Neutral Citation Number: [2021] EWHC 1765 (Ch)

Petition Nos. CR-2018-006649 & CR-2021-000474

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

IN THE MATTER OF (1) GO DPO EU Compliance Limited (2) GO DPO EU Recruitment Limited (3) GO DPO EU Advisory Services Limited and (4) EU Compliance and Recruitment Ltd
AND IN THE MATTER OF The Companies Act 2006

A Remote Hearing using Microsoft Teams
30 June 2021

BEFORE :

INSOLVENCY AND COMPANIES COURT JUDGE JONES

- - - - - - - - - - - - - - - - - - - -

BETWEEN:
(1) JAMES WILLIAM RITCHIE
(2) BRYAN DAVID FOSS
(3) MARTIN CLAUD HICKLEY

Petitioners

-and-
(1) ARDAFREVESH KOLAH
(2) DARREN VERRIAN
(3) GO DPO EU COMPLIANCE LIMITED
(4) EU COMPLIANCE AND RECRUITMENT LIMITED

Respondents

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Mr Harry Hodgkin (acting under the Public Access Scheme) for the **First Petitioner**
Mr Anthony Jones (instructed by **LawBite**) for the **Second and Third Petitioners**
Ms Kira King (instructed by Balfour Manson) for the **First Respondent**
The **Second Respondent** did not attend and was not represented

Hearing dates: 19, 20, 22, 27-30 and 5 April 2021

- - - - - - - - - - - - - - - - - - - -

This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii

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.

.....CHJ 30/6/21.....

INSOLVENCY AND COMPANIES COURT JUDGE JONES

I.C.C. Judge Jones:

A) Introduction

1. There are two s.994 Companies Act 2006 Petitions before me concerning the following four companies (together to be called "the Companies"):

   a) EU Compliance and Recruitment Ltd ("the Initial Company") which was the first incorporated, on 13 October 2014. The Petitioner, Mr Ritchie, holds 169 shares. The First and Second Respondents, Mr Kolah and Mr Verrian, hold 415 shares each. It owns and licences the registered trade mark name and logo "GO DPO".

   b) GO DPO EU Compliance Limited ("Compliance") which was incorporated on 2 June 2015 to carry out the business of General Data Protection Regulations ("GDPR") training. Of the Petitioners, Mr Ritchie holds 2,225 of the issued shares, Mr Foss 300, Mr Hickley 800 and Mr Harvey 400. Mr Kolah and Mr Verrian, hold 2,771 shares each. In addition, Mr Jeremy Stern and Mr Ritchie Mehta hold 500 shares each.

   c) GO DPO EU Recruitment Limited ("Recruitment") which carried on the business of the recruitment and provision of GDPR resources, permanent or interim placements. It was incorporated on 2 June 2015 and dissolved on 27 February 2018. The registered shareholdings are: Mr Ritchie 18 shares and Mr Kolah and Mr Verrian 41 each. Mr Ritchie in his Petition claims an agreement with Mr Kolah and Mr Verrian that the shares would be held equally but that was not pursued.

   d) GO DPO EU Advisory Services Limited ("Advisory") which was incorporated on 29 February 2016 to provide GDPR advisory and consultancy services. It was dissolved on 6 March 2018. Mr Ritchie, Mr Kolah and Mr Verrian are registered with equal shareholdings (32 shares each) and Mr Foss with 4 shares.

   e) The Petitions assert an agreement that it would *"capture provision of any GO DPO services related to GDPR and Data Protection not otherwise captured"* by the other three companies.

2. Mr Ritchie's petition seeks an order that Mr Kolah and Mr Verrian purchase his shares in Compliance. He alleges they have diverted business and revenues from the Companies both before and after his purported and wrongful dismissal as a director of each of the Companies on or about 14 August 2017. That diversion includes the business carried on by a company they incorporated on 9 August 2017, GO DPO EU Consultancy Services Limited ("the New Company"). He estimates that a sum in the region of £1 million should be disgorged. His Petition claims an account and enquiry, a declaration that he remains a director and chief financial officer of the Initial Company and Compliance and that he remain so for the other two Companies once they are restored to the register. He seeks a declaration that the dissolution of Recruitment and Advisory was in breach of fiduciary duty.

3. Mr Foss and Mr Hickley in their Petition seek the same or equivalent relief as Mr Ritchie together with the payment of management fees and expenses owed to them by the Initial Company and/or Compliance. They contend that their case differs in that they played no part in the events relied upon by Mr Kolah and Mr Verrian to justify Mr Ritchie's purported dismissal. Their case is that their neutrality upon the issue reflects the approach they took during the material events of August 2017.

4. Mr Kolah and Mr Verrian do not dispute receipt of various payments from the Companies (either directly or through service companies) and from third parties but contest the allegations of diversion including the claim concerning the New Company. They assert that insofar as the payments challenged were derived from the Companies, their work and remuneration had been properly authorised. Insofar as the payments were derived from other sources, they were entitled to carry out this work by agreement with the shareholders and directors. They have a cross-petition which seeks ratification of Mr Ritchie's removal as a director of the Initial Company and Compliance or seeks an order for his removal. They rely upon his transfer of sums to his corporate vehicle without authority. They also rely upon various breaches of fiduciary duty including his failure to permit access to Compliance's on-line bank account statements and his freezing of its bank accounts.

5. Mr Mark Harvey is also named as a Petitioner but he has taken no part in the proceedings and there is an issue whether he authorised his name to be added. That is an outstanding matter for the purposes of costs and was adjourned at the pre-trial review until they become an issue to be determined. The other shareholder/investors in Compliance, Mr Jeremy Stern and Mr Ritchie Mehta, have not been joined but are aware of the petitions. Their views will need to be sought if final decisions upon relief may affect their rights but this trial is principally concerned with liability.

6. The parties have been represented by counsel at trial except for Mr Verrian who did not attend and was not represented. The court received an email from him on the Friday before the Monday's first day of trial referring to his inability to attend for medical reasons. The court responded, copying in all parties, to the effect that it was for him to decide whether to apply for an adjournment. If he did, he would need to provide medical evidence disclosing his current medical condition, the prognosis and an opinion as to whether he is able to participate in a remote hearing trial (with or without assistance or special measures to assist him). In addition that if he did not wish to attend but wanted his witness evidence to be read, he should make a written request. If so and should the court decide it would be read as a statement without being tested by cross-examination, the court would take into consideration the absence of that testing when considering its evidential weight. It was also noted that should he not attend and not ask for his statement to be admitted, the other parties should refer to Rule 32.5(5) the Civil Procedure Rules if they may be considering relying upon the statement.

7. Mr Kolah had to change counsel during the trial because of ill health. I addressed this in an oral judgment delivered on Thursday 22 April when I decided to adjourn the trial to 27 April 2021. Ms King was instructed to act on his behalf for the remainder of the trial. This led to the exceptional course of Mr Kolah being cross-examined before the Petitioners and their witnesses. It was to provide time for Ms King to be fully

prepared and was on the bases of: agreement; confirmation on behalf of Mr Kolah that proceeding in that manner was not considered prejudicial to his interests; and it being recognised that application(s) could be made to recall Mr Kolah should that prove appropriate following cross-examination of the Petitioners' witnesses.

8. I must commend Ms King for the skill she has demonstrated by so quickly mastering her brief. I am grateful for the approach of assistance and openness Mr Hodgkin and Mr Jones have adopted in these circumstances in accordance with the traditions of the Bar. I should also record that all counsel have provided considerable assistance to the court within the context of presenting their cases with great skill.

B) An Overview

9. It is fair to observe that the statements of case when considered together are dense and convoluted. Whilst I have borne the statements of case in mind throughout, I will refer to them only to the extent necessary when addressing the facts and stating my decisions. Concerned that complexity might prevent the parties from seeing the wood for the trees, during the pre-trial review I directed there should be a list of issues for trial. Two lists have been provided but for the purposes of bringing shape to the case, I will set out the following overview.

10. There are four inter-connected, key topics. First, whether Mr Kolah and Mr Verrian diverted business and revenues before their decision to remove Mr Ritchie as a director on or about 14 August 2017. Second, whether the dismissal of Mr Ritchie was lawful and in any event whether it was justified by reason of his breach(es) of duty and in particular his transfer of Compliance's funds to his own company. Third, whether business and revenues were diverted by Mr Kolah and Mr Verrian after the removal of Mr Ritchie as a director. Fourth whether the formation and use of the New Company results in claims against Mr Kolah and Mr Verrian.

11. Based upon the outcome of those topics, the Petitioners will need to satisfy the court on the balance of probability that the affairs of the relevant Company have been conducted in a manner that was unfair and prejudicial to them (respectively) as a member. If so, it will then be necessary to decide what relief, if any, should be granted. There are also decisions to be made as to whether Mr Ritchie should be ordered to repay the sums he transferred to his company as sought by the cross-petition and whether Mr Foss and Mr Hinkley are owed money which should be repaid.

12. Summarising the positions adopted, as to the first and third topics (i.e. combining the allegations of diversion of business and revenues): Based upon the statements of case and witness statements, at the beginning of the trial there were two distinct camps: The Petitioners relied on the strict principle that no director should be involved in or profit from any business opportunity or work which might compete with the Companies by engaging in data protection, data privacy or GDPR services without (as appropriate in the circumstances) board or shareholders' approval. They asserted this principle was breached resulting in secret profits and/or that in any event money was paid to Mr Kolah and Mr Verrian by Compliance and/or Advisory for which they must account.

13. Pitched diametrically opposite to the Petitioners, Mr Kolah's position with regard to Compliance, now without the support at trial of Mr Verrian, was that everyone was entitled to and did carry out their own work. That could include data protection and data privacy work provided it did not involve the open GDPR programme training Compliance would be carrying out with Henley Business School ("HBS"). This was entirely consistent with the work he had been carrying out before the Companies' formation and he had to be able to continue such work to earn a living. Although Recruitment was to provide a different service, its business never started and in any event he was also entitled to take up permanent and/or interim GDPR placement roles. As to Advisory, it became involved with closed GDPR training but in distinction to the open training provided by Compliance through HBS, services provided by any of the directors (whether directly or through a service company) would be remunerated. As to the New Company there was no competition with Advisory because it had been dissolved. To support his position he relied upon all directors and shareholders knowing the work he had previously provided, appreciating that he required an income to live when his remuneration from Compliance was not being paid but accrued until it could be afforded, them continuing with their previous work and their approval of the services he provided and for which he was remunerated whilst a director of the Companies.

14. By the end of the evidence there were three camps. This resulted from evidence volunteered by Mr Ritchie during his re-examination which drew the following distinction between Compliance and Advisory: Advisory would subcontract its services for consideration and directors carrying out work would be paid on terms to be negotiated for each contract. This is what occurred for the "Phase 1 Hitachi Contract" around November 2016. The work was carried out by Mr Kolah and Mr Hickley it having been agreed that they would each receive approximately 36% of the monies to be paid to Advisory. Their work resulted in a final report being delivered by Advisory on or about 18 May 2017.

15. Mr Kolah joined that camp during the trial to the extent that he observed when this proposition was put to him by me during his cross-examination that it appeared correct. This occurred upon his recall as a witness after Mr Ritchie's evidence was concluded. Subject to that, his camp remains as previously pitched. Mr Foss's evidence was that he had no knowledge of such arrangements, had not been consulted over them and he did not move from the Petitioners' "no conflict" principle. Mr Hickley moved to the new camp but only to the extent that he acknowledged this arrangement for the Hitachi contract, whilst observing that he had left his entitlement with Advisory and that this was its only contract. Subject to that he remained alongside Mr Foss.

16. As to the dismissal topic, there are three camps concerning the transfer of funds. Mr Ritchie's case is that he was protecting the money from Mr Kolah and Mr Verrian having discovered cause to believe they would misappropriate Compliance's funds from its bank account. Mr Kolah asserts that Mr Ritchie misappropriated the money by transferring the funds to his company without authority. Mr Foss and Mr Hickley hold a neutral position on the basis that they had no involvement with Mr Ritchie's transfer.

17. Unsurprisingly, there are only two camps concerning the New Company. The Petitioners' rely upon the Initial Company's trade mark, other intellectual property rights and the "no conflict" principle. Mr Kolah attributes the formation and subsequent business of the New Company to the breakdown in relations and business that followed Mr Ritchie's misappropriation and the allegations Mr Ritchie made against himself and Mr Verrian. Whilst he recognises that the New Company would have been in competition with Advisory, that was not the case because Advisory had been dissolved.

C) The Witnesses Cross-Examined

18. Mr Ritchie is a Chartered Accountant with some twenty six years of experience. He relies upon three witness statements (his 7th to 9th) but unsatisfactorily his eighth seeks to adduce his first six witness statements served in respect of interim matters. Helpfully (a characterisation that applies throughout the trial) his counsel, Mr Hodgkin, produced a document identifying the paragraphs which would be relied upon as though trial witness statements.

19. Mr Ritchie was a poor witness during his cross-examination. He appeared to have come to Court with the preconceived idea that as a witness he should argue his case. He would frequently fail to answer even the simplest of questions asked by Ms King and myself. The reason for that was usually that he chose instead to give the evidence he wanted to provide on the topic in issue irrespective of the question asked. This typified his evidence during the morning. After the luncheon adjournment and before his cross-examination re-started, he complained to me that he was *"frustrated"* by Ms King's questions because they were leading not open questions and that prevented him from saying what he wanted to say. I anticipate that he meant he was frustrated by the fact that I had frequently had to insist during the morning that he answered the question and did not deviate or use the question to argue his case. Despite the explanation to him that cross examination was for the purpose of putting the other side's case, that leading questions were the order of the day and that he should answer the questions, his approach did not greatly improve.

20. Not only was this approach unhelpful but it damaged the reliability of his evidence. He was too keen to always attack the conduct of Mr Kolah and Mr Verrian in order to argue his case. For example, taking a derisory view of the suggestion that Mr Kolah had expertise in the field of data protection and privacy. Another good example of that tendency is his criticism of them for not having contributed capital to the Companies. It is a helpful illustration because it was a matter unnecessary to raise, had little relevance to the issues and there was no cause for that criticism. There has been no suggestion of them having been required or even requested to provide it. Yet he described the fact they did not do so as *"significant"*. When asked why, he floundered within the general comment that capital contributions help to turn a concept into a business. The reality is that he simply wanted to "attack".

21. His criticism of a lack of contribution arose in the context of Ms King putting to him that he had failed in his role of obtaining capital. When answering that question, he first relied upon the assertion that a second round of funding had not been required and then that he had fulfilled his task by raising £162,500. Ms King made inroads into

that assertion by analysis. However, it was his answers to questions concerning the £30,000 overdraft facility which he included in that figure, which are additionally reflective of his approach. He was asked in the context of the perceived failure of Mr Kolah and Mr Verrian to contribute capital whether their willingness to secure the facility by personal guarantees was relevant. His response was to dismiss the guarantees as merely paper. A person giving fair evidence would surely have acknowledged the value of the personal guarantees in the context both of Compliance needing the overdraft facility and of the fact that demand was subsequently made on the guarantees.

22. My overall assessment is that Mr Ritchie came to Court with a script in his mind which he had established in reliance upon the reconstruction process of memory and consideration of the many papers. Reconstruction always occurs but in this instance his answers reflected that script rather than being an attempt to recall what had occurred at the time. I cannot accept, for example, his apparent memory of the precise words used when he purportedly recollected them in the witness box. There has to be a concern that his "script" recreated a self-serving version of events. The need for concern being illustrated but the fact that the above-mentioned "third camp" (paragraph 14 above) did not emerge until the end of Mr Ritchie's re-examination when it "slipped out" whilst not in fact answering the question of him.

23. However, that and the fact that his approach in the witness box was awful, does not necessarily mean that his evidence should be rejected. That concern cannot be "proved" and I do not take that approach. It may be, for example, that his script is reasonably accurate bearing in mind his review of the documents. It means instead that I must approach his evidence with considerable caution by recognising there is considerable potential for it to be unreliable. Whether that is the case or not will depend upon my assessment of the specific evidence being addressed within the context of the other, specifically relevant evidence and the evidence as a whole.

24. Mr Foss was a complete contrast as a witness. He is an experienced non-executive director with many professional qualifications including being a Chartered Director and a Fellow of the Institute of Directors. He is a visiting professor with Bristol Business School. He answered the questions carefully and specifically. I have no hesitation in concluding that he sought to assist the Court. Whilst the accuracy of his evidence must be assessed taking into consideration, as with all witnesses, the limitations of memory, I will approach his evidence from the foundations of reliability.

25. Data protection is Mr Hickley's area of expertise but his previous employment by Affidea B.V. covered a wide role and he has recently worked on a special project concerning auditing at the Financial Reporting Council. Whilst his evidence was not as crisp as Mr Foss's, that is not a criticism but a reflection of an amenable character and the fact that he will not have had the same type of business experience. He too was clearly willing to assist the Court and I reach the same conclusions with regard to reliability.

26. Mr Kolah did not exchange a witness statement drafted for the purposes of the trial but relied instead upon existing statements drafted for interim matters. This is not

entirely satisfactory but that was his decision and I am confident that he has provided all the evidence he wished to for the purposes of the trial.

27. The overall approach to be taken to his evidence must be based upon the seriousness of the allegations, the existence of the New Company and the dissolution of Recruitment and Advisory. As a result, I must consider his evidence very carefully when assessing it against the evidence as a whole. A finding of misconduct on any one part of the case will give rise to the need to bear in mind a "bad character" disposition subject, of course, to the fact that a failing in one matter can and does not of itself establish the outcome for another matter.

28. It should be observed, however, and borne in mind that during cross-examination Mr Kolah came across as a thoughtful and intelligent man. He managed to cure an initial tendency to try to argue his case and he answered the questions in a considered manner. There were contrasts between occasions when he was able to provide detail and when he was rather vague. This is illustrated by his imprecise answers to questions concerning his case that there was an implied agreement that entitled him or his service company, Maverick UK Limited ("Maverick"), to carry out and be remunerated for the data protection work undertaken whilst a director. However, for the purposes of witness assessment, that distinction sustained my impression that he was generally doing his best to assist the court and was not trying to embellish or otherwise create his evidence to suit his case. Nevertheless, there were occasions when his answers were unsatisfactory. For example, when dealing with the New Company and its infringement of intellectual property. Whilst he was in the witness box for a reasonably long period and there will always be "ups and downs", this reinforces the potential for unreliability and the overall need to treat his evidence with caution despite the favourable impression described.

D) The Statements Admitted

29. Mr Kolah relied upon the statements of nine witnesses whom the Petitioners decided not to cross-examine. Mr Stern's first statement supports the extent and importance of the work and effort provided by Mr Kolah and Mr Verrian. He is also critical of Mr Ritchie both with regard to his approach to his role as a director and to his transfer of Compliance's funds in August 2017. Indeed, he is critical of the presentation of the Petitions in a commercial context. However, that witness statement does not provide evidence of his recollections of any of the events concerning the four topics identified. His second witness statement is more extensive starting with detailed, personal evidence from which to conclude that Mr Kolah had expertise in data protection in the context of marketing and sales before the Companies were formed. It was Mr Kolah who appreciated scope for the potential application of the GDPR.

30. Mr Stern's second statement also describes his understanding of the scope of the business in which he invested and his understanding of the ability of and need for Mr Kolah and Mr Verrian to continue to earn their own income. He addresses his concerns in respect of the transfer of monies from Compliance in August 2017. This and his evidence as a whole disagrees with the claims of unfair prejudice concerning

that topic and as unchallenged evidence must be taken into consideration when reaching the findings of fact and decisions below.

31. Mr Kolah relies upon the evidence of Mr Dack, an IT consultant, to explain that he had access to Mr Kolah's computer through "TeamViewer" for the purpose of enabling disclosure in these proceedings and to refute suggestions that files were hidden.

32. Ms Dubiniecki is a Canadian lawyer and privacy professional licensed in Quebec and Ontario and specialising in Canadian and EU data privacy law. She addresses the circumstances in which she was retained to draft documentation and to speak at courses within the context of speaking to the knowledge of the Petitioners. She relies upon terms of engagements agreed with Mr Ritchie for the former, in respect of which she worked with Mr Hickley. She attributed her retainer as a speaker on the GDPR HBS programme to Mr Kolah whilst still relying upon the terms agreed with Mr Ritchie. She is plainly annoyed by the delay in being paid which she attributes to Mr Ritchie.

33. As to other witnesses, the evidence of Mr Grass, a US Attorney, also addresses Mr Kolah's expertise and details Mr Kolah's efforts from 2018 to introduce Compliance's GDPR HBS programme to the United States of America. Mr Stern was also involved in that process. Ms Gammons is a designer of the MBA Programme for the Creative Industries at HBS and has known Mr Kolah for some twenty years or more. He was a regular external lecturer on that Programme between 2011-2016 and she states that his expertise is data protection, data privacy law, security and marketing. She sets out her recollection of how the programme came into being, attributes this to Mr Kolah and does not have the same recollection as Mr Foss concerning his evidence that he himself was instrumental in the programme's acceptance. She describes Mr Kolah's appointment as a Director of the Programme a "key condition for Henley Business School". The contract for the programme expired in 2019 by when, as she explains, the School pursued a different executive education strategy.

34. The evidence of Professor Bellamy also addresses Mr Kolah's expertise from personal knowledge. For example, he describes the work Mr Kolah carried out at Cranfield University/Defence Academy from 2004 within areas including privacy, data protection and security. He describes Mr Kolah as a leading expert. There is an equivalent endorsement by Rear Admiral Leaman with reference to publications and work carried out for the Royal Navy and Cranfield University/Defence Academy. His evidence includes details concerning his enquiries of the potential use of the GDPR Henley Business School programme for his staff and within it criticisms of the approach at a meeting and subsequently by email of Mr Ritchie.

35. Mr Preece, a company director and former British Army Officer, who states that he began working on the GDPR HBS programme in 2017, also gives evidence concerning Mr Kolah's expertise. Mr Kolah's accountant, Mr Furrer, provides a character reference against the background of the allegations of hidden income and non-disclosure made against Mr Kolah.

36. Whilst these statements were not challenged, for the avoidance of doubt I make clear that I have taken no consideration of matters of opinion and argument which should not have been included within a witness statement.

37. There is also the statement of Mr Verrian which all parties asked to be admitted pursuant to ***Rule 32.5(5) the Civil Procedure Rules***. I have applied the approach to be found within the Court of Appeal's decision in ***Williams v Hinton*** [2011] EWCACiv 1123, [2012] C.P.Rep.3; [2012] H.L.R. 4 at paragraphs [43-46] of the judgment of Lord Justice Gross with whom Lord Justice Moore-Bick agreed.

38. There is also a witness statement from Mr Harvey. It is the subject of a Civil Evidence Act Notice and he was not originally to have been called. Mr Ritchie instructed Mr Hodgkin to apply for permission to call him as a witness after the evidence had been closed. I refused. It was far too late in the case, it would mean that his evidence in chief had not been put to Mr Kolah or addressed by any other witness and no specific need for such evidence was identified. It would have been contrary to the overriding objective to grant the application in those circumstances. There is also the issue as to why Mr Harvey would be a witness for the Petitioners but not a Petitioner in circumstances of him being named as one. The relevance of that is unclear but that is because the position of Mr Harvey and his joinder has not yet been explained. It would be wrong to grant permission whilst this is opaque. In those circumstances it is also unclear why there should have been a Civil Evidence Act notice in the first place if he could have given evidence, even though such a course is permitted. I have nevertheless decided to read the evidence and to bear it in mind but in the context of appreciating that its weight is significantly reduced by the absence of cross-examination.

E) The Evidence and Facts

E1) Introduction

39. This section of the judgment will address the evidence and set out key findings of fact to be applied for the purposes of the decisions to be made. It will only refer to the matters and the evidence considered necessary to be addressed for this purpose. An absence of express reference does not mean the remaining matters and evidence have not been considered. The balance of probability test will be used throughout.

E2) Mr Kolah's Expertise

40. The first matter to address is the challenge by the Petitioners to Mr Kolah's expertise in or indeed knowledge of the areas of data protection and data privacy before the formation of the Companies. This was identified by the parties as being relevant if Mr Kolah can establish that he had been entitled whilst a director of the Companies to carry out work of the type with which had previously been engaged. Mr Ritchie during cross-examination stated he was wholly unaware that Mr Kolah had any such expertise, did not accept he had and stated that he understood him to have a B.B.C. and marketing background having attained a law degree.

41. The email correspondence from about August 2014 establishes that Mr Kolah had the concept for a business concerning GDPR training. This is not in dispute and it was not "out of the blue". I am satisfied that he had by that time established expertise and experience in the field of data protection and privacy. I do not accept Mr Ritchie's contrary evidence. First, because it does not match with the fact that Mr Ritchie and others were prepared to join Mr Kolah in this new venture and entrust him with significant work in the preparation of GDPR courses and in providing training. Second, because that expertise and experience is apparent from the unchallenged evidence provided by Mr Kolah's witnesses whose statements were admitted. Whilst evidence from Mr Hickley supported Mr Ritchie, I felt at the time that this was more one expert's view of the limitations of another despite expert knowledge. The witness statements of Mr Grass, Ms Gammons, Professor Bellamy, Rear Admiral Leaman and Mr Preece sustain that conclusion. Third, in the light of this overwhelming evidence I attribute Mr Ritchie's evidence to his approach to giving evidence which I have already criticised.

E3) The Stand-Alone Companies and Their Businesses

E3i) Introduction

42. The second matter to address is the fact that although the Companies were formed to take advantage of the same intellectual property derived from "GO DPO", they are not a *"group"* as defined by ***section 474 of the Companies Act 2006***. Each company has its own shareholders. Mr Ritchie, Mr Kolah and Mr Verrian retained the Initial Company, Recruitment and Advisory for themselves subject to a 4% shareholding in Advisory being given to Mr Foss. Only Compliance also has outside investors and Mr Hickley as shareholders. It is the only company with a shareholders' agreement in addition to their respective Memorandum and Articles. It is apparent from the documentation to be referred to below that they were to have their own scope of business as illustrated by their respective names.

43. Those facts are relevant to the claims within the Petitions because issues such as a director's entitlement to remuneration or other payment and the application of the fiduciary duty to avoid conflicts of interest need to be decided within the context of the constitution of the individual company concerned and (potentially) the decisions or agreements of the shareholders concerned. As will be seen, this is a case in which the business starts with the open HBS training programme being carried out by Compliance, Advisory is subsequently involved in closed training programmes with a different business model and Recruitment fails to start a business. In addition, there will be an issue whether the closed programme work was transferred to Compliance and, if so, upon what terms and with what consequence. Each of the Companies stands alone but with inter-connections. This also raises the issue whether the Initial Company holds the intellectual property rights on trust for Compliance, as the Petitioners or assert or ultimately on trust for Mr Kolah as he has suggested. To establish the relevant facts, it is best to start at the beginning.

E3ii) The Beginning

44. Mr Kolah's "GO DPO" concept was derived from his appreciation of the fact that the GDPR would offer an opportunity to establish a new business based upon training. His main notion was to establish an open access GDPR training programme in association with HBS. However, the documents also establish that from the beginning he was proposing recruitment services for newly trained data protection officers ("DPOs") as well. Ideas for the expansion of the concept flowed as a result of discussions during 2014 principally between himself, Mr Verrian and Mr Foss. By December 2014 a multiple book deal was being negotiated with "Kogan Page" to publish: "A General Guide to the EU General Data Protection Regulation"; a book entitled "How to become a DPO" ; an industry specific book to accompany the online module with London Business School/HBS for businesses in financial services, pharmaceuticals, the music industry and marketing; and a series of workbooks for each of those specific sectors.

45. By the beginning of January 2015 Mr Foss was introducing the expertise of Mr Hickley to Mr Kolah and Mr Verrian. By 8 February 2015 letters of appointment had been drafted for Mr Foss and Mr Hickley to become independent non-executive directors of Compliance. However, they remained in draft.

46. On 8 April 2015 Mr Verrian circulated to Mr Kolah, Mr Foss and Mr Hickley an executive summary for investors for a £200,000 equity investment in Compliance. Its business would involve: the GDPR e-learning course as part of the HBS programme for which practitioners' certificates would be awarded with Compliance owning the course and HBS the intellectual property in the certificate; the Kogan Page publications; a data protection impact assessment workshop for financial services' DPOs; and the search selection and recruitment of DPOs in financial services. Growth would be sought by the second year through new markets and partnerships within the EU. A £4m EBITDA margin forecast was projected from £8 million sales in year five.

47. During April 2015 Mr Ritchie was being considered for an appointment as Compliance's interim Chief Financial Officer ("CFO"). In a letter to Compliance dated 3 May 2015 Mr Ritchie set out the terms on which he would be willing for his service company, JPR@Number11 Limited, to second him as a CFO reporting to Mr Kolah and Mr Verrian. He proposed a £2,500 per month salary to accrue for four months but the payment of which would also be a personal liability of Mr Kolah and Mr Verrian. There would be a six month back-stop for settlement. He was also to be a shareholder, a lender and someone who should be able to assist the raising of capital for the venture. There would be a fund raising success fee. The intention would be for him to become an executive director. Meanwhile Mr Hickley was actively involved and working on his *"magnum opus date enforcement spreadsheet"*.

48. The terms of investment involvement proposed by Mr Verrian in April 2015 became an issue, as evidenced by an email from Mr Ritchie to Mr Foss sent on 4 August 2015. It refers to a memorandum Mr Foss sent to the "Executive Director Team" which identifies potential disagreement concerning equity. Discussions followed. The position reached by the beginning of 2016 is identified in an email Mr Ritchie sent to Mr Harvey on 4 January in connection with Mr Harvey's potential investment. Mr Ritchie explains that (my underlining for emphasis):

> *"Compliance Ltd is definitely stand-alone and for 'open' programmes Exec education and training in Data Protection and Privacy across the EU and any sector.*
> *The 'DPO' trademark is owned by EU Compliance and Recruitment Ltd, and will be used by Compliance Ltd and Recruitment Ltd - if we need to formalise this likely by a licence. The IP of the Senior Exec DPO e-learning course content will reside in Compliance Ltd and the e-learning development contract is with Compliance Ltd.*
> *Recruitment Ltd is a stand alone business that has already been funded and both Darren and Ardi wish not to have any minority shareholders in this legal entity."*

49. In an email Mr Ritchie sent to Mr Foss (cc Mr Verrian) on 5 January 2016 he records that he had *"consistently communicated … to the 4 Angel Investors of Compliance Ltd"* that each of the Companies was intended to be a "stand-alone" company but with licensed rights to use the trade mark and other "GO DPO" intellectual property registered and owned by the Initial Company. The *"business scope boundaries"*, which had been consistently communicated to the investors were: Compliance *"is open programme (actions the EU and any sector); "Advisory/closed programmes … [is] a separate entity"* (my underlining for emphasis) with a business model that will potentially not require finance because it will achieve growth through revenue/cash receipts due to payments in advance for the course; and Recruitment is *"a separate entity … funded separately [which] should not require external investor funding"*. Compliance and Advisory (although not then formed or named) are *"different business model[s]"* to Recruitment and *"would likely have different buyer(s) interest"*.

50. That information is consistent with a document entitled *"Matrix for 'stable' of GO DPO stand-alone companies"* sent by Mr Ritchie to Mr Kolah and Mr Verrian as an attachment to an email on 6 January and to Mr Foss with an email sent on 8 January 2016. It appears to have also been sent to all the investors. A table entitled *"GO DPO 'stable' of companies/key activities"* also describes the business activity of Compliance in terms of open programmes being *"EU-wide – F[inancial] S[ervices] & Non-F[inancial] S[ervices] – [at] DPO level and other levels (eg Board, more junior staff)"*. The role of a company to be formed, which would be named Advisory, was written in the table to include: *"all advisory including risk assessments, hands-on implementation assistance, secondments – design and provision of bespoke training to a selected/varied group of staff"* (my underlining for emphasis). In the notes that company is described as a *"different business model to open programmes"*. It will require *"Skilled people and hourly rate card – fees time based or fixed"* (my underlining for emphasis). It may or may not involve an e-learning programme.

51. It is the case, therefore, that from the beginning a clear distinction was drawn between Compliance and Advisory not only between open/closed programmes but also between the different methods of running the businesses. The former to be self-financing, whilst Advisory would need to have its own funds to pay those to be engaged. It is to be concluded that at this stage those investing in Compliance knew from the information provided by Mr Kolah, Mr Verrian and Mr Ritchie and agreed that it would provide open programme data protection training. Any closed training

programmes and advisory or recruitment work/services would be outside its purview. They would be carried out by Advisory and Recruitment respectively for the ultimate benefit of their shareholders, Mr Kolah, Mr Verrian and Mr Ritchie. In addition, Compliance would not own the intellectual property rights but would have the benefit of a licence to enable it to carry out its business. For convenience I will call this distinction and knowledge together with the other descriptions of the intended natures of each Company's business within the above-mentioned January emails and attachment with its table "the Stand-Alone Understanding".

52. The Compliance written shareholders' agreement is dated 31 December 2015 and expressed to have been signed that day. That does not tie in with the above-mentioned email correspondence or the board minutes of 24 June 2016 which evidence that it was in fact signed by the majority on 23 or 24 June 2016. An email from Mr Ritchie sent on 15 September 2016 to Mr Harvey and Mr Stern (copying in Mr Kolah and Mr Verrian) refers to Mr Hickley even then not yet having signed. However, the important point is that it is executed by all Compliance's shareholders (the Petitioners (including Mr Harvey), Mr Kolah, Mr Verrian, Mr Stern and Mr Mehta).

53. The minutes of the Compliance board meeting held on 24 June 2016 welcome Mr Harvey as an investor director. He requests a disclosure letter to be annexed to the shareholders' agreement outlining IP rights/IP transfers and describing the remits/operational scope of all companies bearing the "GO DPO" registered trademark. Mr Ritchie was to action this and to draft the structure business descriptions of the "GO DPO stable of companies" for the benefit of the Compliance shareholders. However, there does not appear to be a disclosure letter and the evidence before me leads to the conclusion that the Stand-Alone Understanding continued.

54. In the absence of a disclosure letter and any changes before the Compliance shareholders' agreement was made, the question of IP rights/IP transfers became an issue. An email sent 11 January 2017 by Mr Kolah to Mr Verrian and Mr Foss includes the following:

> *"Rights of shareholders to share in the IP value of the GO DPO® brand I'm extremely unhappy with the muddle that the company has ended up in - and I do place a large responsibility for this at the door of James Ritchie who was given responsibility as commercial director. This was a big mistake in hindsight.*
>
> *However, with your agreement, I want this sorted out urgently so that all shareholders are 100% clear what they have invested in and that includes the IP rights in the GO DPO® brand.*
>
> *All investors in GO DPO® EU Compliance MUST have clarity as to a share of the IP rights in the GO DPO® brand. This is fair and reasonable and there is a reasonable expectation that they would have as part of their shareholding. We've failed to be honest about this. This point has caused great ill-feeling among the shareholders where James hasn't been straight with them (as the Investor Relations person) and I don't want this to go on any further.*
>
> *This muddled legal position needs to be sorted out once and for all, so that every shareholder has a legal expectation of sharing in the GO DPO® brand*

> *IP value as well as the share in the IP for the content of the GDPR Transition Programme and a share of the profits generated. The way we've allowed to get to this muddled situation where Mark Harvey, Ritchie , Bryan Foss, Jeremy Stern and Martin Hickley simply don't know or had assumed they had a share in the IP of GO DPO® brand is unacceptable to me.*
>
> *Action: With your agreement, I want Darren to discuss this with J Partner, Technology, IP, Innovation, Blandy & Blandy LLP, review the documentation we have in place and propose how we fix this so there's complete clarity for all the early investors/shareholders who have supported the company in its early stages, as well as each is told by Darren exactly what that share of the IP in GO DPO® brand looks like."*

55. Notwithstanding those concerns, which in terms of assessing character must be read in Mr Kolah's favour, the position did not change. The shareholdings in the Companies have not altered. The Petitions have not sought to challenge the stand alone status. The Companies were and remain (subject to dissolution) self-standing.

E3iii) The Constitutions

56. Compliance's shareholders' agreement provides that its terms will have precedence in the event of any conflict with its Memorandum or Articles. It is expressed to be the whole agreement between the parties relating to its subject matter. It includes a right for each member to propose an additional director or the removal of a director if there is a reasonable basis and shareholder voting support of more than 75%. This is in addition to not substitution for any appointment and removal provisions in the Articles.

57. The agreement expresses the intention for board meetings to be held at least quarterly with reasonable advance notice including an agenda. Binding decisions may not be made unless the nature of the business has been notified to all directors in advance and all founder directors (Mr Kolah, Mr Verrian and Mr Ritchie) are present or the members have already agreed the decisions referred to in the agenda. The board's responsibility for specific tasks can be delegated to a sub-committee. Annual general meetings are to be held not more than 15 months apart with the first no more than 18 months after incorporation. Shareholders have the right to have the (accurate and complete) accounting and other financial records made available to them at frequent regular intervals. The Articles cannot be amended and neither shareholders' rights or the share capital can be altered without full shareholders' agreement. The agreement can only be varied in writing, signed by at least 85% of members. There are express obligations to the effect that the shareholders must maintain Compliance's confidential information. It contains no share transfer prohibitions except for the requirement that the purchaser enters a deed of adherence accepting its terms and except for prohibitions concerning the transfer of the rights and obligations it creates.

58. The written constitutions of the other Companies are solely within their Memorandum and Articles. The Companies have the same form of Articles. For each of them Article 2 contains the usual, directors' general authority for management with a wide power of delegation in Article 4 but Article 3 confers power upon the shareholders by special resolution to direct the directors to take or refrain from taking specified action.

Directors' decisions must be at a meeting (the procedure for which is in Articles 9-13) and either by majority under Article 7 or taken in accordance with Article 8, which provides for unanimous decisions by indication of a common view. Article 14 addresses conflicts of interest (to be referred to below) Articles 17-18 number and appointment and Article 19 remuneration.

E3iv) The Directors

59. Filings of the Companies only record Mr Kolah, Mr Verrian and Mr Ritchie as directors. However, the minutes of a Compliance board meeting held on 10 August 2015 congratulate Mr Hickley on his appointment as its Director of Data Protection. The minutes also specifically record that he will hold a non-executive post along with Mr Foss. Mr Ritchie will be responsible for Companies House filings.

60. Notwithstanding those minutes, issue is raised as to whether non-executive directors were appointed. Mr Hickley accepted in cross-examination that he ceased to be a director after about a month. Mr Foss in an email sent to Mr Ritchie on 5 January 2016 concerning the draft shareholders' agreement expresses his concern that he was not named as a founder director and had not been registered as a director at Companies House. At that stage he appears willing to accept he was not appointed. He writes in the email that he presumes the executive directors are recommending him to be a board adviser or consultant. Nevertheless, Mr Foss's position as a non-executive director was endorsed in an email from Mr Ritchie sent 6 January 2017 in which he referred to Mr Kolah and Mr Verrian confirming that role. As an additional pointer, albeit in the context of a social email, Mr Kolah described Mr Foss as *"my NED"* in an email sent on 4 June 2016 concerning a drinks reception. There is also an email from Mr Foss to Mr Hickley sent on 13 December 2019 referring to Mr Kolah confirming Mr Foss to be a non-executive director.

61. Based on that evidence, I am satisfied that Mr Foss was appointed and continued to be a non-executive director of Compliance. There is no evidence that he was dismissed. The fact that his appointment was not recorded at Companies House does not alter its validity and is an error of filing. However I have not found evidence of his appointment as a director of any of the other Companies. Article 8 of Advisory's Articles of Association permits appointment by ordinary resolution or by a decision of the directors. There are no minutes of any meeting held for that purpose. Insofar as Advisory was concerned he received a 4% shareholding but I have to conclude that he was only a director of Compliance. The obvious importance of that conclusion for the Petitions is that Mr Foss should have been invited to the board meetings of Compliance but not of Advisory or Recruitment.

E3v) The Directors' Remuneration

62. The Compliance shareholders' agreement makes no reference to remuneration but it is not in dispute that the shareholders agreed during the summer of 2016 that Mr Ritchie, Mr Kolah and Mr Verrian would be entitled to a salary of £3,000 a month each, Mr Hickley £2,000 a month and Mr Foss £1,000 a month. Nor is it in dispute that they

agreed this would not be paid but accrue (subject to a short term exception to accrual for Mr Verrian).

63. That accrual agreement forms an important piece of the background because it recognises that the Compliance shareholders appreciated their company was under-capitalised. Their solution for Compliance's inability to pay directors' remuneration was not to increase the share or working capital but to allow it to accrue until the business was sufficiently developed to no longer need the shareholders' loans or to accrue current remuneration. This is an essential and weighty fact when considering whether there was also an agreement or understanding concerning the directors' ability to undertake other work as Mr Kolah asserts. The Compliance shareholders will have appreciated that its directors needed other sources of income. Put simply, no-one could have expected Mr Kolah or any other director not to receive remuneration or other emoluments from other sources when Compliance would not be paying them. In colloquial terms, they all needed an income to live. Advisory and Recruitment provided an option but as start-ups they could not be relied upon to meet that need. Indeed, it is apparent from the evidence that Recruitment never came close to even starting its business.

64. Therefore, the members of Compliance must have appreciated and accepted that each director was entitled to undertake other work ("the Directors' Right to Other Remuneration"). That finding of fact is a straight forward reflection of the directors' need to fund their daily living. I accept Mr Kolah's evidence to that extent but plainly it is necessary to identify the ambit of the permitted work. That is the real issue of dispute. Mr Kolah drew attention to the other work carried out by Mr Ritchie and Mr Foss but that does not assist to draw the boundaries if it is work which would not in any event have infringed the "no conflict" principle. My understanding is that it is not. The boundaries of the Directors' Right to Other Remuneration will need to be defined in the final decision having considered all the evidence and the potential for amendment or other variations during the course of Compliance's trading. However, at this stage at least (i.e. the summer of 2016) there is no contemporaneous evidence from which to identify an express agreement prescribing the boundaries.

65. Potentially that might have left an unfettered right or at the other end of the spectrum undermined the existence of the Directors' Right to Other Remuneration for lack of certainty or conclusion. However, neither possibility would be correct in this case. As a finding of fact, it can and should be implied objectively from the above-mentioned circumstances and context that Compliance's shareholders intended (subject to further agreement) that this right would not include work: (i) available or offered (directly or indirectly and whether as a specific contract or as a business opportunity) to Compliance without express authorisation by the directors or shareholders; or work (ii) available or offered to the director from the director's own sources if that work would compete with the scope of the work then being carried out or planned to be carried out by Compliance. ("the Implied Terms of the Directors' Right to Other Remuneration"). Those terms, which bear in mind a director's statutory and common law duties, also give business efficacy to the Director's Right to Other Remuneration. What the effect of those terms will be in practice will have to be addressed when the boundaries are defined in the final decision.

66. In the case of Recruitment, the Directors' Right to Other Remuneration would equally have applied for the same reasons but the matter is academic in the sense that its business never started and the Implied Terms of the Directors' Right to Other Remuneration are otiose. For Advisory, there is no suggestion of any fixed remuneration agreement, accrued or not. As a start-up business without the benefit of shareholders' loans or other working capital it would be dependent upon its receipt of future income to enable remuneration to be paid. Therefore, all that applied to Compliance equally applied to Advisory but at a heightened level. Bearing in mind the cross-over of shareholders with those of Compliance, Advisory's director shareholders must also have accepted that the Directors' Right to Other Remuneration equally applied to Advisory together with the Implied Terms.

67. The absence of any fixed remuneration for directors also explains the agreement volunteered by Mr Ritchie in re-examination (paragraph 14 above). That agreement was expressed in terms of sub-contracting because of consequential questions I asked at a time when Advisory's Articles of Association were unavailable. However, Article 19 (which applies to all the Companies) provides that the directors may undertake any services for Advisory that they decide. Each will be entitled to such remuneration as the directors determine both for their services as a director and for any other services undertaken for Advisory. Therefore, whether sub-contracting is the correct analysis in a particular case or not, the directors were always able to agree remuneration for services carried out for Advisory (or indeed any other of the Companies) whether as directors or otherwise. The agreement disclosed by Mr Ritchie is permitted by the articles and meets the above-mentioned circumstances arising from its position as a start-up business.

68. I accept Mr Ritchie's evidence based upon the background just discussed, its consistency with Mr Kolah's evidence and the fact that this agreement (not previously mentioned within his written or oral evidence) was not part of Mr Ritchie's "script" but a voluntary and clear recollection of events. It is also entirely consistent with the specific agreement that Mr Kolah and Mr Hickley were entitled to equal shares of 72% of the income derived by Advisory from its November 2016 Hitachi Consulting contract. That entitlement is not disputed. Therefore, I am satisfied that it was agreed or understood by the Advisory shareholder directors that the directors should and would be remunerated for any work they carried out whether pursuant to their services as directors or for any other service undertaken. The terms of remuneration should be agreed before the work began or is concluded but otherwise should be agreed on a quantum meruit basis ("the Advisory Remuneration Agreement").

69. For completeness it is also to be noted that Article 19 (which applies to each of the Companies) provides that *"directors are not accountable to [Advisory] for any remuneration which they receive as directors or other officers or employees of the Company's subsidiaries or of any other body corporate in which the Company is interested"* unless the directors decide otherwise.

70. There is, however, one further matter of evidence to address. Mr Stern in an email to Mr Ritchie sent on 21 August 2017 wrote that there was an agreement around August/September 2016 *"that the directors would no longer accrue salary and would instead work for nothing on the core business but get paid for their time on non-core business, such as delivering closed programmes for clients"* (my underlining for

emphasis). This email was written in the context of Mr Ritchie's dismissal on 14 August 2017 and the resulting "fall out". He had written in similar terms to Mr Foss earlier that day:

> *"As for his claims of inappropriate behaviour by Ardi and Darren regarding payments for presenting closed programmes, he is fundamentally wrong in thinking the worst. Although not ideal the arrangement was known to all (including me) as a result of the decision taken almost a year ago not to allow them to take any more salary or accruals from the business, and only be paid for what they did outside of the core programme. James paid Ardi money (90% I believe) for a Hitachi training session and was informed of the Nationwide session and the proposed split (75;25)"* (my underlining for emphasis).

71. This email post-dates the agreement to which it refers and is written in the context of the hiatus of Mr Ritchie's purported dismissal. Neither side has advocated this agreement and Mr Ritchie's email in response refuted the proposition(s). There is also evidence that it was agreed that the entitlement to accrued remuneration would cease with effect from 30 June 2017. I refer to an email from Mr Ritchie to Mr Foss dated 3 January 2018 in which he records that he, Mr Verrian and Mr Kolah had agreed that accruals stopped on that date *"after months of pressure from Jeremy and lesser so from Mark – which was not unreasonable as their equity interest/value was just getting further and further away from 'the money"*. There is, therefore, evidence in conflict. Nevertheless, the email is of note for several reasons. Whilst its limitations are recognised, it supports the findings above to the extent that Mr Stern recollected a distinction between core/open programme business and non-core/closed or other business. That is consistent with the Advisory Remuneration Agreement. In addition, it introduces the issue which results from the fact that in due course Compliance contracted for closed or other business raising the issue whether it was bound by the Advisory Business Agreement as a result of a change in the scope of its business. That is to be considered next.

E3vi) Changes to the Scope of the Businesses?

72. The Petitioners' case is that closed training contracts became the province of Compliance. On 19 September 2016 Mr Harvey sent to Mr Stern and Mr Ritchie his notes of a board meeting. The notes are relied upon in submissions on behalf of Mr Foss and Mr Hickley as evidence of the agreement of Mr Kolah and Mr Verrian to the closed training being operated by Compliance, not Advisory as the above-mentioned January 2016 emails and the table drafted by Mr Ritchie established. This was disputed by Mr Kolah during his cross-examination. The relevant passage of the notes reads:

> *"3. Group structure and clarity on IP and Revenue allocation to company we have invested in: Management team confirmed all revenue avenues outlined in investors update will flow to EU Compliance Ltd. James to work with me on finalising schematic of companies."*

73. No such conclusion can be drawn as submitted from that note. The passage is far too ambiguous and neither the confirmation (whether oral or in writing) or the investors' update referred to have been identified before me. However, the issue of change of

scope did arise at the beginning of 2017. That occurred against the background of a significant dispute between Mr Kolah and Mr Ritchie. Mr Kolah's perspective can be identified from his above-mentioned email sent to Mr Verrian and Mr Foss on 11 January 2017. Having addressed the IP issue as quoted above he also writes:

> *James Ritchie*
>
> *There is something not right about James Ritchie. This comment has been told to me independently by six people. I have reached the point where I have to protect my name and reputation and that of GO DPO® where I feel this is being undermined in my relationships with business contacts that I have a personal relationship. The significant unhappiness with people who have encountered dealing with James has reached a tipping point – and now this includes P . James has to revert to the role of shareholder in GO DPO® EU Compliance. I have been completely at odds with James for over the last 6 weeks and the way he has conducted himself with me personally and I've had enough. I won't continue to work like this anymore.*
>
> *Action: With your agreement, James needs to be told by Darren there isn't a job for him at GO DPO® and that it's in his and the company's best interest he steps back into his position as an investor in GO DPO® Compliance*
>
> *GO DPO® Advisory No trading history. Action: I want to bring a shareholder vote and need your support that we will wind this company up. It was a mistake to create this as a vehicle for James Ritchie and he was pushing for this. It was NEVER my intention to have this as part of GO DPO® - and moving forward the company will have two areas of interest: the GDPR Transition Programme at Henley and the recruitment business. This advisory business has been the cause of a lot of conflict within the team and must now end.*
>
> *GO DPO Recruitment No trading history. Action: I want to bring a shareholder vote and need your support that we will wind this company up. We need to agree with James that we will return his investment (made to build the website) and close the company. Once achieved, I propose that we negotiate with Goodman Masson for a joint venture recruitment company under the GO DPO® brand (under licence from GO DPO Compliance) with a new shareholder structure. This new joint venture will have Darren as the CEO who will be paid an annual salary and will drive this business from the offices of Goodman Masson in the City. Goodman Masson want to pursue this and they don't want anything to do with James Ritchie. Any bespoke training work for companies will be managed through the GO DPO® Recruitment brand"* (my underlining for emphasis).

74. The reference to Goodman Masson is to the discussions held from about October 2016 to establish *"a GDPR Transition 'Implementation/hands-on assistance' venture"*, as Mr Ritchie describes it in his email to Mr Verrian, Mr Kolah, Mr Hinckley and Mr Foss sent on 3 November *2016.* On 15 January 2017 Mr Kolah sent the following email to Mr Verrian and Mr Foss:

> *"The meeting will take place at 11.00am on Monday 16 Jan 2017 at Brand Exchange, London.*

> *Three resolutions have been tabled for the Directors of the companies of GO DPO EU Advisory Services Limited and GO DPO EU Recruitment Limited:*
>
> *1. The directors take the common view that GO DPO EU Advisory Services Limited (Company No. 10033133) is wound up.*
>
> *2. The directors take the common view that GO DPO EU Advisory Recruitment Limited (Company No. 9619324) is wound up.*
>
> *3. Ordinary resolution is approved by all shareholders in each company that disapplies the provision of any conflicts of interest under article 14 of the Memorandum and Articles for both companies."*

75. Discussion email correspondence between Mr Verrian and Mr Kolah followed with Mr Verrian being far from sure about the course proposed by Mr Kolah. As part of that correspondence and continuing the themes of his 11 January 2017 email (above), Mr Kolah writes on 15 January 2017 that he wants a new Recruitment company to be run by himself, Mr Verrian and Mr Foss without Mr Ritchie. He is against the idea of Advisory undertaking consultancy work, which has never been *"part of the vision … it was always the online GDPR programme and recruitment".* He also writes:

> *"Given the feedback and the complaints I've personally received about James Ritchie from a large number of key business contacts /potential alliances and potential clients including Hitachi Consulting, Accenture, and Guide Dogs, the general view of all of them is not wanting to work with James Ritchie.*
> *James Ritchie had pushed for the consulting business. I have completely lost all confidence in James Ritchie as a result of his behaviour with others and with me personally. I want agreement to wind up the consulting business. This clears the way for you, myself, Martin and Bryan to undertake consultancy work on GDPR in a private capacity and this aligns with what happens with other Executive Fellows at Henley Business School from my personal perspective.*
> *Hitachi Consulting was lined up by myself and I agreed the fees with them. They have informed me they will only deal with me from this point onwards and that the invoice raised by GO DPO Advisory has been cancelled in agreement with myself and Hitachi Consulting. Martin and I will continue to work in a private consulting capacity.*
> *With respect to any consulting work that may emerge through my relationship with Accenture, the same arrangement applies.*
> *The experience to date has been extremely unpleasant for me both personally and professionally as I feel my good name and reputation has been impacted. It's also been a massive distraction in dealing with James and the unsatisfactory way he's dealt with matters.*
> *The focus must be on making the GDPR Transition Programme viable as well as launching a recruitment business that has the potential tom grow very rapidly."* (my underlining for emphasis)

76. There is no minute of the 16 January 2017 meeting but plainly the resolutions were not passed. Mr Ritchie's email sent to Mr Verrian, Mr Foss and Mr Kolah on 18 January 2017 expresses his surprise to hear of the different direction to the approach he had been pursuing with Goodman Masson and refers to the potential for work from

Accenture. He wishes to continue with that approach, advocates that there should be an Advisory company and writes:

> *"I feel strongly that the GO DPO brand value should be optimised by having the 'stable' of market solutions to corporates/organisations - training, advisory (incl. help them make change/comply) and recruitment. This is incredibly powerful and no Big 4, Accenture, McInsey, etc or legal firm is likely ever to offer this - and with the Journal and Texts wrap around which Ardi should be complimented on.*
> *I genuinely we believe we are on track as we are - closed programmes can switch into Compliance Ltd. This is no big deal and a good sweetener for the external Investors with Revenues/cash being behind the plan they invested in."*
> (my underlining for emphasis)

77. The reference to *"can switch"* is not evidence of an agreement whether read on its own or in the light of the earlier communications. Nor is there subsequent correspondence or board minutes in the bundle to provide that evidence before Mr Ritchie in an email sent on 26 January 2017 to Mr Stern, Mr Harvey, Mr Verrian, Mr Kolah, Mr Hickley and Mr Foss, as one of his investor updates, writes:

> *The Executive Team propose to move 'closed programme' revenues (ie. Bespoke training) from the Advisory legal entity to GO DPO EU Compliance Limited. Only beneficial to investors of the latter, so we will assume no objection unless raised by Monday 30 Jan".* (my underlining for emphasis)

78. This passage is relied upon by Mr Foss and Mr Hickley to establish a binding agreement for Compliance to have the closed programmes. Mr Kolah when cross-examined could not identify to whom the term *"executive team"* referred and did not accept that he had reached any such proposal or decision whether as member or director. Looking at the correspondence as a whole, I conclude that Mr Ritchie was probably identifying (without any bad faith) the one matter he had found within the overall dispute over Advisory's future direction which did not appear to be in issue. However, he should not have presented it as an agreed proposal. It is plain from the emails referred to above, starting on 11 January 2017, that it was not a stand-alone item but part of a new and significantly different approach advanced by Mr Kolah. It should not have been isolated and presented to Compliance's investor shareholders as a decision of an executive team, which must mean Mr Kolah, Mr Verrian and Mr Foss whether as directors and shareholders of Compliance and/or Advisory. There is no further correspondence at this stage and I am satisfied that no agreement was reached as a result of the 26 January email and/or earlier events.

79. I also note that even the concept of a binding agreement is difficult when Advisory and its shareholders would be giving away work which the Stand-Alone Understanding caused to be within Advisory's scope of business for no consideration. Mr Hodgkin during his submissions on behalf of Mr Ritchie recognised the difficulties facing the case for an agreement advanced by Mr Foss and Mr Hickley. He submitted that the key point was that Compliance in fact undertook closed programme work during 2017 without dispute from Mr Kolah or Mr Verrian.

80. However even if there was an agreement for closed programme work to be carried out by Compliance not Advisory, it cannot have been thought by the directors and the

shareholders of Compliance that this would be on the premise that the Advisory business model with the Advisory Remuneration Agreement applicable to closed programmes was abandoned. That closed programmes would be treated in the same way as the HBS GDPR open programme and that Compliance's directors would be required to draft and present the programmes without any additional payment for those services. Not only is there no evidence that such a course was suggested but it would have been contrary to the Stand-Alone Agreement and obviously would not have worked. Mr Kolah in particular could not have been expected to undertake all the additional work and incur the additional time on the basis that he would be entitled to no more than the accrual of his existing Compliance remuneration. A contrary proposition would justify the response that he needed an income to live on. Bearing in mind also that the Articles for the Companies are the same, in my judgment any such agreement or the subsequent undertaking of such work by Compliance without an express agreement must have been on terms that the Advisory Remuneration Agreement continued to apply.

E4) Problems Before The Events Leading To Mr Ritchie's Dismissal

E4i) Alternative Sources of Income

81. The emails referred to above identify that by January 2017 there were serious issues between Mr Kolah and Mr Ritchie over the future operation of the Companies to the extent that Mr Kolah wanted Mr Ritchie out of the picture. They identify that Mr Kolah did not want a separate consultancy business. There were also other problems in the lead up to the dismissal of Mr Ritchie in August 2017.

82. Connected to the dispute between Mr Kolah and Mr Ritchie but also a self-standing problem for Mr Kolah and Mr Verrion was their need for income. Taken out of context but to make the point, Mr Foss in an email sent to Mr Stern on 30 September 2017 expresses the assumption *"that some limited recent successes mean that Darren and Ardi have been able to pay their mortgages"*. Mr Kolah raised the problem of income need in an email seen by Mr Ritchie and Mr Foss on 3 November 2016. It expressly refers to his outside consultancy work, lecturing and teaching:

> *"The leads I have generated for consultancy work for myself are from my personal and direct contacts and to do with my need to earn money from undertaking consultancy work in order to pay my bills.*
>
> *At this stage, I'm comfortable putting this work through GO DPO® on the proviso that when monies are paid to GO DPO®, I'm reimbursed 100% within 4 hours of this happening. This is non-negotiable from my point of view.*
>
> *If there's additional resource required for consultancy work, then this is incremental work can be generated and profits returned to GO DPO.*
>
> *At this point, we need to focus on converting the leads that we have and not start a scatter gun approach that leads to a dilution of effort and time.*
>
> *I've got major pressures and concerns in balancing the need to earn money, finishing off Module 3 and then look at Module 4 as well as trying to get IBM to sponsor the GDPR Transition Programme.*

> *On top of that I have to prepare to speak at conferences as well as get the Journal of Data Protection and Privacy to publication. I don't have any further capacity and I'm only earning from teaching at Kingston Business School – which is the final draw on my time.*
>
> *We are a start-up and as such we need to recognise that we have to do things differently until we have capacity to take on new initiatives."* (my underlining for emphasis)

Whilst the consequential email correspondence of Mr Ritchie and Mr Foss that day reveals them to be disgruntled, there is no suggestion that this is disclosure of facts of outside work of which they are unaware. They do not challenge the work on the ground of an unapproved conflict of interest and there is nothing to suggest alteration to the Directors' Right to Other Remuneration or to the Advisory Remuneration Agreement

83. The January correspondence above followed and in an email Mr Kolah sends to Mr Foss on 16 February 2017 he sets out his criticisms of Mr Verrian and Mr Ritchie. He also writes (my underlining for emphasis):

> *The vision for the company has been lost. It was always training and recruitment. Given that there's never been any performance from the recruitment business, no sales focus for the GDPR Transition programme but over excitement from two individuals who are not data protection but insist on wanting to build a consultancy business … I've never wanted a separate vehicle for a consultancy business … The value is in training and (as yet) recruitment … The enterprise value of the GO DPO EU Compliance would be zero if I hadn't brought Accenture to the table or hadn't created incredible content and a buzz in the market about Henley. I've told [Mr Verrian] that once the GDPR Transition programme is written, I will step in to manage the relationship with Henley working with you and that will allow [Mr Verrian]to focus on building a viable recruitment company with Goodman Masson … [Mr Ritchie] is an investor and Financial Director. Period.*
>
> *I should be left alone to earn a living and having private client consultancy work doesn't create a conflict of interest for me. Actually, it helps credibility for the company as well as a channel to the GDPR Programme. I'm not a meal ticket for [Mr Verrien] so he can retain earnings from my work that I have brought in and that I deliver. I think he needs to be realistic and earlier today he accepted that I couldn't be stopped from doing GDPR consultancy work but started to become passive aggressive about how he had to look after the interests of the company and do what is right. This is all a bit rich for me. The company is training people. I don't train people privately. And the company is recruiting people. I don't recruit people privately.*
>
> *I can't continue to work without a steady income and pay my mortgage and meet my family's obligations without getting well paid. So earning a living at the same time as working for free for GO DPO is where I'm at right now … I think we will succeed if [Mr Verrian]focuses on building a recruitment business and I'm left to nurture the Accenture and client relationships for Henley …".* (my underlining for emphasis)

84. These emails are consistent with the Directors' Right to Other Remuneration. The problem is that the directors and/or shareholders of the Companies did not expressly agree the boundaries of that right except for the Advisory Remuneration Agreement. Mr Foss in the above-mentioned email to Mr Ritchie sent on 5 January 2016 came close to identifying the problem (albeit in the context of an unclear reference the Contracts (Rights of Third Parties) Act 1999) when he writes:

> *"it is important to clarify which of us are or not an employee, as anyone associated with the business in less than an exclusive commitment needs to be free to work elsewhere as long as any other work does not compete"*.

85. His reference to employees exclusively committed is entirely consistent with the Implied Terms of the Directors' Right to Other Remuneration and the concept of no competition is not difficult to appreciate in principle. Whilst Mr Ritchie portrays this as a case of concealed and illicit diversion of business and revenue, the reality is that at this stage (i.e. before his removal as a director) it is a case enquiring whether Mr Kolah and Mr Verrian went outside the boundaries of The Directors' Right to Other Remuneration in the context of that right being required to ensure they had a living taking into consideration the Stand-Alone Understanding and the Advisory Remuneration Agreement.

86. Examples of payments Mr Kolah received through Maverick for his work from at least April 2017 and which the Petitioners assert are diversions of business and revenue include: On 1 April 2017 Maverick invoiced Advisory, addressed to Mr Verrian, for consultancy fees of £3,600. On 21 April 2017 Maverick invoiced Amplified Business Content for £760 in respect of speaking engagements, namely a luncheon at Smith & Williamson and a GDPR Conference in London. On 17 May 2017 Maverick invoiced Amplified Business Content £120 for the preparation and delivery of a GDPR webinar. On 31 July 2017 Maverick invoiced Compliance, addressed to Mr Verrian, for payment of £3,663.46 for Nationwide Building Society (Swindon) training plus expenses. The Petitioners allege that Maverick was being used to receive payments from Compliance customers between 2 June and 14 August 2017 totalling in the region of £23,000. Those payments have been identified from Maverick's HSBC bank statements on the basis that the payee is shown as "Amplified Bus Cont L", "Promoveritas Limit", , "Business Control S Associates", "Goodacre UK Limited", "Networkers Intern", "Marcus Evans Ltd", "Liberum Capital LT", "CB Consulting LIMI", "CIPR", "Atlantic SB" and "Compliance" itself.

E4ii) Financial Problems

87. Another problem during 2017 is that Compliance was not earning enough money quickly enough. Whilst there is an overdraft facility of £30,000, the fund raising has not achieved sufficient equity or working capital to create an alternative or additional buffer. The loans from JPR@Number11 Limited (which Mr Ritchie states total £35,000) and PromoVeritas Limited, a vehicle for Mr Stern, repayable in July and November 2016 respectively are being rolled forward informally. That is not to suggest that the business was not beginning to grow. There are HBS, GDPR work-shops during 2017. During January and February 2017 Accenture and Aviva Life are interested in the HBS GDPR course and Accenture is asking for a fee of 80% of the £8,495 delegate price on the basis that it will be submitting 20 people. There is also

some interest from Legal and General. Mr Kolah and Mr Hickley are developing contact with BT, as mentioned in Mr Hickley's 31 January 2017 email. Mr Kolah is identifying the need to accelerate module completion in order to for Accenture to contract. However, funding is always a problem and, as will be seen when specifically addressing the events in August 2017, Compliance is unable to pay its debts as they fell due by that date.

E4iii) Internal Disputes

88. I have already referred to the January 2017 disputes concerning the future direction of the Companies. This and other disputes continued, potentially exacerbated by the fact that further modules are being written with many hours work being required of a few. This is placing a lot of pressure on Mr Kolah and Mr Hickley, pressure which increases during February 2017. An email from Mr Foss sent 7 February 2017 indicates that there is an issue with Mr Kolah's criticisms of others concerning work load and cultivating leads. Mr Verrian by email to Mr Kolah on 15 February, the email which results in the 16 February email above, writes (amongst other matters):

> *"I also need to understand your own plans as recent conversations haven't been clear and for all intents and purposes you appear to be keen on setting yourself up as a GDPR Consultant outside of the GO DPO Stable and therefore increasing your own enterprise value but not that of the business. This could have implications going forward as we have IPR, Conflict of Interest, competition and potentially client crossover (Hitachi / Macquarie / Richmond Events / capital One / Nationwide) as well as the perception from Henley and our shareholders so please let me know what your intention is so we can proceed in the best and most appropriate manner."* (my underlining for emphasis)

89. On 22 February 2017 Mr Verrian calls a Compliance board meeting for a date to be agreed. The same day Mr Kolah raises issue with Mr Ritchie's authority to prescribe as he wrote in his email of even date:

> *"As discussed with Darren, with immediate effect until the outcomes of the pending Board meetings are agreed, no one Director is authorised to commit any one of the GO DPO companies to third party contracts or liabilities without the approval of at least a second Exec Director. For practical purposes, the above to apply with a de minimus spend/liability of £250.*
> *In the event of non-adherence to this no GO DPO company shall be liable for the costs and the said Director shall have the financial liability personally. All material contractual, financial, partnerships and other strategic matters should be put to the respective Boards for consideration."*

90. This is a directive based upon discussions between two directors without involving the third in the case of Advisory or the other two directors in the case of Compliance. It does not have board authority and implies that it is changing the approved status quo. There would be no need for such a diktat if directors were not at the time authorised to commit the Companies to third party contracts without approval. Looking at the management position, it is plain that Mr Ritchie did not have the authority to dictate this limitation. He was concerned with the finances not with day to day business and

entering into contracts. Nor would Mr Foss as a non-executive director of Compliance. It is, therefore, an email which recognises but seeks unilaterally to withdraw the existing authority of Mr Kolah and Mr Verrian to commit Compliance and Advisory to third party contracts. I find as a fact that they had that authority in the exercise of ordinary, day to day management. It might be suggested that the £250 limit means the email is intended to refer only to purchases or expenses but this was not developed in evidence at the trial.

91. Mr Kolah saw the situation as one where Mr Verrian and Mr Ritchie are joining forces against him and he begins to refer within emails to the possibilities of his resignation and winding up. Mr Ritchie's personal email to Mr Kolah of 23 February makes clear that they will be proceeding with Advisory but seeks reconciliation. That same day, Mr Kolah in an email refers to the potential for retaining Ms Dubiniecki to help write the outstanding modules. By email the same day Mr Ritchie agrees to it in principle. Mr Ritchie has stated in evidence that there was a binding policy for Compliance that no third parties will be involved in its work without board agreement because of the absence of sufficient funds and the need to keep expenditure to a minimum in order to repay the lenders. Whilst he is plainly correct that expenditure should be kept to a level which Compliance can afford, there is no board or shareholders' meeting evidenced by minutes or otherwise at which the policy was decided. There is no suggestion of a "Duomatic" decision.

E4iv) Access To Financial Information

92. A fourth problem is that Mr Kolah and Mr Verrian do not consider they are receiving the financial information required from Mr Ritchie. They also specifically complain about their lack of access to Compliance's bank accounts. Emails of June 2017 evidence Mr Verrian and Mr Kolah enquiring of Mr Ritchie about cash flow, budgets and forecasts. Some information is provided with an email sent 27 June. On the same day Mr Ritchie informs Mr Verrian and Mr Kolah that investors were asking for a meeting. Mr Verrian considers that inappropriate on the basis that as CEO he should do so and *"drive the agenda"*. It appears that the purpose of the shareholders' meeting is to evaluate the current position and the future potential now that Compliance is at a crucial time in its life.

93. The control of financial information and of access to the bank accounts is not a decision for Mr Ritchie to make alone as CFO. The directors have a right to access the information and to see the bank accounts whether on line or by paper statements. Mr Verrian and Mr Kolah are on the mandate and that in itself identifies a board decision entitling them to operate the accounts in accordance with the mandate. There is no evidence of a board or shareholders' decision to the contrary. In addition, the shareholders of Compliance have the right under the shareholders' agreement to have accurate and complete accounting and other financial records made available to them at frequent regular intervals.

E5) The Events Leading To Mr Ritchie's Dismissal

94. Those problems form a background to the events in July and August 2017 concerning Mr Ritchie's transfer of Compliance funds to his own company and his dismissal by Mr Kolah and Mr Verrian. On 17 July Mr Verrian emailed Mr Ritchie to ask for himself and Mr Kolah to be set up as users of the Compliance and Advisory bank accounts. He also wrote:

> *"I met with [Mr Kohla] on Friday and he has potential client work, but will not put through the company if he doesn't have line of sight to the accounts.*
> *I have agreed that if this doesn't happen he will invoice as maverick and then pay GO DPO the 10% but I am keen that doesn't happen."* (my underlining for emphasis)

95. This email is of importance for a number of reasons. First, it establishes a problem for Mr Kolah, namely that he has no on-line access to and, therefore, no day to day sight of the bank accounts. Second, it is a problem within the context (not in dispute) that Mr Ritchie has control of the accounts. Third, it is consistent with the Advisory Remuneration Agreement in that Mr Kolah will receive payment for work which he carries out for Advisory. Fourth, the reference to 10% does not suggest that this is a specific agreement between Mr Kolah and Mr Verrian made because of this problem but that this is the percentage expected to be retained by Advisory or Compliance when the Advisory Remuneration Agreement applies. Whilst there is no evidence of such an agreement binding upon Advisory and it is not in accord with the percentages agreed with Mr Kolah and Mr Hinkley in respect of the Hitachi Consulting agreement mentioned above, both are illustrative of the potential remuneration which might be received pursuant to the Advisory Remuneration Agreement. Finally, one would expect an immediate response from Mr Ritchie asking what the references to client work, to work not being put through the company and to paying GO DPO the 10% mean and refer to if he is unaware of such matters or arrangements. Instead, all the email in response states is that *"[Mr Kolah] should understand that it is not a 'trade' item"*. It is to be inferred that he did not ask such questions because he knew the answers.

96. In a letter dated 24 July 2017, addressed to Mr Kolah, acting on behalf of Advisory but at his home address, Hitachi Consulting confirms an agreement for Advisory to provide GDPR implementation support services as particularised in a proposal dated July 2017. The services would be provided by Mr Kolah and anyone else considered appropriate subject to prior approval at Hitachi offices. The agreement supersedes a letter of engagement dated 28 December 2016 and is for the period from 1 August to the end of June 2018. Payment would be at a daily (8 hour) weekday rate of £1500 excluding VAT per man engaged plus reasonable expenses. Invoices would be rendered monthly in arrears. It is signed by Mr Kolah the same day as "Founder of GO DPO". During cross-examination Mr Kolah described it as an agreement to provide business analyst services to achieve BS 10012:2017 certification for a personal information management system.

97. There is no evidence that Mr Ritchie will have been aware of that letter. Nor will Mr Ritchie have been aware directly of an email from Mr Verrian to Mr Kolah sent on 25 July 2017 which provides:

> *"As agreed please change customer payments to go Maverick as per out conversation for any advisory work, with you then settling the 10% back to [A]dvisory".*

98. Similarly, Mr Ritchie will have been unaware of an email from Mr Kolah to Mr Verrian sent later that evening which expresses a lack of trust for Mr Ritchie and in that context describes his failure to provide them with access to any of the Companies' bank accounts for over 6 months despite request as *"totally unacceptable"*. The letter states that as a result, Mr Kolah requires new bank accounts to provide them with total control over the accounts to which they are expected to contribute. Mr Kolah also writes that he wants Recruitment shut down and if Advisory is to continue, full accountability. He explains this as meaning that it will be necessary to identify who will be doing what and what financial contribution will be made to Compliance and Advisory. The letter explains that significant investors are required and that there has to be a business strategy and plan. It is also necessary to renegotiate the HBS contract to take over responsibility for sales and marketing. Only changes will produce an exit, he writes. The letter ends:

> *"No movement on BSC Consulting but I'm really trying to get companies to sign up for closed GDPR training programmes, so there is fees payable to me and you and of course … Compliance"*.

99. On 29 July 2017 Ms Dubiniecki emails Mr Verrian to point out that the sums invoiced are due and owing. She is obviously not paid because on 4 August she sends an email to Mr Verrian copying in Mr Ritchie and Mr Kolah complaining about the failure to pay her for her module drafting in the context of having also provided numerous unpaid "volunteer" days.

100. Mr Ritchie will also have been unaware that at the beginning of August 2017 two accounts were opened for Compliance by Mr Kolah and/or Mr Verrian: a "Stripe" payments' account using the Stripe online programme and a "Tide" e-money account provided by Prepay Technologies Limited. Stripe has produced an electronic record showing that a payments account was opened for Compliance by Mr Kolah but recording the "owner email" of Mr Verrian. The account opening date is recorded as 1 August 2017. Tide has informed the Petitioners that Compliance opened a payments account on 4 August. It does not appear that those accounts were used before 14 August 2017 except for one Stripe entry of US$1.00 as a credit card debit. A bank statement for the month of August from Tide records two entries: the first a payment received on 23 August 2017 of £10,800 and the second a payment made of £5,000 on 29 August 2017. It does not matter who opened the accounts, although it was probably Mr Verrian bearing in mind his email and the fact that he would be the person dealing with finances not Mr Kolah. That is because their opening must follow from the above-mentioned request of Mr Kolah in the absence of access to Compliance's accounts and it is a fact that the accounts were used by Compliance whilst under the sole control of Mr Kolah and Mr Verrian after 14 August.

101. E-mails of 5 August 2017 between Mr Verrian and Mr Ritchie identify Compliance's failure and inability to pay its debts as they fell due including payments in full due to Ms Dubiniecki. As a detail, Mr Ritchie does not dispute the obligations to pay Ms Dubiniecki but it is unclear from the emails' wording whether he was only aware of the debt owed for her production of modules and for payment of expenses incurred

when attending workshops or whether he also appreciated the fees for her work training. In any event he emphasises the lack of funds and in one email observes at the same time that the short term loans had been unpaid since July and November 2016. The potential relevance of this is that it provides an insight into the matters with which Mr Ritchie was most concerned. As the CFO he appreciates the Companies' financial difficulties and as the owner of a company who has lent, as mentioned above, £35,000 he is also concerned that the recovery of that debt may well be at risk.

E6) The Transfer of Funds and The Dismissal

102. The key email identified by Mr Ritchie as the cause for his decision to transfer funds to his company, JPR@No11 Limited, on 7 and 18 August (£19,000 and £6,500 respectively) was sent to him on 5 August by Mr Verrian (amongst other email of that date). It reads:

> *5 August 2017*
> *Please make the payments to [Ms Dubiniecki] as Per my request.*
>
> *We have another £4K coming in around the 18th which will be the balance of the nationwide after paying myself, [Mr Kolah] and [*Ms Dubiniecki*] and for the workshop design and delivery*
>
> *I am also due to submit the VAT return and that will be a repayment*
> *We spoke at Great length about extending the overdraft for a short period to cover the short fall so what's happened with that?*
>
> *Can you also organise bank account access - it's months now and it's totally unacceptable that something so simple should not take so long."* (my underlining for emphasis in the context of considering Mr Ritchie's conclusions drawn from its content)

103. Mr Ritchie's reaction to that email, as explained in his first witness statement, is that he thinks Mr Kolah and Mr Verrian are:

> *"going 'rogue' ... by controlling bespoke contracts and/or seminars without obtaining normal authority or discussing the matter in the usual way and were proposing to make a deduction from the payments received from the customers to pay themselves outside of [his] CFO lead on all Finance matters, Board approval or [Compliance's] cash plan .... The sequence of correspondence and the manner adopted by [Mr Verrian] including his insistence upon having direct access to the ... bank account caused [him] to fear [their going rogue] might extend to risk to the bank account as a result of which [he] temporarily withdrew and 'warehoused' (and left untouched) monies from [Compliance's] bank account in my own company bank account, with immediate briefing of [Mr] Foss .... [repeating] the transaction when a receipt of @£7,000 came in ... continuing to leave a de minimis headroom of @£500 ...".*

104. Mr Ritchie's evidence at trial remained that he feared from the contents of this 5 August email that Mr Verrian and Mr Kolah are intending to make unauthorised payments to themselves and that he decides he needed to protect Compliance's money

by transferring first the £19,000 to his company. I do not accept that evidence for a number of reasons:

a) First, the email's content does not suggest this at all. It asks him to make a payment, it refers to money coming in not to withdrawing money, it impliedly acknowledges his involvement with the operation of the account through the reference to discussions concerning the overdraft and its increase being left to him and it acknowledges his control over the accounts by requesting access.

b) I do not accept that the previous correspondence alters that reading and, if anything it makes Mr Ritchie's evidence even less reliable. First because of his knowledge of the Advisory Remuneration Agreement and all the points made in respect of Mr Verrian's above-mentioned 17 July email to him. Second because he was then unaware of the facts which might have created alarm, namely the 24 July Hitachi Consulting letter, the emails between Mr Verrian and Mr Kolah on 25 July and the opening of the bank accounts.

c) Third, his supposed fear is inconsistent with the fact (not in dispute) that Mr Ritchie had sole access to and control of the Compliance bank accounts. As he wrote on one of the 5 August emails, he is managing the account. He suggests in his evidence that he feared Mr Verrian and Mr Kolah might obtain a transfer of funds through their attendance at a branch that week-end. However, there is nothing in that email to indicate this would be done and, as Ms King put it to Mr Ritchie and he failed to answer, the point of the email was to identify money being received not withdrawn.

d) Fourth, even if that was his fear, the obvious solution would have been to freeze the accounts, as he did subsequently, not to transfer sums to his own company, a creditor. In cross-examination he explained that he had not thought of doing that but I find that improbable taking into consideration all of the evidence concerning what he did and the circumstances.

e) Fifth, there is the confusion within his evidence between transferring the money to protect Compliance and transferring the money to repay the loan. This will be developed further below when referring to later correspondence but he accepted in cross-examination that he had used the money to repay the JPR@No11 Limited loan and that the money had not been returned to Compliance until he was required to do so by court order. His explanation was that he would have re-lent the money as required when it was safe to do so. However, that is not keeping the money secure or "warehousing it" to use his expression. It is the repayment of a debt with the creditor holding an unenforceable intention to re-lend.

f) Sixth, his evidence as to fear and intention loses credibility when it is appreciated that whilst the reference to Nationwide was a first within the email correspondence, the fact that Mr Kolah was receiving payment from contracts which involved one of the Companies was not new to him. It was consistent with the Advisory Remuneration Agreement. I refer to the email of 17 July mentioned above. In addition, Mr Ritchie's email in response was very weakly worded if he truly did not know about the Nationwide contract. He asks: *What*

is the Nationwide revenue please – and what amount is proposed to be paid to yourself and [Mr Kolah]" whilst observing that the finances of Compliance need to be managed robustly to avoid collapse. He does not ask what the Nationwide contract is and it reads as a request to know the financial numbers not as a "what are you talking about" response. This response with its concerns for numbers is also consistent with his motive for ensuring his company is paid, his above-mentioned appreciation of Compliance's financial difficulties and also that the recovery of the debt may well be at risk: a motive which is further evidenced by one of his emails of 5 August in which his reference to an absence of funds is immediately followed by reference to the problem of the loans not having been repaid.

g) In addition his email instead of querying the existence of a Nationwide contract asks:

> *"What amount are you both proposing I am expecting to receive?"*. (my underlining for emphasis)

In evidence Mr Kolah explained that this contract between Nationwide and Compliance was a closed contract which had been discussed with Mr Ritchie and in respect of which he, Mr Kolah, would be entitled to payment as he had been for the Hitachi Consulting contract. Mr Ritchie's question leads to the conclusion that not only does he accept there should be payment to Mr Kolah and Mr Verrian but anticipates that he too should be entitled to a payment. This is entirely inconsistent with his evidence that he had no concept of what was occurring and considered any such arrangements to be concealed misfeasance. Acceptance that there should be payment to Mr Kolah and Mr Verrian is entirely consistent with his change of evidence during re-examination when he identified the Advisory Remuneration Agreement, even if his reference to a personal entitlement has no apparent basis or justification.

h) Seventh, this assessment of his emails is entirely consistent with his email of 7 August in response to a heated telephone conversation with and detailed follow up email from Mr Verrian. That email does not disclose the transfer of funds to his company, his perceived need to protect the bank accounts or that he would be asking the bank to freeze Compliance's account. Instead he merely describes himself as being *"a little disappointed"* with Mr Verrian's tone on the Saturday, refers to what he is doing in respect of cash flow and agrees to pay Ms Dubiniecki's expenses.

i) Eighth, there is the above-mentioned later email from Mr Stern sent to Mr Foss on 21 August 2017. I appreciate that account must be taken of emails between Mr Foss and Mr Hickley that morning showing: that Mr Ritchie had told them that Mr Kolah and Mr Verrian had received payment for work they had done; that they were struggling to understand the Nationwide payments since *"that is not the way it works"*; and that Mr Hickley was wondering whether Mr Ritchie was confusing Nationwide with Hitachi. However, Mr Stern is unequivocal when he states that everyone was aware of the Nationwide contract as follows:

> *"As for his claims of inappropriate behaviour by [Mr Kolah] and [Mr Verrian] regarding payments for presenting closed programmes, he is fundamentally wrong in thinking the worst. Although not ideal the arrangement was known to all (including me) as a result of the decision taken almost a year ago not to allow them to take any more salary or accruals from the business, and only be paid for what they did outside of the core programme."* (my underlining for emphasis)

j) Finally, although really only as a footnote because it has played no real part in this decision, my conclusion is consistent with my critical assessment of Mr Ritchie as a witness.

105. Expanding upon the confusion of Mr Ritchie's evidence referred to in sub-paragraph (e) above: In his first witness statement he states that the funds were later deemed to be used to repay Compliance's loan, albeit that this is written in the context of a preceding paragraph referring to temporary withdrawal and warehousing. In his seventh witness statement he contradicts his statement that he was warehousing the funds when he states that he intended to re-lend the funds as soon as Mr Kolah and Mr Verrian agreed to meet and provide satisfactory and transparent answers. They could not be re-lent if they had not already been used to repay the JPR@No11 Limited loan. In addition, when the emails after 7 August 2017 are read, it is apparent that it was only on 15 August that he discusses the matter with Mr Hickley and that this conversation gives rise to his proposal to undertake not to use the funds or to ringfence them as he informed Mr Foss. There would be no need for a proposal if they were already warehoused. Further, it was not until 19 August that he refers in contemporaneous correspondence to the fact that he acted to protect Compliance's money by *"warehousing" it in JPR@Number 11 Limited's bank account"*.

106. I also do not accept Mr Ritchie's evidence that he immediately informed Mr Foss of the first transfer of funds of £19,000. There were telephone conversations with Mr Foss on the Saturday and the Monday. Mr Foss has no recollection of being informed of the transfer but suggested during cross-examination that it was probably mentioned in the context of a poor reception whilst he was in France. Since he did not hear it, that is a matter of opinion or supposition. I do not reach that conclusion. First, if it had have been mentioned, it is reasonable to expect there would have been a conversation or discussion not just a short statement that might have been missed. Second, it would not have been a statement without response and Mr Foss has no recollection of such a conversation. Third, for Mr Foss it would have raised potential alarm bells as to why the money was transferred to Mr Ritchie's company. It is not a conversation he would be likely to forget. Fourth, its non-disclosure is consistent with the purpose of the transfer being to protect Mr Ritchie's company from Compliance not being able to repay the loan. The probability is that Mr Foss does not remember it because it was not disclosed.

107. I have also noted that within the further correspondence during the evening of 7 August when Mr Ritchie discloses to Mr Verrian that he spoke to Mr Foss on Saturday morning, he records that he received advice that there should be a board meeting. Its purpose is to consider the cash plan taking into consideration the *"key financial stakeholders"*. He observes that *"We cannot operate effectively as 'sole traders"* and stated that *"no material payments will leave the bank account from today until"* the board meeting is held. In an email sent shortly after copying in Mr

Foss he describes the agenda as: *"update on where we are at, current activities and near/medium terms plans, strategy and key decision points anticipated"*.

108. In neither email is there a suggestion that the meeting to be called will raise concerns about payments to be received by Mr Kolah and Mr Verrian whether from the Nationwide or otherwise and/or that Mr Kolah and Mr Verrian were intending to make unauthorised drawings from the bank account by attendance at the bank. There is also no suggestion that the meeting would address the transfer of funds to Mr Ritchie's company. Their omission cannot be attributed to secrecy. There is no reason to keep these matters secret when the bank accounts are secure and every reason to raise them. The fact that these matters are not mentioned supports the conclusions reached concerning Mr Ritchie's knowledge of receipts by Mr Kolah and Mr Verian and of the Nationwide contract. In addition, it supports the conclusion as to the true reason for the transfer.

109. Taking all those matters into consideration and my assessment of his evidence as a witness, I conclude as a matter of fact that the purpose of the transfers was to protect the interests of JPR@No11 Limited by ensuring its loan was repaid in circumstances of financial difficulty for Compliance.

110. The meeting was not held because, as stated in email correspondence, Mr Kolah and Mr Verrian objected to it being held during their summer holidays. That does not appear to me to be an acceptable explanation. This was a very serious matter. The rational explanation is that they wanted to deal with matters their own way, as became aparent.

111. Mr Verrian's 6 August email starts with his criticisms of Mr Ritchie, which I will record not to establish their accuracy but to evidence Mr Verrian's mind set. He complains of (amongst other matters): Mr Ritchie's failure to make payments as instructed, his failure to attend to his obligations as a CFO or to obtain funding to prevent under-capitalisation; his failure to provide a plan to repay accrued payments and loans or a business plan for Advisory; and the fact that he had not obtained access to the bank accounts. It also states that Mr Ritchie would not be earning anything from Nationwide because he had not been involved in any client delivery or workshops. It concludes that the business does not need and cannot financially support a CFO who does not deliver workshops for paying clients.

112. That email is consistent with the finding that Mr Ritchie was aware of the Nationwide Building Society contract and payments. Mr Verrian writes that he *"was very clear"* when the Nationwide work was obtained that he, Mr Kolah and Ms Dubiniecki would be paid because they designed and delivered the workshops and that he *"actually told [Mr Ritchie] that [he and Mr Kolah] would both be drawing £3k each and [she] £2k with £4k going into the company pot"*. He attributes this to the fact that it was outside the Henley BS work and to the fact that otherwise they would not receive any funds since they were not accruing or drawing salaries. Whilst this is a self-serving letter in the sense that it is written by him to set out his position at the time of major dispute, it does not read as though it is contrived and its consistencies with the evidence and findings above substantiates the impression that it genuinely records his views at the time, which are consistent with the Advisory Remuneration Agreement. In that context it is also to be noted that Mr Verrian refers to any advisory work being carried

out on the same basis with Compliance/Advisory receiving 10% until a planned September review.

113. As previously mentioned, during this period, 9 August 2017, the New Company is incorporated. Without knowledge of that step, in a detailed email Mr Foss sends on 10 August to Mr Verrian (copying in Mr Kolah and Mr Ritchie) the financial issues are identified and Mr Foss concludes:

> *"All' we need to do is to agree on an approach and we can sort this as we have done before! Hope we can - I am certainly ready to help. When can we meet or call?"*

He does not refer to issues over payments wrongfully received or to be received, Mr Ritchie's perceived risk to the bank account or the transfer of funds to Mr Ritchie's company. Those omissions would be surprising if he was aware of them or appreciated them to be contentious issues. The absence of reference to them also supports the findings above.

114. On 14 August 2017 Mr Verrian emails Mr Ritchie to describe as *"gross misconduct"* the fact, discovered that morning, that he had transferred £19,000 from Compliance's Lloyd's Bank account to his company's account (JPR@Number11 Limited) on 7 August 2017. The consequence of Compliance being unable to pay creditors and suppliers is recorded. Mr Verrien in an email sent to "all" on 14 August 2017 records the removal of those funds as being without authority, identifies it as gross misconduct and informs of the decision to remove Mr Ritchie as a director of Compliance and to rescind his inclusion on the bank mandate. Mr Ritchie's purported resignation as a director of Compliance is recorded at Companies House that day and as a director of Advisory on 15 August 2017.

E7) Subsequent Correspondence

115. Mr Foss sent various emails trying to bring the parties together having on 15 August proposed to Mr Ritchie that he should *"volunteer to move the funds to escrow"*. There is an email from Mr Ritchie to Mr Foss that evening referring to discussions he had with Mr Hickley and to his proposal to give an undertaking not to use the funds or to ringfence them.

116. In an email sent on 18 August 2017 Mr Verrian notifies Mr Ritchie that the bank has informed him of a further withdrawal despite having been removed as a director and that the police will be contacted. Mr Ritchie's response on 19 August, which refers to him having consulted with Mr Foss, attributed his actions to Mr Verrian's demands and behaviour on 5 August because he would be deviating from Compliance's cash plan and paying monies when it had insufficient funds including paying himself, Mr Kolah and Ms Dubiniecki from some Compliance work with Nationwide leaving Compliance at financial risk. It is those circumstances, he writes, which caused him to protect Compliance's money by *"warehousing" it in JPR@Number 11 Limited's bank account"*. It cannot be without significance and supports the findings above concerning his real reasons for transferring the money that he does not refer to his fear of Mr Kolah and Mr Verrian withdrawing funds from the accounts by attendance at the bank. There is also a letter dated 19 August 2017 marked without prejudice from

Compliance signed by Mr Kolah and Mr Ritchie on behalf of Compliance concerning settlement.

117. On 21 August 2017 Mr Ritchie emails Mr Foss, Mr Harvey, Mr Stern and Mr Hickley to inform them that he had called Lloyds Bank to place a temporary block on Compliance's accounts, it having come to his attention that he had been removed from access to them. They cannot be reactivated without his consent. He observes that Mr Kolah and Mr Verrian have still to explain why they had been paying themselves from *"Nationwide contract/services receipts"*. This led to the previously mentioned 21 August 2017 email from Mr Stern to Mr Foss which starts:

> *"Based on today's correspondence from James, the plan we discussed today on the phone may not work as we had hoped. He is standing firm, has blocked the bank account and is 'now looking for robust support from key financial stakeholders'*
> *James may have some useful financial background but GO DPO has not need massive benefit from it : the business case was written by someone else (who was paid a large amount of money) and has not been updated since to my knowledge, the Annual accounts and Companies House submissions were done by Darren, the fund raising failed to achieve anywhere near the desired amounts, and all the day to day accounting is not run by James, but by Darren. James just pays the money.*
> *[Previously quoted paragraph at paragraph 63*]
> *The business must face the reality of a split between individuals. I had hoped it was recoverable, but I feel now that it is not. I hope you can influence James to see a way out that does not cause further pain, cost and distraction and assure him that I will be focussing on protecting his investment as best I can."*

118. By email sent 29 August 2017 Mr Foss asked Mr Ritchie to review the agenda and include an item concerning the transfer of funds into a GO DPO account with new arrangements for monitoring payments etcetera. This and the other emails from Mr Foss and Mr Stern are referred to because they evidence the fact that the path taken by the other Compliance shareholders was to try to achieve an accord between Mr Kolah, Mr Verrian and Mr Ritchie. There is no evidence from which to conclude that they had any involvement in the actions of Mr Ritchie which Mr Kolah and Mr Verrian rely upon to support their decision to dismiss him. I find as a fact that they were not involved and took reasonable and proportionate steps to seek resolution once the dispute was made known to them.

119. It is also plain from the contemporaneous documents, including those considered below in respect of dealings after 14 August 2017, that Mr Kolah and Mr Verrian no longer treated Mr Ritchie as a director of Compliance or indeed of Advisory or Recruitment. That inevitably resulted in them not disclosing to him matters of day to day management. Whether this should be found also to be concealment of the diversion of business or assets will depend upon whether there was any diversion. However, their actions and omissions post 14 August 2017 establish that they dealt with matters their own way without including any of the Petitioners. There were no directors meetings called to include Mr Foss or any shareholder meetings. They treated the Companies as their own as the post dismissal review of their actions will establish.

E8) Post Dismissal Actions of Mr Kolah and Mr Verrian

120. The new accounts (opened without the knowledge of the CFO and before Mr Kolah and Mr Verrian were aware on 14 August of the transfer of funds which caused them to dismiss him and the subsequent freezing of the Lloyds Bank accounts at the request of Mr Ritchie) enabled Mr Kolah and Mr Verrian to ensure that Compliance could trade without the involvement of Mr Ritchie, who still had control of the Lloyds Bank accounts. The significance of this in terms of the claim of diversion of revenue must depend upon what happened with the accounts but it is worth referring to the 5 August 2017 draft of Mr Verrian's email to be sent to Mr Ritchie referring to their *"blazing row"* that day and to Mr Ritchie hanging up. The draft was sent to Mr Kolah for his observations (although the response was received after the email had been sent). The following observation from Mr Verrian appears at the bottom of the draft: *"Clearly, HE IS NOT aware of any other income we have coming!".* Mr Kolah's suggestions for the draft included a reference to them visiting the bank manager as soon as possible.

121. There is concern that certain Tide bank statements may have been **"**doctored**"** before their disclosure by Mr Kolah and Mr Verrian. Mr Kolah denies any knowledge of this and relies upon the fact that this part of the disclosure is attributable to Mr Verrian. That rings true on the basis that Mr Kolah was not involved with financial records and his denials appeared credible. In any event there is no doubt that there are significant differences between certain of the statements produced within Mr Kolah's and Mr Verrian's joint disclosure and those provided by Tide in accordance with third party disclosure orders. Entries which are missing include those identifying the existence of the Stripe account. However, I find it difficult to assess this issue using electronic records. Using the court bundle, the statements all appear on their face to be genuine and there are difficulties understanding how items will have been excluded. For example, why for the two pages of statements disclosed by Mr Kolah and Mr Verrian there are 23 not 31 entries and the opening sums are different, yet the closing sums are the same. I am sure a side by side analysis will assist but this is a very serious matter raised shortly before the trial and no finding should be reached without further analysis and potentially expert evidence to assist. In addition, the reality is that I need not reach a final decision of fact on this matter for the purposes of this judgment. It being a very serious matter raised (I say without criticism) late in the day and there being a potential line to be drawn between Mr Kolah and Mr Verrian without having heard from Mr Verrian, I will leave it there.

122. A Compliance "Management Report" for August 2017 to 2018 signed by Mr Kolah and Mr Verrian on 3 September 2018 reports a turnover of £147,000 and a gross profit of just under £100,000 with all creditors having been paid. This must refer only to trading creditors because it also reports that only one shareholder loan of £25,000 has been repaid; presumably by the money transferred by Mr Ritchie to his company. It is stated that accrued debt has been written off and the only ongoing creditor is identified as a web-site host. Presumably that means the accrued remuneration of the directors has been written off but Mr Kolah described this as a misunderstanding and accepts that it remains a Compliance debt. The report shows that Compliance has been kept trading and the content of the completed e-learning modules is believed to have real value. There were two one day workshops but the HBS GDPR transitional programme ended in May 2018 and further work looks unsustainable. There is

reference to on-going conversations at their early stages to licence the GDPR programme content. The accounts reveal a loss of (£15,412.80).

123. The report refers to two new products with Accenture involving a 50:50 revenue share. The documents also reveal that on 13 December 2017 Accenture and Compliance entered into a revenue sharing agreement in respect of two online, interactive video training products produced by Compliance which both would market. Mr Kolah described this as a special project outside normal Compliance work for which he would charge his time. Another shareholder was involved with him in its creation, Mr Ritchie Mehta.

124. Mr Kolah was paid by Accenture what he described as a *"£15,000 ex gratia payment"* for his time in creation and presentation in circumstances of there being minimal sales, as he recollected. He could not remember whether it was paid directly by Accenture or through Compliance but it can be traced as a payment from Compliance into a Maverick bank account on 24 August 2018. It is derived from an Accenture payment of £21,000 received the day before in payment of a 23 July 2018 invoice for training content, software development. On the face of it, therefore, it is not an ex gratia payment but it needs further investigation. The Stripe payment transaction records appear to show a number of credit card payments for the videos between January and May 2018 with 2 further payments in August, the last on the 9th. The report states that neither of the Accenture products has received any real sales volume because the drivers behind it have moved to different departments. There is an expressed desire for Compliance to push the products into the U.S.A.

125. There is also reference in the report to a 60 minute GDPR fast track video and to a 10 minute GDPR cartoon video. This is consistent with promotional material of January and May 2018 which describes Accenture having teamed up with HBS and GO DPO to create an online GDPR training course at a cost of £49.99 per user with a shorter version for £4.99. It explains Mr Kolah's role in this course. In addition the report refers to client training proposals and enquiries.

126. The Petitioners have identified many payments and matters which they rely upon to justify a case of diversion of business and revenue after 14 August 2017, as well as before. For example, on 10 August 2017 Compliance invoices Accenture £12,000 (incl VAT) for a *"GDPR Bespoke Workshop"*. The bank details for the payment are for Compliance's Tide account. The Petitioners have been unable to trace the payment. On 23 August 2017 Compliance receives £10,800 into the Tide account from Capita. The Petitioners observe the reference to this payment is the same as an invoice number dated 15 August 2017 but assert that this document is a receipt. In fact it appears to be a copy of part of the original invoice with the remainder of the page used to record subsequent payments and to record that nothing was owed after a further payment of £10,800 was made on 18 September 2017. This was described as a one-off work shop by Mr Kolah, a closed, bespoke event. The Petitioners also referred to page 3 of the September 2017 Compliance, Tide Bank Statement which includes a payment of £1,099.99 to Maverick which appears to relate to a laptop.

127. An Accenture letter dated 15 September 2017 records the appointment of Compliance as the provider of on-line GDPR training services for a term of 4 years ending 30 June 2021 subject to earlier termination by Accenture whether by 30 days' notice or earlier

notice when clause 7 of attachment 4 applied. A fee of £250 would be paid for each participant. Mr Kolah recollected that the right of termination was exercised soon after the expiry of the GDPR transition period.

128. On 24 September 2017 Maverick invoices Compliance £3,600 for a Clydesdale Bank GDPR workshop for programme design and delivery. On 25 September Compliance receives £3,300 from Accenture into its Tide bank account. The Petitioners complained that the invoice to which this entry refers was not disclosed by Mr Kolah or Mr Verrian. Mr Kolah accepted that Mr Verrian should have disclosed it. On 20 October 2017 Maverick invoices Compliance £4,200 for the preparation and delivery of a GDPR workshop for Accenture. This was paid from the Tide account on 21 October 2017, Accenture having paid Tide £15,000 on 13 December 2017.

129. By an invoice dated 10 November 2017 the New Company identifies a payment on 15 April 2018 of £16,800 for an invoice to Centurylink Limited for "Bespoke Training for 19 Business Leaders". There are other similar "invoices" recording payments on 20 and 22 February 2018.

130. On 13 December 2017 Maverick invoices Compliance for £6,000 in respect of a GDPR workshop for CenturyLink. A payment of £6,000 is made by the New Company from its Barclays Account on 13 December 2017 with the statement referring to the same invoice number for its reference. A Compliance invoice dated 18 December 2017 for £3000 is addressed to Accenture for a GDPR Training Programmes. Its payment cannot be traced by the Petitioners.

131. The January 2018 Compliance, Tide Bank Statements include for the purposes of illustration: various personal shopping withdrawals; a receipt of £300 from Accenture; A receipt of £2,060.30 from Maverick with the reference "Company Loan" to cover a payment out to Ms J E Reeves with the reference "Clydesdale". The receipt from Accenture cannot be cross-referenced to the Compliance invoice dated 18 December 2017 for a GDPR Training Programme because the reference is different. Mr Kolah accepted this was pursuant to the Compliance : Accenture on-line contract.

132. Within an "invoice" dated 28 January 2018 the New Company identifies a payment on 15 April 2018 of $28,500. This appears to be for a sum invoiced to Solarwinds MSP UK Limited requiring payment on 28 January for a GDPR 60 minute video licence. Mr Kolah explained that this was a 3 month retainer for public relations and marketing work. The first payment into Maverick's bank account was in respect of this contract was for work carried out in January and the last payment was made in December 2018. He stated there was a written agreement.

133. In addition the Petitioners for the purposes of establishing work carried out rely upon Mr Kolah's Twitter feed of May 2018. Mr Kolah, whilst describing himself as an executive Fellow and director of the GDPR transition programme at HBS and as founder of *"compliance agency GO DPO"*, refers to having spoken at and chaired 40 conferences in 2017 and having "clocked up 15 appearances alone" in 2018. He also refers to his latest book, "GDPR Handbook: How to Implement the [GDPR]" published April 2018.

134. The Petitioners also look to Mr Kolah's contract with Bright Horizons as a diversion of business. He was employed for 12 months as a Global Privacy Officer in 2018. Mr Kolah does not consider this to be relevant because he is not a consultant only an employee and it was the step he took to earn a living and pay his bills. In this operational role he was responsible for the company's data privacy and protection. He was implementing not advising.

135. The Petitioners also refer to an invoice dated 9 July 2020 from Maverick to Cohen Veterans Bioscience which requests payment of £960 for Mr Kolah's work as a "Global Privacy Advisor" concerning the "Wellcome Trust Grant Application". The rate is £160 per hour and there is another similar invoice dated 31 August 2020 for £5,520 in respect of work in that month. Mr Kolah explained that he was no longer working as "GO DPO". It was a completely separate introduction.

136. Whether any of those actions can be justified or not, it is plain and I find as a fact from the evidence that from 14 August 2017 Mr Kolah and Mr Verrian ran Compliance and Advisory as though each was their own company without any regard to the other shareholders: Mr Ritchie, Mr Foss and Mr Hickley in respect of Compliance; and Mr Ritchie and Mr Foss in respect of Advisory. They simply did not communicate with them, there were no annual general or other meetings of shareholders and no discussions concerning the business. Mr Foss and Mr Hickley have complaints that they were excluded from any involvement in the GDPR, HBS training course and evidence has been heard concerning the reasons for this (or any other). However, there is no need to address that specific issue in the light of the findings already made in this paragraph. The position in regard to Mr Foss is made clear in respect of Compliance within a letter from Mr Verrian (also written on behalf of Mr Kolah) dated 15 November 2017 but the general tenor of the desire to run Compliance on their own can be applied to Mr Hickley and Mr Ritchie and for him also in respect of Advisory. It reads:

> *"Following recent events [Mr Kolah] and myself, as the founders of the Company have reluctantly concluded that our relationship with you, as well as the other shareholders in the Company has broken down Irrevocably.*
> *We do not wish to run the business with the current dispute that has arisen amongst the shareholders and we are working to resolve these on an individual basis with each shareholder and investor.*
> *There-fore we ask that you disassociate your public profile as being in anyway associated with "The Company" and that you do not in future make any claims of Association.*
> *As you were never registered at Companies House as a NED of the company we do not need to inform them of any change in status.*
> *We have been left with this as the only option as we can no longer trust you in any capacity as we have significant evidence of your duplicitous behaviour, this evidence goes back as far as June this year with respect to conversations you had with James Ritchie before his removal from the company that were very clearly in breach of your role as a non-executive director.*
> *We recognise that this isn't the outcome that we all expected when we started this journey but we believe that it's the only solution that will enable all parties to move on.*

The board is of the view that this the best way to bring matters to a close without engaging in time consuming and expensive legal action.'

E9) The Dissolution of Recruitment and Advisory

137. Mr Kolah and Mr Verrian achieved the dissolution of Recruitment and Advisory by applications for voluntary striking off pursuant to sections 1004-1005 of the Companies Act 2006. There was no board or shareholders' meeting to which Mr Ritchie was invited. At the time Recruitment had not traded for at least 3 months but Advisory still had an extant contract with Hitachi Consulting. Mr Kolah and Mr Verrian accept that the New Company's business would have been in competition with Advisory but for this dissolution through its name being struck off the register at Companies House.

F) The Law

F1) Unfair Prejudice

138. The law concerning ***section 994 of the Companies Act 2006*** is not in dispute and can be dealt with briefly because it is plain that a deliberate diversion of a company's business and/or revenue by those in control of the company, in particular to themselves or to another business they own, is capable of amounting to unfair prejudice of the shareholders who have been excluded from full participation in the profits of their company. Similarly an invalid exclusion of a director can amount to unfair prejudice not only for the director if they are a shareholder but also for the other shareholders because those in control have disregarded the agreement between the members regarding the conduct of the affairs of the company.

139. In a nutshell, therefore, ***section 994*** requires a member of a company to satisfy the Court that its affairs have been conducted in a manner unfairly prejudicial to their interests or to the interests of members generally. It is long established that for this jurisdiction to be engaged, the conduct complained of must be shown to have been both unfair and prejudicial to the petitioner. Unfair prejudice must be suffered as a member and not in any other capacity. It will usually give rise to financial harm, directly or through the company, but does not have to. If the Court is satisfied, it may pursuant to ***section 996*** make such order as it thinks fit for the purposes of giving relief in respect of the matters complained of. (see generally ***Re Saul D Harrison & Sons plc*** [1995] 1 BCLC 14 and ***O'Neill v Phillips*** [1999] 1 WLR 1092, HL).

140. However, in this case there is also an issue as to whether Mr Ritchie and anyone assisting him can rely upon his dismissal as an unfair and prejudicial action of exclusion if it resulted from his own misconduct. The appropriate approach is set out in Hollington on Shareholders' Rights, 9th ed at 7-64 as follows:

"In "exclusion" cases, the majority may seek to justify the exclusion of the minority as being a reasonable management decision, taken in the best commercial interests of the business. It is clear, however, that it is not sufficient that the majority were acting in good faith and making a reasonable commercial decision: Re Westbourne Galleries [1973] A.C. 360 at 381F–H. But

> *it still remains open to the majority to argue that the "working partner" has brought his exclusion upon himself by reason of his own misconduct. Given that the statutory test is ultimately unfairness and it is necessary to take into account the conduct of both parties, as a matter of common sense any misconduct by the excluded party would at least be a factor to be taken into account by the court in deciding whether the majority has acted unfairly and also what, if any, relief to grant. But, in order to do practical justice, the courts are loathe to allow s.994 petitioners to degenerate into old-style divorce cases, where one side blames the other, the proceedings become lengthy and expensive, and at the end of the day the court has the very difficult and often futile task of deciding where fault lies in circumstances where the parties have simply fallen out and neither side is seriously at fault."* (my underlining for emphasis)

141. Misconduct can also justify the refusal of relief (see *Re London School of Electronics Ltd [1986] Ch 211* at 222 B–C, *Richardson v Blackmore [2006] BCC 276* and *Grace v Biagioli [2006] BCC 85*). The equitable doctrine of "clean hands" provides useful guidance for that purpose even though it is not directly applicable because relief in equity is not being sought. A petitioner's conduct can also be reflected in any share valuation by a decision to apply a discount. Although this is an approach to contributory responsibility which does not normally find favour, in *Re Bird Precision Bellows [1986] Ch. 658* at 671–672, Oliver LJ held that the court was obliged in the exercise of its wide discretion to take the conduct of the parties into account.

F2) The Topic of Conflicts of Interest

142. It is clear from the facts that there were different remuneration agreements for Compliance and Advisory and that insofar as work was moved from Advisory to Compliance it too would be subject to the same remuneration entitlement as it would have been had it remained. It is also plain that Mr Kolah and Mr Verrian received (whether directly or indirectly to their service companies it matters not) payments from Compliance and third parties. The former insofar as they were received before 14 August 2014 are unlikely to give rise to an issue because the Compliance bank accounts were controlled by Mr Ritchie. That changed after 14 August and to a limited extent shortly before with the opening and use of the Tide and Stripe accounts they established for Compliance.

143. As to those payments by Compliance, there should be accounting records pursuant to ***section 386 of the Companies Act 2006*** containing entries for each payment which will explain the transactions. Once the transaction is identified, the next question will be whether they were entitled to the payment. If entitlement is established, the next question will be whether the statutory and equitable "no conflict" principles were breached. A principle which incorporates secret profits. If so, the general principle (to be expanded upon below) is that any profit acquired by a director by reason of that office must be accounted for to the company unless properly disclosed and approved or retrospectively sanctioned subject to application of the Articles of Association. That general principle will also apply to payments received from third parties.

144. The equitable principle underlying the codification of directors' duties within the ***2006 Act*** is that directors, being fiduciaries, must not place themselves in a position where their own interests conflict with their duties to and the interests of the company unless permitted by the articles of association (whether the articles require board or

member approval or otherwise). This applies to internal decision making and to any external duty or interest which might conflict with their fiduciary duties.

145. As to external matters, it is explained by the Court of Appeal in ***Bhullar and others v Bhullar and another*** [2003] EWCA Civ 424, [2003] 2 BCLC 241, that:

> *"whether the 'reasonable men looking at the facts would think there was a real sensible possibility of conflict' and where a fiduciary, such as the director of a company, exploited a commercial opportunity for his own benefit, the relevant question was not whether the party to whom the duty was owed (ie the company) had some kind of beneficial interest in the opportunity but whether the fiduciary's exploitation of the opportunity was such as to attract the application of the rule".*

146. Equity has always treated the "no conflict" rule as a strict one. I refer to the well-known passage from the speech Lord Wright in ***Regal (Hastings) Ltd v Gulliver*** [1967] 2 A.C. 134 HL at 154G: ***[1967] 2 A.C. 134 HL*** at 154G:

> *"The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.*
>
> *The leading case of* Keech v Sandford *is an illustration of the strictness of this rule of equity in this regard, and of how far the rule is independent of these outside considerations. A lease of the profits of a market had been devised to a trustee for the benefit of an infant. A renewal on behalf of the infant was refused. It was absolutely unobtainable. The trustee, finding that it was impossible to get a renewal for the benefit of the infant, took a lease for his own benefit. Though his duty to obtain it for the infant was incapable of performance, nevertheless he was ordered to assign the lease to the infant, upon the bare ground that, if a trustee on the refusal to renew might have a lease for himself, few renewals would be made for the benefit of cestuis que trust."*

147. This strict approach can also be found within the following passage in the Court of Appeal's decision in ***Re Allied Business & Financial Consultants Ltd, O'Donnell v Shanahan*** [2009] EWCA Civ 751, [2009] B.C.C. 822 when addressing the question whether there was a "scope of business" exception:

> *3. The authorities relating to trustees' and directors' duties to account for profit earned in consequence of a breach of the ''no profit'' rule all pointed to the same conclusion and none qualified the liability to account by reference to whether the impugned transaction was (in the case of an alleged breach by a director) within or without the scope of the company's business. The principle of accountability by directors in breach of the rule derived from the strict rule affecting trustees. The rationale of the ''no conflict'' and ''no profit'' rules was to underpin the fiduciary's duty of undivided loyalty to his beneficiary. If an opportunity came to him in his capacity as a fiduciary, his principal was entitled to know about it. The director could not be left to make the decision as to whether he was allowed to help himself to its benefit. The authorities relating to directors' accountability not only did not support the ''scope of business'' exception in relation to the ''no profit'' rule, they were contrary to it. (**Keech v Sandford** (1726) Sel. Cas. Ch. 61; **Parker v McKenna** (1874–75) L.R. 10 Ch. App. 96 ; **Furs Ltd v Tomkies** (1936) 54 C.L.R. 583; **Regal (Hastings) Ltd v Gulliver** [1967] 2 A.C. 134n applied."*

148. That case concerned a quasi-partnership for a company providing clients with financial advice and assistance (including arranging bank loans, mortgages and insurance) and with an object to carry on any other trade or business which could, in the opinion of the directors, be advantageously carried on by the company. Two of the quasi-partners, to the knowledge of the other, continued their pre-existing property investment and development business whilst the company was in business. A property purchase transaction involving the company as the vendor's agent eventually led to a wholly different transaction but involving the two quasi-partners as members of the new purchaser. The fact that the business opportunity to purchase the property had come to the attention of the two quasi-partners in their capacity as directors was sufficient to make them accountable to the company for the profit they made from the transaction. It did not matter that the company did not carry on the business of property investment. It did not matter that the company would have only received a commission not any element of profit under the original transaction with which it had been concerned. They had used information obtained as directors for which the company had the better right. This breached the "no conflict" rule because they did not offer the opportunity to the company and did not obtain authorisation to enter into the transaction on a personal basis.

149. The Companies Act 2006 codified the "no conflict" principle addressing secret profits and conflicts arising from transactions or arrangements with the company separately from each other and the general duty. The following is a summary (noting that ***Chapter 4 of Part 10 of the 2006 Act*** is not addressed):

a) Regard is to be had to the underlying equitable principle when construing the codified duties within ***sections 175-177 of the 2006 Act***. Each section concerns separate duties and provides different mechanisms for their exemption or waiver.

b) ***Section 175 of the 2006 Act*** creates a duty to avoid actual and possible conflicts of interest unless the situation cannot reasonably be regarded as likely to give rise to a conflict or (without the need for express authorisation in the Articles of a private company) the matter has been authorised by independent directors in the manner specified within ***sub-sections (5) and (6)***. It includes a duty not to exploit *"any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity)"*. Section 175(6) requires both that the director and any other interested director are not counted in the quorum for the meeting and that either they do not vote or the matter would have been agreed without their voting. If that requirement cannot be met, there needs to be disclosure and approval in general meeting.

c) This duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest or if the matter has been authorised by the directors. Authorisation may be given by the directors where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors. The authorisation is effective only if any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and the

matter was agreed to without their voting or would have been agreed to if their votes had not been counted.

d) ***Section 175 of the 2006 Act*** does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company. Any such conflict must be declared under ***section 177 of the 2006 Act*** in the case of proposed transactions and under ***section 182 of the 2006 Act*** in respect of existing transactions.

e) The declaration under ***section 177 of the 2006 Act*** applies if a director is *"in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company"* provided the director is aware or ought reasonably to be aware of the interest or of the transaction or arrangement. The declaration must be made before the company enters into the transaction or arrangement. It may be made at a meeting of or by notice to the directors under ***sections 184 or 185 of the 2006 Act***. There must be full and frank disclosure of the precise nature of the interest. A further declaration must be made if the one made proves to be inaccurate or incomplete before the transaction or arrangement is entered into. The onus is upon the director to prove compliance with the letter and spirit of this duty.

f) Exceptions to that ***section 177*** statutory duty arise if the director is unaware of the interest or of the transaction or arrangement in question. No declaration is required if: (i) it cannot reasonably be regarded as likely to give rise to a conflict of interest; (ii) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware); or (iii) if, or to the extent that, it concerns terms of his service contract that have been or are to be considered (see generally ***Fairford Water Ski Club Ltd v Cohoon and others*** [2021] EWCA Civ 143).

g) ***Section 176 of the 2006 Act*** prohibits a director from receiving a benefit from a third party as a result of being a director or of doing or not doing anything as a director if receipt can reasonably be regarded as likely to give rise to a conflict of interest. Benefits received by a director from a person by whom his services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party.

h) ***Section 180(4) of the 2006 Act*** provides that the above-mentioned duties are subject to the rights and ability of members or of any other provision in the articles of association to authorise the conflict.

i) There are also specific transactions which require the approval of members as listed and provided for in ***Chapter 4 of Part 10 of the Act***.

F3) Dismissal of a Director

150. Subject to statute, a director can only be removed in accordance with the terms of the Articles or, if appropriate, a shareholders' agreement. However, ***section 168 of the Companies Act 2006*** enables members to remove a director by ordinary resolution on

special notice for which 28 days is required. A copy of that notice must be sent by the company to the director forthwith upon receipt of the notice. The director is entitled to be heard on the resolution even if not a member (***section 169*** which includes provision for written representations). A failure to comply with those provisions will result in the purported resolution being invalid, assuming the ***Duomatic*** principle cannot be relied upon on the facts (see ***Schofield v Schofield*** [2011] EWCA Civ 154, [2011] 2 BCLC 319.

F4) Trade Mark and Passing Off

151. This topic can be mentioned in the most summary of terms in the circumstances of this case. The Initial Company's registration of a trade mark confers upon it the exclusive right to use that trademark subject to any licence(s) it may grant to another. Infringement of the mark can be protected by a claim which may include an injunction, damages or an account of profits. The Initial Company's unregistered intellectual property rights are protected under the common law by the tort of passing off provided goodwill is established and there is a misrepresentation by another, leading people to believe that the good or services they provide are those of the Initial Company or commercially connected to it. The same potential remedies of an injunction, damages or an account of profits exist. A director of the Initial Company who causes an infringement or passing off will incur a personal liability arising from those actions and will also be acting in breach of fiduciary duty.

G) Topic Decisions

G1) Introduction

152. The facts and law above need to be applied to decide whether there has been unfair prejudice pursuant to ***section 994*** and, if so, the relief (if any) which should be granted pursuant to ***section 996 of the Companies Act 2006***. The four topics may establish unfair prejudice individually or cumulatively. For that reason and because there are two petitions it is convenient to set out the decisions that apply to each topic before and subject to deciding the matter cumulatively within the Conclusion.

G2) The First Topic – Diversion of Business/Revenue before the Dismissal

G2i) Propositions

153. The allegation of a diversion of business and/or revenue both before and after Mr Ritchie's dismissal is based upon two overall propositions. First that there was diversion from the Companies to Mr Kolah/Maverick and/or to Mr Verrian or his service company, Beauverr Limited. Second that there was diversion to them directly from third parties.

G2ii) Payments received from the Companies

154. In respect of payments received from the Companies before Mr Ritchie's dismissal, there is the feature that he controlled the bank accounts. The new bank accounts established in early August 2017 were not used until after Mr Ritchie's dismissal (except for the de minimis US$1.00 Stripe entry). There can be no doubt that he will have scrutinised all payment requests, whatever their form. This is apparent from the manner in which he describes his obligation to control Compliance's expenditure within his evidence. The payments will only have been made with his approval on the basis of entitlement. The Petitions are not founded upon a claim that any approved payments resulted from false documentation or representations. Nor have Mr Foss and Mr Hickley raised any issue concerning Mr Ritchie's scrutiny and approval. That approval will have established that Mr Kolah and Mr Verrian (as appropriate) were entitled to the monies paid.

155. The fact that the payments were subsequently approved by Mr Ritchie also sustains the case that Mr Kolah and Mr Verrian will have had no reasonable reason to regard the transaction or arrangement as one which would give rise to a conflict of interest requiring a declaration under ***section 177 of the Companies Act 2006***. In addition, as explained above, an exception to the requirement arises if, or to the extent that, the other directors are already aware of the reasons for the payment. That may give rise to an issue as to Mr Foss's knowledge but it is clear that all such decisions of approval of a payment were delegated by him and the others to Mr Ritchie as bank account controller and CFO. Mr Foss should be treated as being aware of all matters known to Mr Ritchie as a result of that delegation. For all these reasons I have decided that there will have been no breach of the conflict of interest duty and in any event no unfair prejudice to the members as shareholders.

G2iii) Payments/Business received from Third Parties

156. However, there are also payments and, therefore, business received directly from third parties. Examples appear at paragraph 86 above and the Petitioners emphasise their case that it still cannot be presumed that every payment or benefit (including business opportunities) received has been discovered. The fact of receipt of business opportunities, business and consequential payments from third parties which may concern or be of the same nature as the businesses of Compliance and/or Advisory means three issues must be addressed in turn:

a) First, whether there is an obligation to provide an account of those receipts including details of the underlying transaction.

If so:

b) Second, whether an account should be ordered taking into consideration, for example, matters such as whether it is necessary, disproportionate or unlikely to be fruitful.

And if ordered:

c) Third, whether any order for payment to the appropriate Company should result.

157. Whilst the trial concentrated upon the payments received by Mr Kolah because of his cross-examination and Mr Verrian's absence, it is clear from the evidence that the same issues arise for Mr Verrian insofar as he received payments from third parties connected with the business of the Companies.

158. The only issues before me are the first and second and it is agreed that they are to be decided from an overview of the examples relied upon rather than from detailed examination of each specific instance (bearing in mind late disclosure and consequentially the late development of the Petitioners' case on individual items). The obligation to account applies to all transactions, arrangements and payments which infringed the "no conflict principle". Whilst the precise scope of business opportunities, work and payments to fall within that category will need to be addressed within the context of specific instances, a starting point is to adopt the widest category that might apply, data protection.

159. To be excluded from that widest category will be items falling within the Directors' Right to Other Remuneration (applying the Implied Terms when appropriate) and within the Advisory Remuneration Agreement (applied also to the Advisory type of work carried out by Compliance). Those items of work are permitted under the terms of the constitutions of Compliance and Advisory and will be authorised pursuant to those agreements. That authorisation means they did not fall within (as appropriate) the duties to declare and not to accept benefits within ***sections 175, 176*** or ***177 of the Companies Act 2006***.

160. Applying that widest category and the exclusions, based upon paragraphs 48-51 and 64-68 above, the decision for the first issue is that Mr Kolah and Mr Verrian (as appropriate) owe an obligation to provide an account in respect of all (if any) business opportunities each received, business transactions and arrangements each entered into and all payments each received relating to or connected (directly or indirectly) with:

    a) Compliance's open programmes executive education and training in Data Protection and Privacy across the EU and any sector;

    b) Advisory's risk assessments and hands-on implementation assistance, secondments business including any such business which was in fact carried on by Compliance;

    c) Recruitment's recruitment of DPOs business.

    such account to identify (if appropriate) the reasons why the Directors' Right to Other Remuneration (applying the Implied Terms when apt) and/or the Advisory Remuneration Agreement apply.

161. It is appreciated that such categorisation may be clearer to apply in some cases than others. It may be that the facts of a particular transaction or payment may raise the need for caveats resulting from specific facts. Refinement of that decision based upon

specific instances is not to be ruled out whether for the ultimate benefit of the Petitioners or of Mr Kolah/Mr Verrian, although an over-zealous approach is not to be adopted. However, the conclusion provides a general guide to the arrangements and transactions including payments received for which Mr Kolah and Mr Verrian have a duty to account as directors of Compliance and Advisory. Neither Mr Kolah or Mr Verrian rely upon declarations and authorisation pursuant to ***sections 175 176*** or ***177 of the Companies Act 2006*** in respect of such monies or other benefits. Pursuant to the second issue, there should be an order for such an account if it is decided appropriate to grant that relief. This will be considered in the Conclusion below when viewing the topics cumulatively.

G3) The Second Topic – The Dismissal

162. The second topic has a self-evident outcome in that Mr Ritchie was not properly or validly removed from office as a director of Compliance and Advisory. The Companies' Articles do not confer a power of removal upon the directors. The Compliance shareholders' agreement requires a meeting of members and a 75% majority and there was no meeting. ***Section 168 of the Companies Act 2006*** cannot be relied upon. There was no notice, special resolution or any step taken which complied with its requirements.

163. There cannot be any doubt that this invalid action breached the agreement between the members of Compliance regarding the conduct of its affairs. This is not a trivial or inconsequential breach. It is a decision made unilaterally by two director/members in the context of a dispute to which they were a party. It meant that the removal was forced upon the Second and Third Petitioners without them having a say or without any procedure for a fair determination having been used. That was unfair and prejudicial to their interests. The court needs to decide whether to grant relief and, if so, the nature of the relief when viewing the topics cumulatively in the Conclusion.

164. It was also obviously unfair and prejudicial to Mr Ritchie. The only matter remaining with regard to his petition is whether his conduct can be relied upon by Mr Kolah and Mr Verrian to avoid either a conclusion of unfairness or prejudice and/or to affect the nature of any relief which might otherwise be granted. That too needs to be addressed when viewing the topics cumulatively.

G4) The Third Topic – Diversion of Business/Revenue after Dismissal

G4i) Payments received from the Companies

165. As to the third topic, Mr Kolah and Mr Verrian having taken control of the Companies from 14 August 2017 assumed sole responsibility to fulfil the duties of the directors to ensure the Companies kept adequate accounting records pursuant to ***section 386 of the Companies Act 2006***. Those records should be of sufficient detail to show and explain the Companies' respective transactions. The records should include entries from day to day which show the matters in respect of which money has been received and paid. There should be no need for an account to be ordered when applying the first issue

identified in paragraph 156 above. There should be an existing account of all payments made by Compliance (or indeed any other of the Companies) to Mr Kolah and Mr Verrian or their respective service companies with details of the reasons for the payment. It appears that has not occurred and to the extent it has not, the other shareholders are entitled to require them to fulfil their statutory duty. In addition, all shareholders of Compliance are entitled to have accurate and complete accounting and other financial records made available to them at frequent regular intervals.

166. In so far as there are no such accounts, it is plain Mr Kolah and Mr Verrian should produce them. If the accounting records (produced or to be produced) do not justify any payment, Mr Kolah and Mr Verrian must provide that justification or otherwise they will have to account for the money received. That is because of their duty to account as fiduciaries responsible for the assets of the respective Companies. If it is established that they were taking funds to which they were not entitled from Compliance or Advisory, obviously that would be an act of unfair prejudice for which relief may be given.

G4ii) Payments/Business received from Third Parties

167. The approach to be taken with regard to payments/business received from third parties after Mr Ritchie's dismissal is the same as the approach to be taken before the dismissal. Subject to the necessary changes (including transposing paragraphs 123-135 for paragraph 86), paragraphs 156-161 above equally apply to payments/business received from Third Parties from 14 August 2017.

G5) The Fourth Topic – The New Company

168. This topic also has a self-evident conclusion. The New Company had no right to use "GO DPO EU" within its name. Mr Kolah's claim to be the beneficial owner of the rights held by the Initial Company is plainly wrong. The facts establish that the Initial Company was used as a stand-alone company for its ownership of the trade mark and other rights. This was the basis on which the investors in Compliance became shareholders of that company. Whilst that does not confer upon them any interest in the Initial Company, it evidences the legal and beneficial ownership rights of the Initial Company. There is no evidence of any intention on the part of the shareholders of the Initial Company or of Mr Kolah in his personal capacity that he should retain a beneficial interest.

169. The facts establish that the Initial Company was and remains the owner of the trade mark and all other intellectual property concerning that name. There was no meeting of its directors or members to confer any licence or other rights upon the New Company. The trade mark was infringed and there will have been passing off to the extent that the requirements of goodwill and misrepresentation are satisfied. That is a matter for investigation by an account of profits whether sought by the Initial Company as owner or (if appropriate) the Companies as licensees. Whether the New Company should be joined is a matter for their consideration.

170. It is also obvious that Mr Kolah as a director of the Initial Company and of Compliance, Advisory and Recruitment was in breach of his fiduciary duties by forming and using a company which infringed the Initial Company's trade mark and which inevitably will have led people to believe that the goods or services they provided are those of the Initial Company and/or of its licensees or are commercially connected with them. Clearly the requirements of ***section 175 Act*** and/or, as appropriate, ***section 177 of the Companies Act 2006*** applied to the creation of the New Company with its chosen name and to any work derived from the use of "GO DPO EU" in its name. In addition, Mr Kolah accepts that the New Company's business would have competed with Advisory but for its dissolution and that admission must also apply to Compliance on the basis that work which Advisory carried out was and might have been carried out by Compliance as found above.

171. Mr Kolah's contention that the New Company did not compete with Advisory because it was dissolved must fall away for two reasons. First, it is a breach of ***sections 1004 and 1005 of the Companies Act 2006*** to apply to have a company struck off when it has not ceased trading. Advisory had an extant contract with Hitachi Consulting. Second, because he and Mr Verrian acted without authority and in excess of their powers by causing the dissolution. This was a decision that required shareholder approval. They did not have shareholder authority, there having been no meeting involving Mr Ritchie (indeed, whether as a director or shareholder). The dissolution was plainly an unfair and prejudicial act for Mr Ritchie, who finds that he no longer has shares in Advisory because it has ceased to exist.

172. In addition, although the breach in respect of Advisory ceased upon its dissolution, restoration of Advisory will have the result that the breach continued and continues as though the dissolution had not occurred. Applying ***Part 31 of the Companies Act 2006*** the Companies will be deemed to have continued in existence as though they had not been struck off once restored.

H) Conclusion

173. The outcome of the decisions above is that some of the claims require an account to be taken (if appropriate) before unfair prejudice can be determined and others have satisfied the Court that the affairs of Compliance, Advisory and Recruitment (as appropriate) were conducted in a manner that was and remains unfairly prejudicial to their respective members who have petitioned for relief under ***sections 994 and 996 of the Companies Act 2006***.

174. Applying paragraphs 153-161 and 165-167 above, an obligation to account exists to establish whether any business opportunity, business transaction or arrangement or payment gave rise to a conflict of interest and, if so, whether there is an obligation to account for the profits in respect of (subject to any refinement of the category or exclusions resulting from the specific facts of any particular transaction):

    a) All payments received by Mr Kolah and Mr Verrian and/or their respective service companies from any of the Companies from 14 August 2017 when payments from the bank accounts were no longer under the control and, therefore, subject to the scrutiny of Mr Ritchie but not before.

b) All business opportunities, transactions/arrangements and payments received by either or both of them from third parties from the date of formation of Compliance and Advisory to the date of the account connected with data protection services (applying the widest possible category) but identifying (with reasons) items falling within the Directors' Right to Other Remuneration (applying the Implied Terms when appropriate) and/or within the Advisory Remuneration Agreement (applied also to Advisory work carried out by Compliance).

175. Subject to any exceptions arising from the facts of a specific transaction, those accounts cannot be considered unnecessary or disproportionate or unlikely to be fruitful when addressing matters cumulatively. The accounts should be ordered (subject to any other suitable alternative remedy). It will be decided upon the taking of the account (with all necessary enquiries) whether any order for payment to the appropriate Company will result. This will be based on receipts and apply the "no conflicts" principle but exclude items which the account establishes were authorised by the Directors' Right to Other Remuneration (applying the Implied Terms when appropriate) and/or the Advisory Remuneration Agreement (including work of the type which would have been carried out by Advisory but for the fact it was carried out by Compliance).

176. Unfair and prejudicial acts have been established by Mr Foss and Mr Hickley as shareholders of Compliance as a result of Mr Kolah and Mr Verrian's dismissal of Mr Ritchie and their subsequent conduct controlling Compliance as though they were the only directors and shareholders. Those actions involved a breach of the contract between shareholders. They ignored and effectively excluded the other shareholders. There was also a failure to keep and provide accounting records in accordance with their statutory duty and, for Compliance, the shareholders' agreement. There was also unfair prejudice as a result of the formation and trading of the New Company which will have impacted adversely upon Compliance as a licensee of the trade mark and intellectual property rights it has infringed. There was no compliance with the requirements of ***section 175 Act*** and/or, as appropriate, ***section 177 of the Companies Act 2006*** in respect of the New Company.

177. Unfair prejudice has also been established by Mr Ritchie in respect of Compliance, Advisory and Recruitment as a result of his dismissal subject to the issue whether his conduct can be relied upon by Mr Kolah and Mr Verrian to avoid a conclusion of unfairness and prejudice and/or to affect the nature of any relief which might otherwise be granted. That issue would need final determination following the taking of the accounts but for the existence of other unfair and prejudicial conduct which makes that course unnecessary. First in respect of Compliance, even if the dismissal was justifiable the subsequent conduct of Mr Kolah and Mr Verrian resulted in unfair and prejudicial conduct. That is because they controlled Compliance as though they were the sole directors and shareholders as expanded upon above. Second, Mr Ritchie can also rely in respect of Advisory and Recruitment upon their dissolution. Third, in respect of Advisory (assuming its future restoration) and Compliance he can also rely upon the formation and trading of the New Company. The second and third conclusions also apply to Mr Foss in respect of his four Advisory shares.

178. Subject to the existence of a more appropriate remedy, that leads to the conclusion that there is no need for an account to be ordered in accordance with paragraph 175 above for the purpose of determining unfair and prejudicial conduct. An order for the purchase of shares (if appropriate) can be made in any event (subject in the case of Advisory to restoration). However, there will still be a need for the account but for the purpose of assessing the value of the shares to be purchased. The share purchase order should be on the usual basis and there should be no discount to reflect the fact that the relevant shares represent a minority shareholding. The date of valuation is a matter to be decided after judgment is handed down. At present the submission on behalf of Mr Foss and Mr Hickley is that it should be at a date other than the end of the trial because the Company has been, from mid-2017 onwards, deprived of its business, leading to a loss in the value of the shares as between the relevant unfairly prejudicial conduct and the trial makes sense. The parties are entitled to reflect on their positions and to give instructions for submissions having read this judgment.

179. If an order for an account is made, directions will be given concerning the taking of the account and any necessary enquiries following submissions. First, however, there is a question whether it will be more appropriate for the Companies to be wound up on just and equitable grounds. The findings of fact and decisions above justify that remedy. Its potential benefits include: resolving the Companies' financial positions including identifying and paying creditors (which will also resolve the pleaded issue that liabilities are understated or should not have been written off that, understandably, has not really featured within the trial); the extensive powers of investigation available to a liquidator; the fact that a liquidation may provide the most cost effective route; and the fact that an office holder will have overall control rather than the matter being left in the hands of Mr Ritchie and/or Mr Foss and Mr Hinkley.

180. This possibility arose during discussions with Mr Hodgkin in the course of his closing submissions and it appeared attractive to him and to me at the time. I remain of the impression that it is a sensible course but it is a route which requires further consideration by the parties having received this judgment and further submissions. The non-participating shareholders should also have the opportunity to address the Court (whether in writing or at the hearing, with or without representation) upon the relief they consider most suitable for them. They will be doing so as interested parties and will not be liable for costs (assuming, as will surely be the case, that there is no misconduct in doing so).

181. In all those circumstances the draft judgment offered the parties (in briefest summary) the option of having a formal hand-down of this judgment with substantive relief to be determined at a further hearing or (if time permitted) to raise the substantive matters immediately after hand-down. The parties chose the former (or were not prepared for the latter). Therefore, all decisions upon relief in accordance with this judgment are adjourned to a date suitable to all wishing to attend but with all time limits relevant to permission to appeal and appeal extended.

182. As to other matters: A winding up order, if made, would also address the claim of Mr Foss and Mr Hickley for payment of sums representing their unpaid remuneration. That is a decision which cannot be made at this stage by the court and in any event there is the issue of payment of other creditors to also consider. At this stage that relief will also be adjourned.

183. The Petitioners have relied upon the infringement of the trademark owned by the Initial Company by the formation and trading of the New Company in the context of seeking relief as shareholders of Compliance and, in the case of Mr Ritchie, also Advisory. Mr Ritchie has not sought that relief as shareholder of the Initial Company. That is attributable to the fact that he also claims the Initial Company holds the trademark on trust for Compliance. Mr Hodgkin in his final submissions has asked for an order of assignment. That claim is to be dismissed in accordance with the decision above concerning the Stand-Alone Understanding. If alternative relief is to be sought, it can be applied for at the adjourned hearing.

184. The relief sought in respect of Advisory includes an order for its restoration. That will require the usual formalities involving the Treasury Solicitor on behalf of the Crown to be dealt with. Mr Ritchie and/or Mr Foss may ask for this relief at the adjourned hearing if that is the course they or either of the wish to take and if that is possible.

185. There will be no order in respect of Recruitment on the basis, as accepted by the parties, that this business never started and no relief is sought in respect of it by Mr Ritchie.

Order Accordingly