   a. Mr Riley proposed an extension of the patents "buy-back" period in the Heads of Terms and the Shareholders Agreement from three to five years;
   b. Mr Riley proposed that the deadline for the provision by BBHUK of the first £1 million of funding for the Company as provided for in the Heads of Terms, the Shareholders' Agreement and the Subscription Letter be extended from August 2015.
   c. Neither of these items had been set out in the Agenda for the meeting.
   d. Both of these proposals were effectively phrased as an ultimatum: if the Petitioners did not agree, then BBHUK would cease to fund the Company.
   e. Whilst the Petitioners indicated that they would be prepared to agree in principle to the first of these proposals, Mr Christy in particular refused to agree to any extension to the funding provision.
   f. There was no consensus, formal agreement or Board resolution on either point.

438. In his closing submissions Mr Campbell, on behalf of BBHUK, submitted that I should find that Mr Riley made his proposals honestly and in good faith based on his view of what was reasonable in all the circumstances and in particular in order to match the patents hand-back period and the £1 million funding period with the longer period which had become clear was required before the product could come to market. He asked me to reject the suggestion made by Mr Lewis in cross-examination that Mr Riley had in fact been motivated by either BBHUK's cashflow difficulties or a desire to take control of the project from the Petitioners.

439. I agree with Mr Campbell to this extent. Save that he was intending to protect the position of BBHUK, I cannot come to a firm conclusion as to the actual motivation behind Mr Riley's behaviour. However, as I have already stated, I do not have to do so. I suspect, as he indicated in his evidence, that at least part of it derived from his distrust and dislike of Mr Christy.

440. However I reject BBHUK's justification for Mr Riley's behaviour.

441. There were clear breaches of the Company's Articles of Association. In raising significant matters which had not been put on the Agenda for the Board Meeting, there was breach of Article 28. More importantly, as I have stated, there was a clear conflict of interest in Mr Riley attempting to force through a renegotiation of the terms of agreements previously

entered into by BBHUK. Mr Riley was director of both BBHUK and the Company. Article 34 should have been complied with and it was not.

442. I have already held that, at the meeting, Mr Riley's focus was on protecting the position of BBHUK. I do not think that he gave any thought to the separate position of the Company of which he was also a director. I think he was entirely motivated by what they thought was in the best interests of BBHUK as the company which was obliged to fund the further development of the project. It could not, in my view, possibly have been in the best interests of the Company (as opposed to BBHUK) for there to be any delay in the funding for the development of the recycling shower project. I do not think that any director of the Company, had they given it a moment's thought, could genuinely or reasonably have thought that any delay in funding from BBHUK could possibly have been in the best interests of the Company. I do not think that Mr Riley did.

443. In any event, there was a clear conflict between Mr Riley's duty as a director of the Company and his position as director of BBHUK. As he was in clear breach of the "no-conflict" rule, even if he had a genuine belief that he was acting in the best interest of the Company (which I find he did not), this would not have prevented him from being in breach of his directors duty to it (see the passages from the Southern Counties and Re Tobian cases cited in paragraphs 304 and 305 above).

444. Nor do I think that Mr Riley's conduct can be excused by his being a nominee director for the same reasons as discussed in relation to the removal of the prototype from Australia.

445. Mr Riley's behaviour was unfair towards the Petitioners. They were effectively ambushed at the Board meeting and faced with an ultimatum. It was contrary to their expectation that they would be involved in the day-to-day management of the Company. It was behaviour by or on behalf of BBHUK which was, in my view, not in good faith. It constituted a threat by the majority shareholder that, if they, as the minority, did not agree to allow it significantly to alter its existing obligations, then it would breach them. That is indeed what it did. It caused the Petitioners prejudice in that they were further excluded from the management of the Company and faced with a threat to withdraw its funding.

(5) The manipulation of the Board Minutes

446. I have dealt with this issue in paragraphs 259 to 266 above.

447. Mr Riley was sent the draft of the minutes by Mr Powell (E) before the other members of the Board. This was unfair conduct vis-à-vis the Petitioners. Mr Riley has no right to receive the draft minutes before anyone else.

448. Further, as I have found, he purported to make an amendment to the draft to include something which had not been discussed or agreed. This was again unfair conduct.

449. However I do not think that this unfair conduct has caused any prejudice to the Petitioners. The minutes were sent to Mr Christy and Mr Brewin who disputed their contents. They were never agreed or signed and no formal resolutions were recorded.

(6) The unilateral decision by BBHUK to withdraw funding from the Company.

450. I have dealt with this issue in paragraphs 267 to 272 above.

451. In his oral closing submissions, Mr Campbell accepted (rightly in my view) that the unilateral decision by BBHUK to cease to provide the agreed funding to the Company was unfairly prejudicial conduct. It was a clear and unagreed breach of its contractual obligations as set out in the Heads of Terms and the Subscription Letter. It was contrary to the Petitioners fundamental expectations derived from the quasi-partnership and joint venture. The whole point of the arrangement which lead to the formation of the Company was for BBHUK to provide the funding to complete the development of the recycling shower. The entire foundation of this was effectively destroyed by the refusal of BBHUK to provide anything other than the initial £112,000.

452. In answer to this Mr Campbell asked me to find that this was, at the end of the day, simply a joint venture that had soured with fault lying on both sides. In the light of what he said were all the circumstances, BBHUK had made a bona fide and reasonable commercial decision not to fund a project which, contrary to what it had initially been lead to believe, was nowhere near to commercial production and indeed might never be commercially viable. Faced with this and the fact that Mr Christy and the Australian engineers had apparently walked away and washed their hands of the project, BBHUK took a commercial decision which the court should not second-guess. It would be wrong for the court to exercise its discretion and grant relief.

453. As will have become clear, I do not accept BBHUKs case on this. I do not accept that the Petitioners painted a false picture of the state of development of the recycling shower or that BBHUK, or any of its directors, could reasonably have been misled. I have come to the view that the main reason why Mr Christy decided to resign as a director, and why Mr Conway-Lamb and Mr Dyhrberg decide not to relocate, was the conduct of BBHUK. Whilst I cannot come to a firm view as to exactly why BBHUK and its directors changed their mind about funding the recycling shower, I do not have to.

454. Thus I find that there are no acts or omissions on the part of the Petitioners which could possibly justify this admitted unfair and prejudicial conduct by BBHUK.

(7) <u>The failure by the Company to meet its statutory accounting obligations</u>

455. I have discussed these at paragraph 274 to 276 above.

456. I agree with Mr Lewis when he submits that it does BBHUK no credit to describe these as "make-weight allegations" or as a "litany of inconsequential matters" (as BBHUK do in its Amended Points of Defence and its Opening Submissions). They are clear, and undenied, breaches of company law.

457. However, even if they constitute conduct on the part of BBHUK which is unfair towards the Petitioners, I do not think that such conduct has caused them any prejudice. By the time of these breaches the damage had effectively been done in that the Company was moribund. Nothing that was or was not in the Company's accounts could alter that fact.

(8) <u>The General Meeting of the Company on 15th November 2017</u>

458. I have discussed this issue at paragraphs 278 to 283 above.

459. I think that the conduct of BBHUK at this meeting, in effectively blocking the Company from taking any action against it, was unfairly prejudicial conduct towards the Petitioners.

460. BBHUK as majority shareholder blocked any move by the Company against it in respect of its admitted breach of its obligations. By that stage it might well be thought that the cause of action against BBHUK was the only real asset which the Company had left. To prevent the Company from attempting to realise that asset was certainly unfair towards the Petitioners. This is essentially for the same reasons that I have held that the unilateral decision to cease funding was also unfairly prejudicial. Indeed, it can be seen as all part of the same course of conduct by BBHUK: unilaterally and in breach of obligation ceasing to provide funding (thus effectively killing off the Company and its business); then preventing the Company from taking any action to assert its rights against BBHUK.

(9) <u>Conclusion on prejudice</u>

461. I have held that BBHUK was guilty of a number of instances of unfairly prejudicial conduct towards the Petitioners. As well as seeking to examine the prejudice caused by each individual instance of unfair conduct, it seems to me that one has also to stand back and look at the prejudice which the cumulative impact of all this unfair conduct has had.

462. As Mr Lewis points out, in September/October 2014, the Company was a highly promising start-up with ground breaking patented technology and a five-year history of awards, grants engineering work and brand development. Its product had the potential, as Mr Hance

recognised, to be an "*iPhone moment*" for the bathroom industry. The effect of BBHUK's unfair conduct was effectively to "kill off" the recycling shower project.

463. It seems to me that the Petitioners have been prejudiced in that they have lost: their expectation of having an input into the day-to-day running of the Company and the continuing development of the recycling shower product; any value which their present and future shareholding in the Company might have had; the ability to develop for market the recycling shower into which they had invested five years of time and effort.

REMEDY

464. As stated at the outset of this judgment, this trial was on liability only. As I have determined that the Petitioners have succeed in proving unfairly prejudicial conduct on the part of BBHUK under section 994 of the 2006 Act, it will be necessary to have another hearing to determine what order, if any, the court should make under section 996.

465. Despite this, I was asked by both parties in their closing submissions briefly to indicate my preliminary thoughts on what remedy might be appropriate. I shall do so.

466. I am conscious that section 996 accords to the court a wide discretion to grant appropriate relief.

467. My present view is that there would be no point in granting relief the effect of which would be to attempt to resurrect the Company or the recycling shower project. The Company has been moribund for six years. No development work has been carried out on the recycling shower project. Time has moved on and a competitor now has "pole position".

468. Thus my present view is that the Petitioners should obtain financial relief representing what they have lost by reason of the unfairly prejudicial conduct on the part of BBHUK. My present view is that this would be represented by their being awarded the value of their shareholding (to include the value of the right to acquire further shares in future and without any minority discount) as at late October 2014, that is before the decision taken by Mr Hance to remove the prototype from Australia.

469. I hasten to add that these are my preliminary views. I will invite submissions from the parties (as they envisaged) as to what directions I should give as to the remedies trial. I will invite the parties now to agree an order which embodies the outcome of this judgment as well as directions for the exchange of written submissions on consequential issues.