Neutral Citation Number: [2024] EWHC 456 (Ch)

Case No: CR-2021-000495

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

Rolls Building
Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date: 11 March 2024

Before:

INSOLVENCY AND COMPANIES COURT JUDGE GREENWOOD

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IN THE MATTER OF TRISANT FOODS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Between:

JOHN SENESCHALL **Petitioner**

- and -

1. **TRISANT FOODS LIMITED**
2. **MARKET FRESH LIMITED**
3. **LYNNE JONES**
4. **DAVID MARSHALL**
5. **DAVID McCORMICK**

Respondents

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Daniel Northall (instructed by Armstrong Teasdale LLP) for the Petitioner
The Respondents appeared in person (the 4th Respondent appearing for the 2nd Respondent)

Hearing dates: 13-17 and 22 November 2023

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This judgment was handed down remotely at 9.30am on 11 March 2024 by circulation to the parties or their representatives by e-mail.

ICC JUDGE GREENWOOD:

[A] Introduction

1. In this matter, by my judgment in respect of liability following a trial in November 2022 ("**the Liability Trial**") I held:

   1.1. that the Petitioner, Mr Seneschall, had established that the affairs of the 1st Respondent ("**the Company**") had been conducted in a manner unfairly prejudicial to his interests as a member under s. 994 of the Companies Act 2006 ("**the Act**");

   1.2. that Mr Seneschall had established that the 2nd to 5th Respondents had conspired to injure him by unlawful means; and,

   1.3. I dismissed the counterclaim of the 2nd Respondent ("**Market Fresh**").

2. My reasons for those conclusions were contained in my judgment ("**the Liability Judgment**") at [2023] EWHC 1029 (Ch). In brief summary, amongst other things, I held as follows.

   2.1. From about the end of 2019 there was a plan which involved, as a principal aim, the end or reduction of Mr Seneschall's participation in the Company's affairs. Each of the 3rd Respondent ("**Ms Jones**"), the 4th Respondent ("**Mr Marshall**") and the 5th Respondent ("**Mr McCormick**") knew about the plan, agreed to it, and in different respects, each according to his/her position, participated in it.

   2.2. The plan entailed (or was, from time to time, more or less intended by each protagonist to entail) the eventual purchase of Mr Seneschall's shares in the Company by Market Fresh (or perhaps another entity directed by Mr Marshall) albeit from a position of relative bargaining strength. Ultimately, Mr Marshall was the person upon whom the entire plan depended. Mr Seneschall was unaware of the plan, which was dishonestly concealed from him.

   2.3. Importantly, even if, by the end of 2019, the relationship between the parties was such that some change of management or ownership was justified or even necessary, that fact did not excuse the Respondents' concealed plan, or the terms on which, in effect, Mr Seneschall was excluded from the business, given the Company's continuing reliance on his property as security, and given the

absence of an offer of any sort to buy his shares, or to relieve him of his obligations as guarantor or mortgagor of or in respect of its liabilities.

2.4. The decision to allege gross misconduct against Mr Seneschall was not taken because of a genuine belief that his conduct justified that allegation. It was motivated by the Respondents' desire to exclude Mr Seneschall, according to their pre-existing plan; the disciplinary process was not conducted fairly, or in good faith. Furthermore, following his suspension in July 2020, Mr Seneschall was deliberately excluded (in breach of the ISHA) from participation in the Company's financial affairs (including the decision to accept informal funding from Market Fresh) and was refused information to which he was entitled, as a director.

2.5. The plan was designed to exclude Mr Seneschall from participation in the business, and from knowledge about its affairs, whilst at the same time exploiting his home as security. Although his financial position may not have been damaged by the refinancing in July 2020, the decisions to suspend Mr Seneschall and to end Ms Jones' suspension, were both deliberately and dishonestly delayed (at least, their communication to Mr Seneschall was deliberately delayed) in order to allow Mr Seneschall to complete the Reward Loan, secured on his house, in ignorance of what was planned and what would very soon happen.

2.6. Mr Seneschall's interest as a mortgagor and/or guarantor should be treated as an aspect of his interests as a member for the purposes of s.994. He had agreed to the use of his home as security, and to the personal risks thereby created, only as an aspect of his initial and continuing membership.

3. In respect of unlawful means conspiracy, again in brief summary, I held as follows.

3.1. From about June 2020, there was an unlawful means conspiracy between Mr Marshall, Ms Jones, Market Fresh and Mr McCormick, to exclude Mr Seneschall from participation in the Company's affairs.

3.2. The conspiracy was based on an agreement previously conceived (in November 2019) and in certain respects previously acted on.

3.3. The conspiracy caused Mr Seneschall loss.

4. This is my judgment in respect of Mr Seneschall's remedies consequent upon the Liability Judgment, and following a further trial ("**the Remedies Trial**") (a split trial having been ordered by ICCJ Briggs at a CCMC held on 16 August 2021). It should be read and understood in conjunction with the Liability Judgment.

[B] The Development of the Issues in respect of Remedies

5. At the Remedies Trial, there were issues concerning:

5.1. the extent to which certain relief sought by Mr Seneschall was open to him (at all) on the pleadings, and the scope of his pleaded case in respect of causation;

5.2. the extent to which certain allegations made by the Respondents were open to them, both on the pleadings and in any event at this stage of the proceedings, the Liability Trial having now concluded, and judgment having been given, including for the dismissal of the counterclaim.

6. As a result, and in order in due course to explain my conclusions on those issues, it is necessary to summarise the genesis of the parties' respective cases in respect of relief.

The Original Pleadings

7. By the Amended Petition, as set out in the Prayer and insofar as material, the Petitioner sought:

7.1. in respect of unfair prejudice, under s. 996 of the Act:

7.1.1. at paragraph 1, an order that "*the Second to Fourth Respondents, or any of them, do procure the purchase of all the Petitioner's shares in Trisant … at a fair value to be determined by the Court, and with interest, on the following bases and assumptions: (a) a sale between a willing vendor and a willing purchaser acting at arm's length without any discount being applied for such shareholding*

constituting a minority holding ….”; at paragraph 1(c) the Petitioner sought adjustments to the share value to take account of alleged misfeasance, and at 1(d), an order that the shares be valued as at the date of the order or as at such other date as the Court might think fit;

7.1.2. paragraph 2 sought, in the alternative, an order that the “*Second to Fourth Respondents*” sell any shares in the Company “*in which they have an interest*” to the Petitioner at a fair value to be determined by the Court;

7.1.3. paragraph 6 sought an “*order for compensation*”; and,

7.1.4. paragraph 8 sought such “*other order or relief as the Court shall in the premises consider just and appropriate*”;

7.2. in respect of unlawful means conspiracy, at paragraph 7, “*damages*”.

8. I observe that no share purchase or sale order was sought against Mr McCormick (the 5th Respondent) who was not a member of the Company and at no time owned or held any interest in any of the Company’s shares (and so in any event had nothing to sell). By contrast, paragraph 5 sought, further or alternatively, an order authorising proceedings against “*the Second to Fifth Respondents*” (emphasis added) by or in the name of the Company, and paragraphs 6 and 7 were not directed at particular named Respondents (and were therefore directed at all).

9. Whilst no submissions were made on this point, and whilst I will not for this reason alone treat as precluded any of the relief now sought against Mr McCormick (given the breadth of the Court’s powers under s. 996, and given the terms of paragraphs 6 and 8 of the Prayer) the terms of the Prayer do reflect a real distinction between Mr McCormick and the 2nd to 4th Respondents, all of whom were members (or in the case of Mr Marshall, the ultimate owner of a member).

10. In respect of the claim for damages for conspiracy, particulars of loss were stated at paragraphs 77 to 82 of the Amended Petition. In summary, and insofar as now material, the Petitioner sought:

10.1. compensation for loss suffered by reference to the value of his shares, "*which have been reduced to zero due to liquidation of the Company which arose as a direct consequence of the Control Conspiracy and Exclusion Conspiracy*";

10.2. compensation because, "*by reason of the Exclusion Conspiracy*", he has suffered "*the actual or threatened enforcement of the security*" given against his home in respect of the Reward Loan, and because "*had the Petitioner been aware of either the Control Conspiracy or the Exclusion Conspiracy, he would not have agreed*" (amongst other things) to provide that security. Moreover, and again had he "*been aware of*" the Conspiracies, he alleged that he would have enforced the Redemption Agreement in September 2019 or would have enforced the terms of the ISHA or HoTs to recover title to shares not yet paid for; in the further alternative, and again, "*had the Petitioner been aware*" of the Conspiracies, he would not have agreed to consolidate the Nucleus and Alfandari Loans, or given security against his home in respect of the Reward Loan.

11. Two points arise, regarding causation, to which I shall return below:

11.1. first, although on a basis unparticularised in the Amended Petition, it was alleged that the Company's liquidation was in fact caused by (was "*a direct consequence of*") the Conspiracies; and,

11.2. second, in significant part, the case in respect of damages was stated in terms of what the Petitioner would have done had he "*been aware of*" the alleged Conspiracies (for example, he pleaded that he would not have given security against his home in respect of the Reward Loan) rather than what would have happened (what he would have done, and whether he would have suffered the alleged losses in any event) had the Conspiracies *not* been undertaken, or "but for" their fact and existence.

12. A third point (material to valuation) is that as stated at paragraph 77 of the Amended Petition, part of the Petitioner's claim was in respect of loss and damage by reference to the "*reduction in his shareholding in Trisant from 75% to 34.9%, including in relation to 10% of his own shares, which were transferred to Market Fresh in consideration for*

the discharge of the Nucleus Loan" (the emphasis is mine). This statement was incorrect, but reflects, as I shall come to explain, an error of some significance, persisted in by the Petitioner: at no point did the Petitioner ever sell or transfer any of his own shares in the Company to Market Fresh; to the contrary, shares were issued by the Company to Market Fresh directly, in return for investment in the Company; those transactions - share sale and share issue - are different, conceptually, economically and in law.

13. In their Amended Defences, the Respondents stated, amongst other things:

    13.1. at paragraph 76 of the Amended Defence of Market Fresh and Mr Marshall, that "*Trisant is and was at all material times insolvent. The value of the shares was always zero*", and at paragraph 77, that "*The Petitioner has suffered the actual or threatened enforcement of the Reward Loan because of the liquidation of Trisant*". In the same Defence it was denied that the Company's liquidation was caused by the Conspiracies, and was stated that had the Reward Loan not been agreed, the Nucleus and Alfandari Loans would have been enforced, including against the Petitioner, and the Company would have gone into liquidation; essentially, it was pleaded that the Petitioner's losses were in consequence of the Company's insolvent liquidation, for which the 2nd and 4th Respondents were not responsible;

    13.2. similarly, Ms Jones denied quantum and causation, averred that "*enforcement under the Reward Loan is as a result of Trisant's liquidation*", and stated that its shares were in any event worth nothing (or only a negligible amount) meaning that no claim could be sustained in respect of their loss or value;

    13.3. finally, at paragraphs 102-105 of his Amended Defence, Mr McCormick in substance repeated the same case.

14. In his Amended Reply, at paragraph 76, Mr Seneschall, in response to the allegation that the Company's shares "*were always of nil value*", referred to the ISHA and the HoTs, and "*noted*" the fact of continuing payments made by Market Fresh under their terms.

15. Furthermore, on 28 June 2022 (before the substantial amendments permitted by ICCJ Burton on 31 August 2022 and contained in the Amended Petition dated 1 September

2022, which introduced, amongst other things, the two conspiracy claims) the Respondents together applied (unsuccessfully, before ICCJ Prentis) to strike out the Petition on grounds (said to be based on the decision in Stanford International Bank (In Liquidation), Re (Antigua and Barbuda) [2019] UKPC 45) that the Company was in liquidation, and had "*always been insolvent*", despite Market Fresh's investment. In response, amongst other things, the Petitioner contended that this was a case in which the "*unfairly prejudicial conduct was an effective cause of the insolvency*" (again, the emphasis is mine) and that the date of valuation should in any event predate the insolvency. The application was dismissed on the basis that the decision in Stanford did not support the broad principle relied on by the Respondents (that the proceedings were "*unwinnable*" simply because of the Company's liquidation).

16. Accordingly, in the circumstances, from the outset, and throughout, the Respondents have expressly alleged that the Company was at all times insolvent (subject to the support of Market Fresh) and that its shares - the shares in respect of which the Petitioner specifically sought a share purchase order - were presently, and had been at all times, valueless.

17. This is significant because ultimately, as I shall explain, the Petitioner nonetheless chose not to seek permission to adduce expert share valuation evidence of his own until very shortly before the Remedies Trial (which given, amongst other things, the imminence of that trial, I refused). Moreover, the submission made at the Remedies Trial on the Petitioner's behalf (at paragraph 64 of the written closing submissions) that it is "*striking that R2-5 first suggested that the shares were worthless following the Court's judgment* [on] *liability and when the relief (or other remedy) to be granted to P became an issue*", was not correct.

Some Consequences of the Liability Judgment

18. The cause and effect of the Company's liquidation was therefore in issue at the Liability Trial. Although, as I said above at paragraph 11, the grounds upon which the Petitioner alleged a causal connection between the unfairly prejudicial conduct and/or the Conspiracies, on the one hand, and on the other, the liquidation, had not been particularised in the Amended Petition, the argument advanced in closing on the Petitioner's behalf (as set out at paragraphs 504 to 514 of Counsels' written closing

submissions) was that: (1) "*but for the unfairly prejudicial conduct*", the shares would have held some value, and (2) in any event, fairness required a valuation date preceding "*the company's insolvency*".

19. As to the first of those, it was argued, in particular, that Market Fresh's *"drip-feeding of investment monies and its unilateral decision-making towards the application of those monies had a serious detrimental effect on Trisant's prospects and profitability*". Specific reliance was placed on Mr Williams' evidence that delay in the investment meant delay in completion of work on the Factory, and meant, in turn, that "*customers could not plan their product trials and would not commit to completing purchase orders*", so that "*the capital that was being invested was being swallowed by the overheads*".

20. In response, amongst other things, Counsel for Market Fresh and Mr Marshall submitted in closing that "*Plainly, Trisant was at all material times valueless*" and was "*insolvent throughout its existence and long before*" Market Fresh or Mr Marshall became involved. In addition, the Respondents argued that the Company was at no point profitable, that its liquidation was in any event ultimately precipitated by Mr Seneschall's own failure to agree further funding after his dismissal, and that it was caused by a variety of factors, including for example, the Pandemic.

21. In the Liability Judgment, I rejected Mr Seneschall's case that the particular specified (alleged) unfairly prejudicial conduct of the Company's affairs had caused its liquidation (or indeed, which is different, its insolvency, which in any event predated the relevant conduct). Amongst other things, I held as follows.

    21.1. First, in any event, that "*drip-feeding*" the investment was not in breach of the ISHA or HoTs, and was not (whatever its effects, and whether or not it was commercially wise) unfairly prejudicial conduct of the Company's affairs.

    21.2. As I said at [299], "*In a nutshell, this was a case in which the parties themselves agreed in terms that were not adequate to meet the needs of the Company, and subsequently blamed each other for the inadequacy of their own agreement*." In other words, their agreements did not in terms provide for investment at the rate apparently required. I did not find - and it was not specifically alleged - that the liquidation was caused by the unfairly prejudicial conduct that in the event I

found to have occurred (conduct which essentially comprised also the Exclusion Conspiracy which I also found to have been undertaken). I therefore did not find that had it not been for Mr Seneschall's exclusion, the Company would have avoided liquidation.

21.3. Second, at [453], equally, I held that the Petitioner had not himself wrongfully driven the Company into liquidation, as alleged by the Respondents: "*It went into liquidation because it was in fact insolvent and wholly dependent on Market Fresh for its survival. After 5 March 2021, Market Fresh decided to withdraw further support, as it was free to do; it was under no obligation to pay anything more. From that point, the Company's liquidation was probably inevitable (or at any rate, some form of insolvency regime was probably unavoidable)*." At [298], I said, "*The central problem was that the Company was at all times undercapitalised; and no point did it have the resources it required to become fully operational; throughout 2019, its position was very precarious indeed, as was common ground between the parties. The simple reason for that was that the agreements made by Mr Seneschall/the Company with Market Fresh (itself under financial pressure) did not provide for or oblige Market Fresh to invest the required sums, at the required speed, so that although Mr Seneschall recognised and complained about the problem, it was not one which was solved by the terms of the investment agreements which he negotiated*."

21.4. Third, at [141], I held (against the Respondents) that the unfair prejudice claim did not fail *in limine* as a result of the liquidation, both because of arguable harm to the Petitioner's interests as a member notwithstanding insolvency (and later liquidation) and because "*in the present case, it would be unsafe to find or assume, at this stage of the litigation, that the Company was at all times, for all purposes valueless, given that Market Fresh invested in it some £1.8 million (paid over a significant period) in return for its shareholding*." Those matters (centrally including the contested issue of valuation) were thus reserved to the Remedies Trial.

21.5. Fourth, in relation to loss and causation in connection with conspiracy, given that the trial was split (albeit by an order made before and without reference to the later introduction of the conspiracy claims, and therefore made without

specific consideration of which elements of the tort might fall to be decided at the Liability Trial) I said only, at [485(iii)], that given the breach of the Petitioner's employment contact, there was some damage, enough to comprise the tort, and that "*the precise form and extent of the remedy … (and therefore the extent of attributable, recoverable loss) is a matter for further evidence and submissions at a further hearing*".

21.6. Fifth, because I held that there was no Redemption Agreement (see [278] of the Liability Judgment) the Petitioner's claim (see paragraph 10.2 above) that had he known of the alleged conspiracies he would have enforced the Redemption Agreement in September 2019 is no longer open to him (and in any event, insofar as I found there to have been a conspiracy, it had not, by then, begun).

22. Accordingly, as far as the original pleadings were concerned, in respect of pleaded loss and damage, Mr Seneschall's outstanding claims were essentially those based on what he would have done differently, had he known of the conspiracy.

The Consequentials Hearing of 15 May 2023

23. Following the Liability Judgment, at a hearing on 15 May 2023, I gave various directions for the determination of relief ("**the 15 May Order**"). In advance of that hearing, the parties produced a "*Schedule of Loss*" setting out to some extent their respective positions in summary form in respect of the relief claimed.

24. By that Schedule, in respect of unfair prejudice, the Petitioner sought remedies to place him in the same position that he would have been in, had there been a negotiation between the parties in late 2019 with a view to his "*clean-break*" exit from the Company. This was described as a "*counterfactual*", a hypothetical negotiation between the parties designed to achieve a complete separation of their interests, and thus comprising not only a share sale (by the Petitioner, of his shares) but also the release from personal guarantees and security given by the Petitioner in support of the Company's business, and a termination payment in respect of his employment.

25. In respect of share valuation, the Petitioner sought that the Company be valued:

25.1. on "*a going concern basis*" and by reference to "*a multiple of expected maintainable earnings or discounted cash flow model*"; and

25.2. by reference to the HoTs, said to value the Company's equity at £36,545 per 1%, meaning that the sum claimed was £1,275,415.

26. It was not clear from the Schedule how those two valuation alternatives (in any event unlikely to lead to the same conclusion) were intended (if at all) to relate either to each other or to the hypothetical, counterfactual negotiation.

27. In essence (and there were other points of issue, including that release from the guarantees and security and the termination payment had not been pleaded) the Respondents disputed the alleged counterfactual, and the alleged other valuation bases, and in particular sought (if there was to be a share purchase order) a valuation by the Court by reference to independent expert valuation evidence.

28. In respect of the conspiracy, the Petitioner sought damages in respect of legal fees (in the sum of £167,855.24) incurred in connection with the allegations of gross misconduct, the disciplinary process and the Employment Tribunal proceedings, and lost earnings (in the sum of £159,287.67). Both were disputed as having not been pleaded and in any event in respect of their quantum.

29. At the hearing on 15 May 2023, Counsel for the Petitioner argued that not only the form, but also the quantum of relief under s. 996, ought to be determined by reference to the suggested counterfactual, to place him in the same position as he would have been in had the hypothetical negotiation taken place in late 2019.

30. Accordingly, it was submitted that one "*benefit of the Counterfactual is that it* ***eliminates the need for the time and expense of expert evidence as to the value of the equity in the Company***" (emphasis added), being "*premised upon the* ***parties' perception*** *as to the value of the shares in the Company and the* ***likely outcome of a commercially negotiated agreement***" (again emphasis added), albeit an outcome which could be determined with the "*luxury of a similarly commercially negotiated agreement reached between the identical parties a matter of weeks*" beforehand, being the HoTs.

31. The Respondents sought (if the Petitioner was to advance his claims for lost earnings and costs) further disclosure, and the Petitioner accepted "*in principle the need for further disclosure*" and witness evidence, albeit "*strictly limited to matters relevant to the outstanding issues*"; the Petitioner did not himself raise any need for further disclosure (and otherwise, as his solicitor, Ms Liebling said in her 7th witness statement at paragraph 9, "*the Petitioner proposed that further disclosure was unnecessary and would only increase the costs and delay of the Remedies Trial*").

32. In the event, I ordered that both the form and quantum of relief under s. 996, and the quantum of any damages for conspiracy, would be determined at the Remedies Trial, and given the range of issues, I directed formal but concise particulars of claim and defence; in addition, I ordered further disclosure and witness statements but limited to issues determined by reference to the further pleadings.

33. In respect of share valuation, I gave permission for evidence to be produced by a single joint expert, by reference to the assets, liabilities, profitability and future prospects of the Company as at three different (alternative, proposed valuation) dates, 19 November 2019, 13 July 2020 and 17 March 2021, "*applying such basis or bases of valuation as the Valuer shall consider appropriate to the Shares*".

34. Through Counsel, Market Fresh offered, and I ordered, that in the first instance the expert's own costs would be met by Market Fresh. That offer and order (and more broadly, the order for a single joint expert, rather than each party (or perhaps "side") having permission separately) was made because it was impressed upon the Court, on behalf of the Petitioner, that he could not (certainly could not himself, without assistance) afford to instruct or pay for an expert; in any event, he continued to argue that expert evidence was an unnecessary waste of expenditure because of the suggested counterfactual; I was told that the Petitioner's financial position was very precarious, that he had not been able to pay his mortgage since January 2023 or pay his prospective (or all of his past) legal fees. The expert was to be chosen by the Petitioner from a list of three to be nominated by Market Fresh (reflecting the fact of its immediate liability to meet the expert's costs) each with "*expertise in the valuation of companies in the food manufacturing sector*". The Order was therefore intended to strike a balance between the Respondents' understandable desire for expert valuation evidence, and the Petitioner's opposition, and in any event his stated inability to pay for it.

35. In addition, in the circumstances, I ordered (at the Petitioner's request) that the Remedies Trial be expedited.

The Remedies Pleadings

36. Subsequently, in accordance with that Order, the Petitioner served "*Particulars of Remedy*" in which, amongst other things, he sought, under s. 996:

36.1. at paragraph 3, an order that that the 2nd to 5th Respondents, "*or any of them, do procure the purchase of all the Petitioner's shares in* [the Company] *at a fair value to be determined by the Court… on the following basis and assumptions: 3.1. a date of valuation of 30 November 2019; 3.2. a sale between the Petitioner and the 2nd to 5th Respondents, or any of them, acting at arm's length as at the date of valuation without any discount being applied for such shareholding constituting a minority holding; 3.3. valuation on: (1) a going concern basis, and (2) a multiple of expected maintainable earnings or discounted cash flow model*"; at paragraph 3.4, it was pleaded that "*subject to the Court's findings as to the date of valuation*", there should be adjustments in the valuation to take into account the misfeasance of the 2nd to 5th Respondents, including mismanagement of the Company since the Petitioner's exclusion in November 2019, the Petitioner's suspension and dismissal, and the costs incurred in defending the unlawful termination of his employment;

36.2. at paragraph 4, it was pleaded that without prejudice to the Court's discretion, the Petitioner "*values the Shares* [those held by him] *as a minimum on a like basis*" to the HoTs, and therefore at no less than £1,275,415;

36.3. at paragraph 5, the Petitioner sought compensation or an indemnity in respect of his various personal guarantees and security given in support of the Company's business, "*to place him in the position he would have been in had the 2nd to 5th Respondents acted upon their undisclosed mutual intention to exclude the Petitioner from participation in the business of* [the Company] *and from knowledge about its affairs in a manner that was neither unlawful nor unfairly prejudicial*", and also, on the same basis, an employment termination payment.

37. As before, it was not apparent on the face of the pleading:

37.1. what was the intended relationship, if any, between the suggested valuation of the Petitioner's shares by reference to the HoTs, on the one hand, and on the other, the suggested valuation as a multiple of expected maintainable earnings or by reference to a discounted cash flow model;

37.2. how, other than by reference to expert evidence, the Court could value the Company as a "*multiple of expected maintainable earnings*" or by reference to "*a discounted cash flow model*"; and,

37.3. whether the hypothetical conduct referred to at paragraph 5 was intended to encompass (in addition to the form and quantum of the remedy sought in respect of the Petitioner's own liabilities) the Court's determination of the appropriate price to be paid for the Petitioner's shares (although that it is how the case was advanced on 15 May 2023, and in the event, at the Remedies Trial itself).

38. As to unlawful means conspiracy, the Petitioner sought damages:

38.1. in respect of the loss caused by his personal liabilities under the Reward Loan, on the basis that had he been aware of the conspiracy he would not have agreed to consolidate the Nucleus and Alfandari Loans, or to give any further security at all;

38.2. in the sum of £167,855.24 + VAT in respect of legal fees incurred in connection with the allegations of gross misconduct, the disciplinary process and Employment Tribunal proceedings;

38.3. in the sum of £159,287.67 representing lost gross earnings from 7 September 2022 May 2023, as a "*consequence of the unlawful termination of his employment*"; and,

38.4. exemplary damages.

39. By virtue of the Respondents' Defences:

39.1. in respect of unfair prejudice, Market Fresh and Mr Marshall conceded the Petitioner's entitlement to an order that his shares be purchased at a fair value to be determined by the Court, albeit valued (at a nil value) as at either 13 July 2020 or 17 March 2021, and by reference to the Company's "*assets, profitability and future prospects … on an earnings-based valuation or an asset based valuation*"; they denied the alleged relevance to valuation of the HoTs, and denied the claims in respect of the Petitioner's own personal liabilities and the termination payment, which in any event, they said were not "*pleaded remedies*";

39.2. Mr McCormick denied that a share purchase order should be made against him in any event, and although Ms Jones pleaded no case specifically in that respect, both of them denied that 30 November 2019 was the correct valuation date, and both raised various issues concerning the basis of valuation; both denied the claim to compensation in respect of the Petitioner's personal liabilities and the security and for compensation representing a termination payment;

39.3. in respect of conspiracy, the Respondents denied the claims, and raised issues of quantification, causation and mitigation, as well as that the claims in respect of legal fees and lost earnings had not been pleaded in the Amended Petition;

39.4. the claims to exemplary damages were denied (and in the event were not pursued at the Remedies Trial).

The Issues on the Remedies Pleadings

40. The background is therefore convoluted, but broadly, by reference to the Remedies Pleadings, the principal issues at the Remedies Trial were as follows.

41. First, in respect of unfair prejudice:

41.1. whether a share purchase order ought to be made against Ms Jones and/or Mr McCormick (in addition to Market Fresh and Mr Marshall, who both conceded the Petitioner's entitlement to that relief);

41.2. in any event, as at what date (30 November 2019, 13 July 2020 or 17 March 2021), by what method and in what amount should the Petitioner's shares be valued;

41.3. in particular as to valuation, whether the shares should be valued:

41.3.1. (as on the Petitioner's pleaded case): (i) on a going concern basis by reference to a multiple of expected earnings or discounted cash flow model; and/or (ii) by reference to a hypothetical, counterfactual negotiation between the particular parties in November 2019; and/or (iii) by reference to the value said to be implied by the HoTs; or

41.3.2. (as on, in particular the 2nd, 3rd and 4th Respondents' cases) whether they should be valued by reference to the Company's assets, profitability and future prospects on an earnings-based valuation or an asset-based valuation;

41.4. whether, and if so against whom, any relief should be given in respect of the Petitioner's personal guarantees and the security given in respect of the Reward Loan; and,

41.5. whether, and if so against whom, any order should be made for compensation representing a "*termination payment*" equivalent to 12 months' salary.

42. In respect of unfair prejudice, there were therefore issues concerning both the form of relief and its quantification, as well as points of pleading.

43. Second, in respect of conspiracy, the issues comprised whether there should be an award of damages, and if so in what sum, in respect of: (i) the Petitioner's personal liabilities under the Reward Loan, (ii) in respect of legal fees, and (iii) in respect of lost earnings from 7 September 2022 to May 2023, and also again, whether it was open to the Petitioner on the pleadings to claim in respect of legal fees and lost earnings.

44. I deal below with other issues of pleading, but at this stage conclude that:

44.1. first, it was open to the Petitioner under s. 996 to seek relief in respect of his personal guarantees and the security given in respect of the Reward Loan, and in the respect of the termination payment; and,

44.2. second, it was open to the Petitioner in respect of conspiracy to seek damages in respect of legal fees and in respect of lost earnings.

45. The reasons for my first conclusion (in the context of the Court's broad and flexible powers under s.996, as described below) are:

45.1. that the claims are consistent with and emerge as possibilities out of my findings in the Liability Judgment, without requiring the Court to revisit matters previously in issue; they raise issues of remedy, not liability, and do not offend against the scheme of the split trial;

45.2. that although the claims were not expressly stated as such in the Amended Petition, (i) they were pleaded in the Particulars of Remedy served, and so the Respondents were given fair notice of them before further disclosure and witness evidence; and (ii) as I have said, paragraph 1(c) of the Prayer to the Amended Petition (albeit in the context of adjustments to the price to be paid for the shares) referred to the Petitioner's dismissal and to the possibility of compensation ordered in the Employment Tribunal proceedings, and to the costs incurred (albeit by the Company) in defending those proceedings;

45.3. that the Prayer in the Petition also referred, at paragraphs 3 and 8, to the possibility of other directions and relief as just and appropriate;

45.4. that had an application been made (after the Liability Trial) to amend the Amended Petition to add these claims specifically, I was given no reason to think that it would have been refused; and,

45.5. that any unfairness (if any at all be genuinely identified) can be considered and met by an appropriate order in costs.

46. In respect my second conclusion, whilst I accept that in paragraphs 77-82 of the Amended Petition under the heading "*Particulars of Loss*", there is no reference to legal fees and lost earnings:

46.1. it was a central element of the claim (and I held) that the Petitioner's employment had been wrongfully terminated; and,

46.2. I repeat the reasons given above in the immediately preceding paragraph.

47. Having said that, in respect of damages, there are issues in respect of causation as pleaded that I deal with below at paragraphs 297-320.

[C] <u>The Witnesses</u>

47. Against that background, the parties gave disclosure and, as follows, served witness statements of fact.

47.1. As at the Liability Trial, each of Mr Seneschall, Mr Marshall, Ms Jones, Mr McCormick and Mr Williams made a statement and each was cross-examined.

47.2. On behalf of the Petitioner, in addition, there was evidence, written and oral, from:

47.2.1. Mr Andrew Axford, who worked for Market Fresh as a National Account Manager from February 2019 to May 2021;

47.2.2. Mr Alasdair Coll, who is employed by Tetra Pak, and whose role, so far as relevant, was to provide training to operators and maintenance staff on the Tetra Recart machinery at the Factory;

47.2.3. Mr Andrew Granger, of Collyer Bristow, who represented the Petitioner and gave employment law advice from July 2020.

47.3. On behalf of the Respondents, in addition, there was evidence from Mr Kemal Chauhan, the CEO of Market Fresh.

48. Ultimately, not all of the evidence given by the witnesses was relevant to an issue; much of it was not. To the extent that it was relevant, I deal with it below, in particular at paragraphs 106-175, and with my assessment of the witnesses.

49. In addition, following (i) an agreed letter of instructions, (ii) the parties' written representations and (iii) their further "observations", a report ("**the Valuation Report**") was produced by a single joint expert, Mr Matthew Haddow, of Menzies LLP, dated 6 September 2023, following which, in response to a series of further written questions on behalf of the Petitioner, he produced a further set of written "**Responses to Written Questions**" dated 11 October 2023. He too was cross-examined on the Petitioner's behalf by Mr Northall, and I deal with his evidence at paragraphs 176-290 below. For various reasons, the Petitioner invited the Court to disregard Mr Haddow's evidence entirely.

[D] The Remedy for Unfair Prejudice

[D1] The Basic Principles

50. Section 996 of the Act states:

> "*(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.*
>
> *(2) Without prejudice to the generality of subsection (1), the court's order may—*
>
> *(a) regulate the conduct of the company's affairs in the future;*
>
> *(b) require the company—*
>
> *(i) to refrain from doing or continuing an act complained of, or*
>
> *(ii) to do an act that the petitioner has complained it has omitted to do;*
>
> *(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;*
>
> *(d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;*

> *(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly*."

51. The Court's purpose when granting relief is to remedy the unfair prejudice suffered by the petitioner. In service of that aim, its powers are extremely wide and flexible, although as Robert Walker LJ (as he then was) said in Profinance Trust SA v Gladstone [2002] 1 W.L.R. 1024 at [19]: "… *even a wide discretion to do what is fair must (as Lord Hoffmann said in O'Neill v Phillips [1999] 1 W.L.R. 1092, 1098) be exercised judicially and on rational principles*".

52. There is no need to multiply examples, but as was said by Oliver LJ (as he then was) in Re Bird Precision Bellows Ltd [1986] Ch. 658 CA (Civ Div) at 669, in a passage often cited:

> "*The whole framework of the section, and of such of the authorities as we have seen, which seem to me to support this, is to confer on the court a very wide discretion to do what is considered fair and equitable in all the circumstances of the cases, in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company*."

53. I shall consider in more detail certain aspects of the law below, but some basic principles (which I take with due acknowledgement from Hollington on Shareholders' Rights, 10th Edition, paragraphs 8-04 to 8-11) and which were not in dispute, are that:

53.1. the remedy should be proportionate to the prejudice suffered by the petitioner and is not by way of punishment for bad behaviour: *per* Jonathan Parker LJ in Re Phoenix Office Supplies Ltd [2003] B.C.C. 11 at [51]; Hawkes v Cuddy [2008] B.C.C. 390 at [243]-[252] (*per* Lewison J as he then was);

53.2. the court has the power to make any order it thinks fit once unfair prejudice has been established, even if that order has not been sought by the petitioner: Hawkes v Cuddy [2008] B.C.C. 390 (Lewison J) (appeal dismissed in [2010] B.C.C. 597 CA at [91]);

53.3. the Court may have to exercise its own creativity in matching the remedy to the unfair prejudice which has been established; for example, in Thomas v Dawson [2015] B.C.C. 603, the Court of Appeal praised the Judge's "*imaginative*" solution at [37];

53.4. in the exercise of its discretion, the Court may take account of the Petitioner's own misconduct, the relevant interests of other members, creditors and other interested third parties, and of the availability of an alternative remedy;

53.5. in many cases, there is much to be said for a "*clean break*": see, for example, *per* Warner J in Re Elgindata (No.1) [1991] B.C.L.C. 959, and *per* Lawrence Collins J (as he then was) in Re Clearsprings (Management) Ltd [2003] EWHC 2516 Ch at [29].

[D2] The Use and Relevance of the Petitioner's Suggested "Counterfactual" in the Context of Unfair Prejudice

54. Having referred to the basic principles, I first deal with the Petitioner's submission that in the context of his unfair prejudice claim, the Court should "*construct a counterfactual world in which all of R2-5's wrongdoing … is undone - at the time when it became unlawful - and replaced - at the relevant time - with lawful conduct*".

55. At the Remedies Trial it was argued that the fair value of the Petitioner' shares: "*can only be determined by reference to what R2-5 would have paid the Petitioner for his shares and what the petitioner would have accepted for his shares had the Petitioner's bargaining position not been weakened (so to remove all elements of unlawfulness)*", and in this respect, that "*as has always been the Petitioner's case, the evidence of an expert valuer is of little to no assistance to the Court*".

56. Accordingly, the counterfactual was said to be material to (and effectively determinative of) both the form of the appropriate relief under s. 996, and also the quantum.

57. As to the form of relief, I agree that in circumstances where a company's member has been unfairly and prejudicially excluded from participation in its affairs, as in the present case, it is not irrelevant to consider how the respondent might have conducted himself,

in the particular circumstances of the case, in order to meet (or avoid) the petitioner's charge of unfairness.

58. In substance, it is on that basis, where a respondent has made an offer to buy the petitioner's shares at a fair value, that he may apply to strike out a petition as an abuse of process. As was explained in O'Neill v Phillips, by Lord Hoffmann, parties should be encouraged, where at all possible, "*to avoid the expense of money and spirit inevitably involved in such litigation by making an offer to purchase at an early stage*": page 1106H. His proposal was for the majority to make an offer to buy which was plainly reasonable so that if the minority rejected it, the majority could apply to strike out any subsequent petition. Unfairness, said Lord Hoffmann, did not lie in the exclusion from management alone but "*in exclusion without a reasonable offer*" (essentially, the point that I was driving at in the Liability Judgment at [459(v)]): "*If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. It is therefore very important that participants in such companies should be able to know what counts as a reasonable offer*".

59. Although important to appreciate that in the context of an offer made by the respondent majority, the issue is whether, in all the particular circumstances of the case, the continued prosecution of the petition would be an abuse of process (rather than the degree of compliance with the guidance set out by Lord Hoffmann in his judgment in O'Neill) the basic features of an appropriate offer, as set out by Lord Hoffmann, included that it be to purchase the shares at a fair value; that if not agreed, the value should be determined by a competent expert, acting as an expert, consistent with the objective of economy and expedition "*even if this carries the possibility of a rough edge for one side or the other*"; and that the offer should provide for equality of arms between the parties (a principle which I had in mind in granting permission to adduce the evidence of a single joint expert).

60. Furthermore, as stated above, in cases of unfair, prejudicial exclusion, the Court will commonly, although by no means invariably, order a clean break between the parties.

61. However, I do not agree (at any rate, I do not agree that in the present case) that following trial the whole remedy to be given by the Court under s.996 is to be determined, as was

suggested by the Petitioner, by an enquiry into what the particular parties, in the particular circumstances in which they actually found themselves, might have offered and ultimately agreed, had in fact they chosen to negotiate a commercially acceptable outcome (as explained by Counsel, "*the likely outcome of a commercially negotiated agreement*" between the parties).

62. For the following reasons, I reject that approach as contrary to principle, undesirable in practice, and certainly in the circumstances of the present case, inappropriate.

62.1. First, although not directly contrary to authority, it is not an approach that as far as I am aware has been employed in a reported case in the context of unfair prejudice proceedings.

62.2. Second, I accept of course that a counterfactual is a concept or device commonly used by the Court in the context of tort and breach of contract, in order to establish that certain damage would not have been suffered "but for" the defendant's wrong, and was therefore, in fact at least, caused by it.

62.3. For example, McGregor on Damages (10th Edition) at 8-003, states: "*The test for whether a defendant's wrongful conduct is a cause in fact of the damage to a claimant, which has almost universal acceptance, is the so-called "but for" test or test of "necessary contribution". The defendant's wrongful conduct is a cause of the claimant's harm if such harm would not have occurred without it; "but for" it. In other words, the defendant's conduct was necessary for the claimant's harm to have occurred. This is usually the threshold which claimants must cross if their claim for damages is going to get anywhere. Since the test is concerned with the necessity of the factual event for the factual outcome it is commonly referred to as "factual causation" although strictly the test itself is not factual or physical but metaphysical. It involves asking the "counterfactual" question of what would have happened but for the wrongdoing. Satisfying the cause in fact test is in the vast multitude of cases an essential condition for the imposition of liability. The reason for this is obvious. If the conduct of the defendant was not necessary for the claimant's harm, so that the harm would have happened anyway, then it is very difficult to attribute responsibility to the defendant for that harm. However, it is by no means a sufficient condition*

because the remoteness and scope of duty requirements, as we shall see, must be satisfied as well."

62.4. Similarly (see McGregor at 8-142A and B) in the context of damages for breach of contract, the Court considers a counterfactual in which only the facts comprising the breach are varied: see for example, British Gas Trading Ltd v Shell UK Ltd [2020] EWCA Civ 2349, in which nominal damages were awarded because the counterfactual involved a consideration of what would have happened had there been contractual compliance, rather than what would have happened had the sellers come to know that they were in breach of contract, and in those circumstances, what would have been their likely reaction.

62.5. In the present case however, I was not invited merely to excise or remove from the history the Respondents' wrongs in order to establish causation (that loss would not have been suffered otherwise) but: (i) to add to the history a wholly new and unpromised element (a hypothetical offer and agreement) designed to make lawful that which was unlawful; (ii) in order to decide upon the whole scope and content of the Petitioner's remedy, rather to establish a causal connection between a wrong and an alleged loss.

62.6. The use of counterfactuals in the context of causation in tort and contract lends no support to their use in the present context. Relief under s. 994 is not fashioned according to the same principles (or for the same purposes) as common law compensation for loss and damage suffered as a result of a tort or breach of contract. Under s. 994, as explained above, the Court does not compensate for loss as such, but gives proportionate relief "*in respect of the matters complained of*", taking account of all the circumstances of the case, and not necessarily limited to merely "*reversing or putting right the immediate conduct which has justified the making of the order*", but instead, looking at the "*reality and practicalities of the overall situation, past, present, and future*" (Grace v Biagioli [2006] 2 BCLC 70 at [73]). Accordingly, the Court is not for example limited to a consideration of the litigating shareholders' own interests (see Re Neath Rugby Ltd (No.2) [2009] 2 BCLC 427 at [84]) as those shareholders would likely be limited in conducting their own private commercial negotiation (and as the Court would therefore be limited, if adopting the Petitioner's

proposed approach). The Petitioner's approach, which would have required the Court to determine relief by asking and deciding what the parties would themselves have agreed at the relevant time, denies the very elasticity (referred to by Arden J., as she then was, in Re Macro (Ipswich) Ltd [1994] 2 BCLC 354, at 404) which is characteristic of the correct approach to deciding relief under s. 994.

62.7. Third, the suggested approach risks the obvious possibility (and in many cases, the overwhelming probability) of unfairness to one or both sides of a dispute. Essentially, there is no obvious reason why the outcome of a hypothetical negotiation between the particular parties to a given dispute at a certain point in time would correspond with the Court's view of the "fair" outcome (let alone the whole appropriate remedy). For example, a petitioner might labour under a wholly unjustified belief in the value of his shares (or indeed, as in the present case, a misunderstanding about the effect of an agreement) and be unwilling to agree their sale, or his departure from the business, at a realistic price; likewise a respondent, who might, in addition, be unable to afford or pay (or therefore offer) even the most accurately assessed price. In such cases, the most likely outcome of a negotiation would be no agreement at all. In other cases, there may be an inequality of arms, or of knowledge or understanding, and the most likely outcome one that is unfairly favourable to one side or the other.

62.8. If, in such cases, despite the particular circumstances and/or features of the parties, the Court were instead to impose or hypothesise a "fair" outcome, then the whole business of the imaginary negotiation becomes entirely unnecessary. Indeed, worse than that, it becomes positively misleading, serving only to conceal beneath artifice the Court's true approach, which is to determine, by reference to all the circumstances, the remedy that most appropriately and fairly addresses the respondent's wrong.

62.9. Fourth, it is an approach that contains or at least invites an error of principle, in that it situates the formulation of the whole remedy in the circumstances extant at a particular moment in time (in this case, November 2019) significantly before proceedings began (indeed, in the present case, even before any prejudice was suffered). However, as a matter of principle, the Court must assess the

appropriateness of any particular remedy as at the date of the hearing and may even take into account conduct and events since the presentation of the petition (see Grace v Biagioli [2006] 2 BCLC 70 at [73]).

62.10. Fifth, in the present case the parties have had ample opportunity to negotiate and agree, but have not done so; indeed, no (open) settlement offers have been made, on either side. It makes little sense to find that nonetheless, had the parties negotiated at a particular point in the past, they would have agreed certain terms (much more likely in the present case is that they would have reached no agreement at all, such is and was the extent of their bitter disagreement about the business, its prospects, and the reasons for its struggles and failure). Although therefore not necessarily impossible, it is an approach that substitutes uncertainty and speculation (the outcome of a hypothetical negotiation) for the Court's own assessment of the fair and appropriate remedy, and (if appropriate) an evidence-based assessment by the Court of a company's value.

62.11. Sixth, in the present case, the Petitioner's suggested approach would have involved a further enquiry into a particular feature of the established conduct, being the price which the Respondents might have had in mind to offer for the Petitioner's shares as part of their plan to exclude and then remove him from the business, and the price which in those circumstances the Petitioner might have accepted; it would have required the Court to enquire - for a second time, and this time for a different purpose - into keenly disputed matters that had already been the subject of extensive evidence and findings at the Liability Trial (and indeed, potentially, to have to consider new evidence conflicting with the findings already made). That course would have been highly undesirable. In part, it was for this reason that on 30 October 2023, shortly before the Remedies Trial was due to begin, I rejected the Petitioner's application (which was made contrary to the approach taken on his behalf at the hearing on 15 May 2023) for extensive further disclosure in respect of the Respondents' alleged intentions.

62.12. If the approach now suggested was to have been the Petitioner's approach to the formulation of his remedy if successful on liability (and as part of that, was to be the basis of his approach to the valuation of his shares) he ought to have pleaded and raised it at an earlier stage, before the Liability Trial, so that it could

have been considered at the same time, in context. However, it was neither the valuation basis nor the remedy pleaded in the Petition, as set out above, which made no mention of "*the Counterfactual*" at all (for any purpose) and sought, in substantially conventional form, a share sale at a fair value to be determined by the Court by reference to "*a sale between a willing vendor and a willing purchaser acting at arm's length*".

[D3] <u>The Appropriate Form of Relief in the Present Case</u>

<u>The Substance of the Relief</u>

63. In my judgment, in substance, the appropriate and fair relief under s. 996 in the present case is as follows:

63.1. the Petitioner should be given relief equivalent to the purchase of his shares in the Company at a price (which I determine in this Judgment below) calculated by reference to the value of the Company as at 30 November 2019 ("**the Valuation Date**");

63.2. in addition, the Petitioner should be given relief (whether by payment of compensation or the provision of an indemnity) equivalent to a release from the personal guarantees and security given in connection with the Company's business and borrowing (which is to say, in respect of the Reward Loan; the hire purchase of steriflow retort equipment through Hampshire Trust Bank; and the hire purchase of Thimmonier equipment through Ultimate Finance);

63.3. in effect, the Petitioner is therefore insulated from the consequences of the Company's insolvent liquidation;

63.4. I refuse the claim to a "*termination payment*" in respect of his lost employment as the Company's managing director.

64. My reasons are as follows.

65. As I have explained above, the core unfairness in the present case, as set out in the Liability Judgment (and in particular at [454]-[468], all of which I have in mind, and which by this brief summary I do not intend to depart from, or indeed, augment) was that

from about the end of 2019, there was a concealed plan, ultimately intended to end or reduce the Petitioner's participation in the Company's affairs and business, which involved as an important step a disciplinary process that was not conducted fairly or in good faith, and involved dishonestly delaying the communication to the Petitioner of decisions about his own and Ms Jones' suspensions, in order to allow him to complete the Reward Loan, secured on his home, in ignorance of what was planned and would very soon happen.

66. As was said at [459(iv)], there was a "*concealed plan, materially executed, to exclude Mr Seneschall from participation in the business, and from knowledge about its affairs, whilst at the same time exploiting his home as security, in order only then, from a position of enhanced bargaining power, to purchase his shares* …". I also found that the Petitioner's agreement to the use of his home as security was as an aspect of his initial and continuing membership, inextricably linked, as "*part of the same investment*" (see [459(vi)]).

67. In those circumstances, the appropriate remedy in my judgment is to achieve, or replicate, as closely as now possible, a clean break between the parties:

    67.1. as I have said, in circumstances of dishonest exclusion, such as this, a clean break between the parties is commonly considered, for good reason, to be the appropriate outcome;

    67.2. furthermore, and although, as I have explained, I do not think it right to fashion relief wholly by exclusive reference to the Petitioner's proposed counterfactual, or by an enquiry into what would have happened had the parties in this case in fact sought to negotiate, I do agree that it is instructive to ask by what means the Respondents might have acted (other than by simply not taking any of the steps they took) in order to avoid or pre-empt the charge of causing unfair prejudice;

    67.3. in my view, an appropriate and fair step would have been an offer in terms of a clean break, achieving what the Respondents wished for (the removal of Mr Seneschall) but on terms not unfair to him (he being paid and returned his stake in the Company, and being no longer liable to any degree in respect of its continuing or future debts, over and in respect of which he would no longer have

any control or influence); in that regard, I remind myself for example, of [71] of the Liability Judgment, in which I said that "*as 2019 drew to an end, personal relationships were severely strained; the working atmosphere at the Company deteriorated, and became troubled and problematic, possibly, over time, to the point of irreversible breakdown*", and of [87], in which I said that by June 2020, relations between the Petitioner and Ms Jones were "*extremely poor, or worse; each wanted or seems to have wanted the dismissal of the other; both were actively marshalling allegations and evidence; in the circumstances, it might reasonably be thought that some change of management was almost inevitable*"; in those circumstances, rather than by the (concealed and dishonest) means chosen, the Respondents (and together, the parties) might have achieved the "*almost inevitable*" outcome - in other words, the management change, entailing the Petitioner's departure - but on fair terms; those are broadly the terms that by the relief given, I now seek to replicate;

67.4. the 2nd and 4th Respondents expressly conceded in their Remedies Points of Defence that a share purchase order would be appropriate (indeed, pleaded that it would appropriate to make that order against "*the 2nd to 5th Respondents*", although obviously unable to speak for or bind the other Respondents);

67.5. in cases where a clean break is considered appropriate and fair, the petitioner is often also ordered to repay sums due to the petitioner or procure an appropriate indemnity against liability (see for example, R&H Electric Ltd v Haden Bill Electrical Ltd [1995] BCC 958; Re Ghyll Beck Driving Range [1993] BCLC 1126; Re Woven Rugs Ltd [2010] EWHC 230) at [177] *per* David Richards J, as he then was; and Shah v Shah [2011] EWHC 1902 at [58] *per* Roth J.);

67.6. I consider that relief to be appropriate in the present case both because, as I held in the Liability Judgment, the use of the Petitioner's home as security was an aspect of, and was inextricably bound up with his investment, interests and position as a member, and in any event, because, put simply, it would have been unfair to expect the Petitioner, following his removal or departure, to continue to support a business in which he had no other interest, and no influence or control, and thus to bind his property and assets, and prevent their use by the Petitioner for other purposes (for example, in support of another venture); in

addition, the conduct of the Respondents in connection with the Petitioner's agreement to the use of his home as security in support of the Reward Loan, was made particularly egregious (as ultimately described at [408] and [409] of the Liability Judgment) by the decision to delay communication of the Petitioner's dismissal in order to ensure that his property was first used as security;

67.7. the remedy is proportionate to the prejudice: there is a simple and balanced correspondence between the Petitioner's wrongful exclusion, and an order that he be paid and returned his stake in the Company.

68. I reject the claim to a sum equivalent to a "termination payment" for the following reasons:

68.1. it is based on the outcome of the alleged counterfactual negotiation, the use of which I have rejected;

68.2. in any event, there was no evidential basis upon which to conclude and no reason to think that a 12-month termination payment would in fact have been agreed; it was not suggested that the sum represented the value of an obligation;

68.3. further, Mr Seneschall was in fact paid until 7 September 2020 (and Mr Seneschall's counterfactual was situated in November 2019); the Company stopped paying salaries at some point in the first half of 2021, and the winding up petition on which it went into liquidation was presented on 24 June 2021;

68.4. I consider the fair outcome in this case, in all the circumstances, is that Mr Seneschall is insulated from the financial consequences of the liquidation, to the extent that I have determined.

69. Finally, given the relief granted, it is unnecessary for me to consider two alternatives that were raised by the Petitioner in relation to the Reward Loan:

69.1. that he be indemnified in respect of the difference between the current balance outstanding to Reward and the sum owed to Nucleus as at late 2019, based upon an alleged telephone discussion between the Petitioner and Mr McCormick on about 23 August 2019 (and a draft email sent by Mr McCormick to Mr Marshall

on the same day, which said that default interest would be "*managed in the overheads within the business*" and would not be "*coming from the £1.8m agreed for the 50.1% share*") said to be to the effect that Market Fresh would be liable for the default interest payments to Nucleus, such that had he known of the plan to exclude him, the Petitioner would have refinanced more promptly, and on better terms, and "*would not have faced the ever escalating liabilities of the Reward Loan, which now stand in excess of £1m*"; and,

69.2. that he be indemnified in respect of liabilities under the Reward Loan since his suspension on 13 July 2020, on the footing that had he known of the plan to exclude him as at that date he would have acted to crystallise his liabilities at that point in time.

70. In any event, as to the first of those alternatives, first, I am not persuaded (and it is most unlikely in the circumstances) that Mr McCormick promised the Petitioner that Market Fresh would itself pay the default interest in addition to the investment, which seems to be the suggestion; the meaning of the email (which in any event was not sent) is not plain to me, possibly not even to Mr McCormick, but far more likely is an intention that the interest payments would be paid by the Company, rather than by means of any reduction in the headline sum of the Market Fresh investment; and second, the suggested conclusion (that the Petitioner should be indemnified in respect of the difference between the current balance outstanding to Reward and the sum owed to Nucleus as at late 2019) is a *non sequitur*: if, as he now says, he would have refinanced on terms "*more favourable to both* [the Company] *and* [himself]" (as he did in his Opening) then he would be liable on those terms, not in the sum as it stood as at September 2019.

The Date of Share Valuation

71. As stated above, as to the appropriate date at which to value the Petitioner's shares, I have chosen, from the various alternatives, 30 November 2019. In this regard, as to the relevant principles, the overriding requirement (and within the Court's discretion) is that the date of valuation should be fair on the facts of the particular case - that which best remedies the unfair prejudice held to be established; in respect of a going concern, the starting point, at least, is the date on which the shares are ordered to be purchased: see for example, Re London School of Economics Ltd [1986] Ch 211 at 224; Profinance

Trust SA v Gladstone [2002] 1 BCLC 141 at [60], and Re Abington Hotel Ltd [2012] 1 BCLC 410, at [123] and [141]. There are many varieties of reason for departing from the usual starting point, including where it is "*simply unclear whether the respondent's conduct after the date of unfairly prejudicial conduct has caused the diminution in the value of the shares, on the basis that it is unfair that the petitioner to assume the burden of the risk*": see Re Phoenix Contracts (Leicester) Ltd [2010] EWHC 2375 at [150] *per* Proudman J, and Croly v Good [2011] BCC 105, at [113] *per* HHJ David Cooke.

72. In the present case, of the three possibilities, I have chosen 30 November 2019 (which was the Petitioner's preferred date) as the date as at which to value his shares because:

72.1. that is when, and from when, the Respondents' plan to oust Mr Seneschall was conceived and began to unfold;

72.2. accordingly, the Petitioner was, from November 2019 onwards, gradually (and ultimately in substance) excluded from involvement in the Company's affairs;

72.3. from that point, increasingly therefore, he had less control over, responsibility for, and knowledge and understanding of, the Company's affairs;

72.4. furthermore, he had diminishing access to information and documents (a point about which, even now, in the course of these proceedings, in connection with the Respondents' disclosure, he has continued to complain);

72.5. on 9 November 2021, the Company went into insolvent liquidation, on a petition presented on 21 June 2021; I deal further with this issue below, but it is not clear on the evidence precisely what caused the Company to go into liquidation (almost two years after the inception of the plan to remove the Petitioner);

72.6. it would therefore not be fair to the Petitioner to make him assume the risk of the Company's failure (to the extent not inherent in a valuation as at November 2019); indeed, it was precisely that circumstance – trading at risk to the Petitioner's property but having wrongfully excluded him – that was one aspect of the unfair prejudice;

72.7. November 2019 is the point at which, I agree with the Petitioner, an alternative (fair) course was open to the Respondents; a separation was desired, perhaps inevitable, possibly beneficial, but it was not openly and honestly offered or addressed; it was the road not taken;

72.8. the Petitioner did not delay in pursuing relief formally, by commencing proceedings; indeed, the Petition was presented on 17 March 2021, some 8 months before the Company went into liquidation.

73. In his Valuation Report, at paragraph 1.14, Mr Haddow said that his valuations were "*based on the contemporaneous data available and what can be assessed from it rather than submissions and forecasts by the respondents that may have been prepared with the benefit of hindsight*." He repeated the point at paragraph 4.20 (that he had been "*mindful of* [his] *instruction to consider information that would/could have been known at the respective Valuation Dates*") and 3.2 ("*based on the information that can be assumed was available at that time. That may be distinct from the information requested and made available to Market Fresh and the basis on which it invested*.")

74. In summary terms, I accept that to be the correct approach (see Re Holt [1953] 2 All ER 1499), subject to the possibility of considering subsequent events if and to the extent that they shed light on the truth of circumstances at the relevant date; thus, for example, for the purposes of deciding what forecasts for the future might reasonably have been made at the valuation date, or checking what was, as at that date, a proper estimate of profits: see for example, Buckingham v Francis [1986] BCLC 353. I do not accept (as was implicit in the Petitioner's "*counterfactual*" approach to valuation based on a hypothetical negotiation between the protagonists as they existed at the time) that the valuers or the court should necessarily be limited to such facts and matters as were subjectively known or in fact made available to the particular parties themselves as at the relevant time; that would be to risk an unfair valuation based upon an unnecessarily partial understanding, and is, in any event, contrary to the usual and well established approach.

75. In the present case therefore, having chosen 30 November 2019 as the Valuation Date, it follows that events and matters subsequent to that date are (broadly) irrelevant to the valuation.

Relief Against Whom?

76. In closing, Mr Northall suggested that one merit of the proposed counterfactual approach was that "*it also ensures fairness to* [the Respondents] *in the apportionment of liability for the remedy as between them*". He sought the relief under s.996 jointly and severally against each of the Respondents (other than the Company). In my judgment, the fair order is as follows.

77. First, that Market Fresh and Mr Marshall should both be liable, jointly and severally, in respect of the whole relief under s.996:

    77.1. Market Fresh is the Company's majority shareholder, and is owned beneficially by Mr Marshall;

    77.2. Mr Marshall was a *de jure* director the Company; he was (as I found in the Liability Judgment) the person upon whom the plan to remove Mr Seneschall depended;

    77.3. the plan entailed, or was, from time to time, more or less intended to entail the eventual purchase of Mr Seneschall's shares in the Company by Market Fresh (or perhaps another entity directed by Mr Marshall);

    77.4. both conceded, in their Remedies Defence, that Mr Seneschall is entitled to a share purchase order, and I have determined that the other relief (which is commonly associated with a share purchase order) is also required to produce a fair outcome.

78. Second, that Ms Jones is jointly and severally liable but only to an extent reflecting her 15% shareholding in the Company. In reaching that conclusion, I have taken into account:

    78.1. that Ms Jones is a shareholder and was a director, but holds a comparatively small number of shares; she was at all times a minority shareholder, and had no means of controlling the Company's affairs;

    78.2. that although she was involved in the relevant conduct, (i) her role was significantly subsidiary to that of Mr Marshall and Market Fresh (and more

generally, was operational rather than financial); in a sense, she was involved as a participant - albeit willingly - in Market Fresh and Mr Marshall's plan; and (ii) her conduct was to some extent in reaction to that of Mr Seneschall himself, who was actively seeking to bring about her removal;

78.3. that an order based on the alleged counterfactual negotiation would very likely not have been made against Ms Jones for the whole relief granted; it is unlikely that she would have agreed to buy any of Mr Seneschall's shares.

79. Third, that there should be no order under s. 996 as against Mr McCormick. In that regard, I have taken into account that he participated in the relevant conduct, but also that:

79.1. he was not a shareholder in either the Company or Market Fresh, or an investor in the Company, or a guarantor to any extent of it liabilities;

79.2. he was a mere employee of Market Fresh, not a director (albeit the titular "Managing Director");

79.3. he was not even an appointed *de jure* director of the Company until 26 August 2020, after the Petitioner had been suspended and the Reward Loan had been executed and secured;

79.4. he had nothing to gain from the relevant conduct – in fact, his conduct was substantially on behalf of Market Fresh and/or Mr Marshall: in substance he acted in accordance with their wishes;

79.5. his genuinely held view was that Mr Seneschall was financially irresponsible or at least incompetent;

79.6. his involvement in the Company's affairs ended or diminished from about the end of 2020;

79.1. an order based on the alleged counterfactual negotiation would very likely not have been made against Mr McCormick for the whole (or any of the) relief granted; it is highly unlikely that he would have agreed to buy any of Mr Seneschall's shares; I recall that as I noted above, the share purchase order set

out in the Prayer in the Amended Petition was explicitly not directed at Mr McCormick.

The Respondents' Arguments as to the Form of Relief

80. In respect of the form of relief under s. 996, I have considered, and rejected, the following arguments advanced by the Respondents.

81. First, it was said (correctly) that the Petitioner willingly embarked on this commercial venture knowing that it was not without risk, that it might fail, and knowing therefore that if it did, he would or certainly could lose any sums invested and suffer loss by virtue of having given guarantees and security in respect of its liabilities (all of which he gave before Market Fresh was involved, and before any unfairly prejudicial conduct).

82. Moreover, it was said that the Company's failure was not merely in consequence of an inherent, commercial risk, but was in fact caused by a combination of the Petitioner's own dishonesty and incompetence.

83. In particular, it was said:

83.1. that the Petitioner's estimates of the cost of refurbishing, equipping, and bringing the Factory (and so the Company) to the point of operational commencement, were very substantially wrong (and dishonestly so), as were his business forecasts;

83.2. that (an act of "*staggering incompetence*") the Petitioner knew, by October 2018 at the latest, that the supply of electricity to the Factory was inadequate for its intended purposes, and yet he nonetheless (in December 2018) caused the Company to enter into a contract with Tetra Pak, involving the installation of equipment that needed an even greater supply of electricity; indeed, had Market Fresh (and Mr Marshall) been told and known about the supply issue, it would never have agreed to invest in the first place;

83.3. that "*probably … the root of the problem*" was that building the Factory was never the Petitioner's priority: in fact, certainly from about the beginning of 2019, at which point his own investment had been spent but the Factory was far

from built (and there were neither customers nor business) his aim and priority (in fact, his "*main motivation*") was to protect his house, by repaying the Nucleus Loan, and discharging the security given against it and his personal liability in respect of the Loan;

83.4. that the Petitioner deliberately failed to refinance the Nucleus Loan by accepting an offer from Bridgecrowd in September 2019 (and thus allowed interest to accrue at a penal rate of about £17,000/month) because he intended to use (without the agreement of Market Fresh) some part of the money invested by Market Fresh to pay Nucleus.

83.5. that therefore, ultimately, the Respondents' conduct was not the cause of the Petitioner's losses: to the contrary, he was the author of his own losses, and in any event, even if the Company failed for some other reason or reasons, the Respondents were not.

84. Second, in addition, it was said:

84.1. that the Petitioner's case on the "*Redemption Agreement*" having failed at the Liability Trial, it would be wrong (essentially, inconsistent) to give the relief sought ("*by the back door*") in respect of the security given in support of the Reward Loan, and that in any event, the Petitioner's financial position was improved as a result of the refinancing;

84.2. that the relief sought in respect of the Petitioner's personal liabilities was not pleaded; I have considered and rejected that argument above at paragraphs 44-45;

84.3. that it would be "double counting" to give relief comprising both payment for shares and (given that sums invested are reflected in the Company's value) in respect of the Petitioner's associated liabilities;

84.4. that the Petitioner had an available "alternative remedy" which he failed to exploit, because when the Company went into liquidation (or before then, when administration was considered) he could have offered to buy its business, or the Respondents' shares, but did not do so;

84.5. that a clean break would have been impossible in 2019.

85. In the circumstances, as to the form of relief under s. 996, the Respondents said that the Petitioner should be limited to a share purchase order plus compensation for his redundancy.

86. I reject each of these arguments for the following reasons.

87. First, and fundamentally, as explained above at paragraph 21, in the Liability Judgment I rejected the Petitioner's allegation that the Respondents' misconduct (as in this respect specified) was the cause of the Company's liquidation. It is now irrelevant and too late for the Respondents to allege that in fact, on the contrary, the Company's liquidation was caused by the fault of the Petitioner, specifically by virtue of his inaccurate and misleading business forecasts or by his concealment of the electrical capacity issue, or indeed, that Market Fresh would not have invested in the first place, had it been told the truth of the position in respect of electrical capacity. I am unwilling to re-open and reconsider issues of "fairness", or in effect to allow the Respondents to resurrect or raise new counterclaims.

88. Furthermore, in the Liability Judgment, I rejected the Respondents' suggestion made in argument at the Liability Trial, that the Petitioner's conduct after his suspension was causative of the liquidation: see [453], "*In the circumstances, I do not agree that Mr Seneschall drove the Company into liquidation, as alleged by the Respondents*" (I pause to note that the allegation, recorded at [427], was that it was the Petitioner's refusal to cooperate in the business after his suspension (in July 2020) that had caused its liquidation – an allegation inconsistent with the suggestion that it was bound to go into liquidation in any event since before then): "*It went into liquidation because it was in fact insolvent and wholly dependent on Market Fresh for its survival. After 5 March 2021, Market Fresh decided to withdraw further support, as it was free to do; it was under no obligation to pay anything more. From that point, the Company's liquidation was probably inevitable (or at any rate, some form of insolvency regime was probably unavoidable)*".

89. Therefore, although the state of the Company's business and its prospects as at the Valuation Date are plainly and centrally in issue (as indeed might be some of the reasons

for its condition, where they are relevant to its value at that Date) it is no longer relevant as such to ask whether its condition (and subsequent liquidation) was in consequence of any person's misconduct or fault. The distinction is between valuation and responsibility (between liability and relief), although the Court might sometimes have cause to consider - for the different purposes of valuation - matters that were before it in respect of liability, as in Re Southern Counties Fresh Foods Ltd [2010] EWHC 3334, [10]-[14], in which Warren J, having rejected the allegation that a refusal to terminate or renegotiate a contract was unfairly prejudicial, nonetheless held it appropriate to take into account the possibility of its renegotiation for the purpose of valuation. To take an example from the present case: whether or not there was in fact an electrical capacity issue as at the Valuation Date might in principle be relevant to the Company's value; whether or not the Petitioner was at fault for not having told Market Fresh about it (or whether or not Market Fresh would not have invested in the first place had it known the truth), is not.

90. In any event, the allegation that the Company's liquidation was caused by the Petitioner's conduct referred to above at 83 was not pleaded (either in advance of the Liability Trial, or subsequently) and neither was it properly evidenced by reference to the course and development of the Company's business until it went into liquidation in November 2021. It would be wholly unfair to the Petitioner to allow this allegation to be advanced against him now, unpleaded, unparticularised, and therefore (because of the limited scope of the disclosure and evidence permitted in respect of the Remedies Trial) not properly addressed in the evidence. Not entirely, but essentially, the form of appropriate relief is to be decided by reference to findings in the Liability Judgment.

91. Second, the Respondents' submissions in this respect proceed on the premise that in any event (even if the Petitioner was not himself responsible) they did not cause the Petitioner's "losses", which were, for example, suffered in simple and inevitable consequence of liquidation (for which they were not responsible). However, in the context of unfair prejudice, that submission is misconceived because although, for the purposes of liability, there must be a causal connection between the conduct of the Company's affairs and the prejudice suffered by the petitioner, the appropriate relief once unfair prejudice has been established is not simply an order for financial compensation in respect of damage caused (although it is, more broadly, "compensatory" rather than "penal").

92. As I have explained above, the Court's flexible power is to deal fairly and proportionately with the situation that has occurred. Thus for example, typically, in a simple case of unfair exclusion, the Court will order the respondent to purchase the petitioner's shares, not because the petitioner has suffered and is to be compensated for a "loss" suffered and measurable by reference to the value of his shares (which after all, he still holds, at the same value) but because that order meets the prejudice suffered and resolves the situation fairly. The position is different in respect of the tortious conspiracy claim, for which damages are claimed in respect of losses caused by the conspiracy.

93. Essentially, it is for these reasons irrelevant (albeit true) that in the present case, I rejected (for the purposes of liability) the alleged Redemption Agreement, and equally irrelevant (if true) that the refinancing in 2020 improved the Petitioner's financial position. Again, the distinction is between unfair prejudice and fair relief: often, in a simple exclusion case where a clean break is appropriate, there is no connection at all between the content of the relief and the act of prejudice; the remedy is not to enforce a prior obligation (for example, to buy the petitioner's shares) or to compensate for the respondent's breach of that obligation – in most cases, no such obligation existed; *a fortiori*, the fact that obligations under the Redemption Agreement were alleged but rejected is not in itself relevant.

94. Similarly, it is irrelevant that the Petitioner embarked on the venture, and gave security and guarantees in the knowledge that the business might fail, as eventually it did. The same might be said of any company member: there is an irreducible risk of loss. However, in the present case, although the Petitioner willingly assumed the risk that the Company might for ordinary commercial reasons fail, he did not assume the risk of his own prior exclusion; having been excluded, he is in principle entitled to a remedy.

95. Third, the fact that Mr Seneschall's shares are no longer valuable is not in itself a reason not to grant relief (as was the conclusion reached by ICCJ Prentis on the application referred to above at 15). For example, in Re Woven Rugs Ltd [2010] EWHC 230, David Richards J (as he then was) rejected the submission that an order to buy shares in a company in administration (albeit in that case as a result of the unfairly prejudicial conduct itself) would be tantamount to a "penalty"; at [175], the judge said, "*It is not a penalty, but the means by which* [the respondents] *will compensate the* [petitioners] *for the damage caused by their wrongful conduct*"; I note also in that case that an order was

made in respect of the petitioners' loans to the company, that they be repaid by the respondents – see [177].

96. Accordingly, at any rate in the present case, the mere fact of the Company's eventual liquidation, almost two years after the Valuation Date, is relevant only if and to the extent that:

96.1. its causes or circumstances in some sense inform the Company's value as at the earlier Valuation Date; and/or,

96.2. perhaps, it is shown that as at the Valuation Date (or perhaps later, as at the date when the Petitioner gave security in respect of the Reward Loan) the Company was in any event inevitably bound to fail (in which case, it might be said that any prejudice was of no ultimate consequence, and that the Petitioner would in any event have lost any share value and been liable to the same degree in respect of the guarantees and security).

97. I deal with valuation below, but as to the second of the possibilities in the preceding paragraph, it cannot in my judgment be said in the present case that the Company was, as at the Valuation Date or the date of the further security, inevitably bound to fail, for the following reasons.

97.1. First, the allegation was not properly pleaded, and was not raised in the Respondents' written closing submissions. There is a significant difference between insolvency and inevitable failure (a distinction made essentially in respect of wrongful trading under s. 214 of the Insolvency Act 1986, albeit framed in terms of the time from which there was "*no reasonable prospect*" of avoiding liquidation): although, as set out above, the former was alleged, the latter was not. For the Petitioner to respond to the allegation, it ought to have been made expressly and properly particularised.

97.2. Second, no doubt because unpleaded, the evidence was not directed at and did not properly address the issue, or address it in a comprehensible manner. It would have been necessary: (a) to establish the ultimate cause/s of liquidation, and (b) to establish that those causes (and their inevitable consequences) existed

as at the Valuation Date. Mr Haddow was not asked and did not express an opinion about the causes of liquidation, or whether the Company was, at the Valuation Date, bound to fail. Had it been pleaded, a different approach to disclosure would have been justified.

97.3. Third, in any event, as I shall explain below, the evidence that was adduced in respect of valuation contradicts the proposition that the Company's liquidation was inevitable as at the Valuation Date.

98. Fourth, as to the allegation that the Petitioner's priority was the protection of his house (and that this, rather than the Company's success had been his motivation), the Petitioner was cross examined by Mr Marshall. However, although it was freely admitted by the Petitioner and I accept that it was important to him (if he could) to protect his house (a point made in his own witness statement at paragraph 6, in respect of his pursuit of the litigation itself) I do not accept that the protection of his house was his main motivation for the pursuit of investment from Market Fresh in 2019 – no doubt he had in mind that outside investment would reduce his personal risk, but equally, he plainly believed, whether or not justifiably, that it would or could mean that the Company itself would prosper, and that his interest in it would become significantly valuable; that was a substantial part of what motivated the Petitioner. Similarly, I do not accept that he deliberately failed to refinance the Nucleus Loan by accepting an offer from Bridgecrowd in September 2019 (and thus allowed interest to accrue at a penal rate of about £17,000/month) because he intended to use (without the agreement of Market Fresh) some part of the money invested by Market Fresh to pay Nucleus. First, the allegation amounted in effect to a bare and unevidenced assertion. Second, in fact, the proposal was presented to the Company's Board, but rejected. Third, this is an issue that I dealt with in the Liability Judgment at [394]-[395]; it cannot be re-opened.

99. Fifth:

99.1. the relief granted does not entail "*double counting*". As explained below, the Company's value takes into account (and was reduced by) its outstanding liabilities; the remedy does not (as was in effect suggested) entail payment in respect of an asset plus repayment of an investment already reflected in an enhancement of the asset's value. In any event, the relief is aimed at an outcome

different from a simple share sale, because in this regard it reflects the terms of a clean break: share value plus relief from continuing personal liability.

99.2. The fact that the Petitioner made no offer to buy the Company's business or shares in 2021 is a fact which might be weighed in evidence, but is not an "*alternative remedy* precluding relief; it was not for example a course so much more obviously appropriate (as would have been the refusal of an appropriate offer made by the Respondents) as to render the petition abusive.

99.3. I do not accept that a "*clean break*" would not have been possible in principle in 2019; in any event, whether or not it would have been practically possible is not relevant.

[E] <u>The Causes of the Company's Insolvency & Liquidation</u>

100. As I have said, it is in principle relevant to consider the causes of liquidation, and to consider whether or not, as at the Valuation Date, there was any real prospect of avoiding liquidation, because in any event those circumstances will or might bear on its valuation.

101. In Section 5 of his Report, Mr Haddow summarised the Company's financial performance for each of the periods prior to the three proposed valuation dates, having considered its financial statements, including full accounts to 30 July 2019, and management accounts and SAGE records for the period from August 2019 to March 2021 (noting some difference between the records in respect of the year to March 2021).

102. He explained:

102.1. that the Company was loss-making throughout its trading life: as at 30 July 2019, it had incurred a net loss of £709,702, and by 28 February 2020, a net loss of £647,026; it failed ever to achieve a positive gross profit margin; in the 7 months to 28 February 2020, its gross profit margin was -336%;

102.2. that the Company was balance sheet insolvent as at 30 July 2019 (net liabilities of £709,602) and (by reference to its SAGE records) as at 7 January 2021 (net liabilities of £1,362,696) and as at 9 March 2021 (net liabilities of £1,455,836);

102.3. that the Company received payments from customers of £6,300 in 2019, of £427,550 in 2020 and of £95,083 in 2021 (a total sum of £528,933 over the whole course of its life), in addition to payments from Market Fresh amounting to £797,930 by 9 November 2019, £1,837,117 by 13 July 2020, and £2,502,188 by 17 March 2021; these sums were used, notes Mr Haddow, "*to pay debts, often overdue, and limit the use of the Company overdraft*"; as at 9 November 2019, £7,064 stood to the credit of the Company's bank account;

102.4. as at November 2019, the Company had debts amounting to £89,609.67, payment of which was overdue, despite the investments made by Market Fresh; Mr Haddow noted that this "*supports the observations in the Judgment that the Company was undercapitalised*", and that as "*the Company was not cash generative through trading, it could only have generated cash with the injection of further investment, most likely in the form of debt*."

103. Notwithstanding this bleak (and undeniable) summary of the Company's financial history, I accept that in November 2019 the Respondents did not themselves subjectively treat the Company as bound to fail. For example, Market Fresh continued subsequently to invest in it pursuant to the terms of the HoTs, albeit under no obligation to do so; between April 2019 and March 2021 it invested c. £2.8m, including sums beyond those anticipated and governed by the terms of the HoTs. Although that fact does not necessarily imply a belief in the Company's success to any particular degree (it may be that to some extent, for example, sums were invested in order to diminish losses rather than secure profits) it is in my view inconsistent with a belief (held in November 2019) that it was already doomed to insolvent liquidation in any event.

104. In addition, I accept (and in the Liability Judgment, found) that from about the end of 2019, the Respondents began to plan to remove and exclude Mr Seneschall from the business of the Company, and that an aspect of their plan was the possible acquisition of his shares, albeit from a position of enhanced bargaining power. Mr Seneschall sought to rely on this fact in support of his case (based on the counterfactual, the use of which I have rejected for the reasons explained above) that had the parties negotiated fairly at that time, they would have agreed a certain payment in return for Mr Seneschall's shares. Thus, for example, on 19 December 2019, Mr McCormick emailed Ms Coyne, Mr Marshall and Ms McKendry-Gray, and said, "*I have also confirmed when I update Dave*

(Dave and I have already touched on this briefly) he may well decide to put an offer to John in the New Year. What John is not aware of at this stage is that any offer will not be anywhere near the value John might like to be expecting. The intention is to collate information over the Christmas period to support his disingenuous and incompetent manner. One way or the other we will get John off the business". This was at a time when it would seem that Mr Seneschall thought his shares to be worth (according to an email from Mr McCormick to Mr Marshall and Ms Coyne) "*... quote 'a couple of million'! Clearly at this time, they are not*."

105. Again, whilst I accept that this evidence supports the conclusion that the Respondents did not at that time consider the Company to be doomed to failure (in those circumstances there would have been little or no point in planning to exclude Mr Seneschall) it says nothing of significance about its actual value, whether generally or to them personally or to some of them. Plainly, they believed that Mr Seneschall was overvaluing his shares; Mr McCormick was explicitly clear that "*a couple of million*" was not only wrong, but wrong to a degree worthy of exclamation. Moreover, an "*offer*", had it ever been made, might have entailed any number of elements in a variety of combinations, including release and payment in respect of Mr Seneschall's personal liabilities and including future profit sharing, should any profits ever be generated (which they were not).

106. Against that background, both the Petitioner and the Respondents adduced their own evidence of fact about the state of the Company in November 2019, and to some extent, about the causes of its insolvency and liquidation.

107. Mr Seneschall's evidence was that the Company failed (that it "*was run into the ground*") because of the Respondents' "*bare incompetence*".

108. Moreover, his evidence was that - "*as time has shown*" - his departure was "*ultimately unhelpful*" to the Company, because Mr McCormick was "*incapable of running*" either the Company or Market Fresh; because Ms Jones had lied about her career experience, was unwilling to develop her knowledge or learn from others, "*talked a good talk, but actually wasn't as experienced in operations as we were all led to believe*", and made it "*almost impossible to do business with Trisant*"; and because the team that remained at the Company after his dismissal "*was incapable of pitching for new and substantial business*". Overall, he said:

"*if I had been the MD of Trisant Foods and been allowed to manage the business on my own terms (probably, in truth, with Lynne and David both gone), Trisant would be thriving today. The death of Trisant wasn't caused by me, it was brought about by Lynne and David, supported by Dave and Eileen, who unfortunately were incapable of running the Factory and generating sales*".

109. In addition to the Respondents' incompetence, Mr Seneschall referred to delays in completing the refurbishment of the Factory. He said that he had thought the business would become profitable within 18 months at most, but that profits could be made within 12 months "*from opening our doors*", although to achieve that outcome required clarity about when the Factory would be operational, which they could never achieve and for which he blamed Market Fresh and its decision to drip feed its investment - which was the point raised at the Liability Trial, and in respect of which Mr Seneschall was supported by Mr Williams. He said that these delays "*caused problems with maintaining customers' confidence in our ability*".

110. As an example, he referred to Oggs, which first visited the Factory in December 2018, "*with a view to launching in August 2019*" but for which the first production run was not until April 2020, so that "*Sainsbury's had empty shelves as Trisant had failed to deliver any product by the time Oggs had told Sainsbury's it would be available.*" Similarly, he said that "*By mid-2019, we had several customers chomping at the bit wanting to start production (Oggs, Little Freddie, Muru and Bay Likes). The problem was not that we didn't have customers who wanted to use the Factory, it was that we didn't have an operating factory to offer them. Once we did, I was confident that the customers would continue to roll in (and I believe they would have done but for my exclusion from the business from late 2019).*"

111. Once running, said Mr Seneschall, "*I was confident that – like at Brecon - there would be a steady stream of new customers wanting to use our services*", particularly so given the Tetra Recart facility. In addition, he said that with the two pouch lines, "*the offer overall was (and remains in my view) a compelling one*". He referred also to his "*excellent contacts*" in the baby food sector and "*potential customers … interested from day one*", including Baby Likes, Little Freddies, Ella's Kitchen and Alex and Phil.

112. As I have said, Mr Wiliams' evidence was to similar effect, that the "*the extensive delays to the factory becoming fully operational meant that most of Market Fresh's investment was swallowed up by overheads and general running costs, e.g. rent, utilities and salaries not by building the elements of the business which would produce revenue (organising product trials, marketing to new customers, commissioning the second Tetra Pak line). That the pouch-line never became operational was very damaging to the business. Each of the forecasts … were premised on the pouch-line becoming operational before or at the same time as the Tetra Recart line. This was also modelled on the basis that Market Fresh's own products will be produced on the pouch line (and the tear top pouch machine had been purchased specifically for this purpose) I do not know why the pouch-line was never completed, or why Market Fresh never produced their own products at Trisant* ……"

113. It was said therefore that the delays in completion of the Factory were fundamental to the Company's failure to meet forecasts and to become profitable, and it was said that these delays were the fault of Market Fresh. There are two serious difficulties with that argument.

    113.1. First, the cost of building the Factory was vastly greater than Mr Seneschall's own estimates – and the greater costs were part of the reason for the delay – so it is not possible to blame Market Fresh exclusively; had the Factory been built at the cost previously estimated by Mr Seneschall, it would have built many months before December 2019.

    113.2. By email of 6 February 2019 for example, Mr Seneschall wrote to Mr Marshall that, "….*based on a very realistic valuation of £5,000,000 as things stand today, (I appreciate it is possible to argue endlessly about this figure but it seems about right to us given the business we have lined up already, the machines ordered and the building works in progress), we would be looking to sell 10% for £400,000 initially, the deal to be completed by the end of March 2019. Thereafter a second tranche of 7.5% of the business would be sold to you in July at a slightly higher rate per share, as we will be in production by then, with the 7.5% valued at £400,000, again the deal being completed by end August*". In other words, it was said that the Factory could be made operational by means of the first tranche of the investment. In fact, the Factory did not become

operational until December 2019, by which time Market Fresh alone had invested about £1.3m (in addition to the sums previously invested by Mr Seneschall himself).

113.3. Second, in any event, that funding delay was the reality, and I held in the Liability Judgment that there was no obligation to invest more speedily. If the delay caused commercial difficulty and reputational damage, then so be it, but I cannot conclude that the Company was more valuable than in fact it was on the basis that investment ought to have been made more speedily: had a different investment agreement been made, or had Market Fresh chosen to invest more quickly, or had the Factory been built more quickly or more cheaply, the Company might have been more valuable; but it was not, and cannot be ascribed higher value based on a hypothetical version of reality. Again, Mr Seneschall has described what he considers to have been the source of the problem, and what he considers might have happened in an alternative version of history. If anything however, his explanation tends fundamentally to undermine the suggestion that the Company held the significant value he ascribed to it in November 2019. This is the point I made in the Liability Judgment – that the investment agreements were not adequate – they did not provide for enough money quickly enough, and whilst Mr Seneschall blamed Market Fresh for "drip feeding", they blamed him for having incompetently or dishonesty failed to tell them how much it would actually cost to build the Factory. In the event, by 30 November 2019, there was no Factory, no customers and no business.

114. Mr Axford was a National Account Manager at Market Fresh between February 2019 and May 2021. His evidence was that when he began at Market Fresh, he was told by Mr McCormick to focus on new products for Market Fresh to be made at the Factory. He said that he was employed to "*sell products*", whatever they might be, and that although the volumes discussed were "*unrealistic to start with*", they could have been achieved in time.

115. He explained that at that time the only potential Market Fresh product was "*Pasta Piing*", which was being manufactured in India, but with significant quality issues and at great expense. He said that these issues could have been resolved by manufacturing the product at the Factory. In answer, Mr Marshall said that to produce Pasta Piing, the Factory would

have needed an oscillating retort rather than a static retort, which it did not have. Having therefore expected to be in a position to recover Market Fresh's investment from profit on this product, he was unable to do so because it transpired that it could not be produced.

116. In this regard Mr Marshall was shown an email sent to Mr Seneschall on 8 November 2023, by a Mr Vinjay Sharma of "Regal Kitchen Foods", who had been asked by Mr Seneschall about a product called "*Pasta Zing*" (which is *not*, to be clear, the product called Pasta Piing) and whether its production required an oscillating retort. Mr Sharma replied that his company had solved the problem ("*The issues addressed by you in the product has already been resolved by our NPD team when the product was developed five years a ago. Our New product development team took 18 months to get this product write without any "clump" and the perfect Al-dente bite required in the Italian pasta. We have 3 air and steam retort and two water cascading retorts*"). This statement was not evidence produced for the purposes of the (or any) trial; it was impossible to interrogate or weigh it. In any event, it made the point that the manufacturing issue was real and problematic, that it had taken time to resolve and required additional equipment; if anything it undermined completely the suggestion that Pasta Piing might have been produced at the Factory without additional cost and work. Moreover, Mr Axford conceded that that he was not "*tech minded*" and "*didn't really know*" about the means of resolving the problem. He was not himself able to question or criticise Ms Jones' (or Mr Marshall's) explanations of why this and certain other products could not be produced.

117. Mr Axford gave evidence of products that were either tendered, considered and/or developed by the Company during his time at Market Fresh, but none of which ever came to the point of manufacture and sale.

    117.1. Pasta Piing, referred to above, in respect of which he said that the Company's development team could "*never get the samples right. They were either too soft and the pasta fell apart or too hard and inedible*"; and for which the "*commercials*" were all wrong, in particular because the suggested RRP was £1.79 a pouch, which was 3.5 times the price of similar microwaveable rice products; this product line was ended by Mr Chauhan in December 2020.

117.2. "Little Sauce Pot", in respect of which samples were made, technical work was done and recipes were tested, but that although "*We were all led to believe that the product was going to be in Tesco*" … "*it was only at the sample submission that it came to light that* [Tesco] *never actually said they wanted it*"; again this product line was ended by Mr Chauhan in December 2020.

117.3. Retorted vegetable and stews in cartons for Dunns, in respect of which there were initial conversations but nothing more.

117.4. Pasta sauces for Miskan/Zen B, in respect of which there were initial conversations and a discussion of samples, but "*we could not get prices or samples from David and Lynne*", whose objection seems to have been in connection with the presence of vegetable seeds in the production line process causing complication.

117.5. Lidl, in respect of which there were initial conversations, and samples requested but never made.

117.6. Aldi, in respect of which there were initial conversations, and samples requested but never made. He described the failure to secure the Lidl and Aldi contracts as a "*huge missed opportunity*".

118. This evidence – given by Mr Axford, one of the Petitioner's own witnesses – illustrates the very real difficulty and uncertainty involved (both practically, in terms of manufacturing, and commercially) in converting hopeful conversations and potential business into actual fruitful, financially profitable work.

119. In common with Mr Seneschall, Mr Axford was extremely critical of Mr McCormick, whom he described as incompetent, lacking the "*sales, management and manufacturing knowledge required*" to do the job, in addition to being a "*bully*", and being "*very selective*" with the provision of information to others. He said that the business "*would have worked, albeit with different people managing it*".

120. Against this, Mr Marshall described Mr Seneschall as a "*poor managing director and an indifferent salesman*", and "*easily replaceable*" (unlike Ms Jones who was "*unique with her ability to develop recipes and run a kitchen and food packaging plant*", and was, in

effect, "*impossible to replace*"). Mr McCormick described Ms Jones as an "*excellent factory manager*", "*highly competent*" and "*extremely good at finding solutions*"; he defended his own experience and ability.

121. As to issues of relative commercial skill and competence, Mr Seneschall is doubtless highly confident of his own abilities; equally, he appears to hold an extremely low opinion of those who succeeded or supplanted him, and indeed of most others involved in the business after his departure, whose qualities range in his view from incompetence to dishonesty. However, I am quite unable to conclude on that basis that his presence, his hypothetical work and acts (combined with the removal of the others) would have brought about a different and altogether more prosperous future – that is a matter of pure speculation and not objectively supported.

122. Mr Axford also explained that he had concerns about the scale of the operation. For example, he said that there were only two functioning autoclaves, which he thought (correctly) would cause problems, creating a "*massive bottleneck in production*" because the "*filling line operated at a much higher speed than the ovens*". Nonetheless, he said that overall - albeit with an obvious degree of caution - "*as a foundation from which to build a strong offering, it seemed viable*." His evidence however was that things were "*always three months off*", "*always just over the horizon*". This evidence, from one of the Petitioner's own witnesses, was telling: quite simply, the business never took off, it never really emerged from a stage of preliminary development. I had no reason to think that Mr Axford was anything other than an honest witness, doing his best to assist the Court.

123. Mr Chauhan commenced his career working for House of Fraser as part of its commercial team, after which he moved to Sony, where he worked in UK Sales and Marketing. In 2006, he began working for Tesco as a Category Director. He worked for Tesco until 2020. In his last three years he was in charge of ambient groceries, a department with a turnover of about £4 billion. In October 2020, he became Market Fresh's CEO.

124. He said that on appointment, it quickly became apparent to him that the Company was a "*major drain*" in terms of both finances and manpower (including sales staff and Mr McCormick, both of whom were paid by Market Fresh, in addition to its direct financial investments – and therefore did not appear as costs in the Company's financial records).

In that respect, his evidence was supported by the analysis conducted by Mr Haddow and set out above.

125. When he began, the Company had only three customers – Muru, Alex and Phils and Oggs. The orders placed by each he described as "*very small*". Simply, he said, the Company had a "*lack of customers*" (again, an observation supported by the figures set out above at paragraph 102, and consistent with Mr Axford's evidence). By way of some explanation, he said that there had been a decline in the baby food market (in which Muru and Alex and Phils operated) resulting from the preference of parents to make their own baby food; although he agreed that the product discussed with Oggs - a vegan replacement for egg white - had good potential (albeit for use as an ingredient in products made by other manufacturers, and therefore not a retailing opportunity) it transpired that they "*were not able to cook*" the product using the Factory's facilities.

126. However, Mr Chauhan said that his "*biggest concern … was just how small the factory was*", which limited its ability to attract large manufacturers dealing in "*huge bulk*" and at a "*small margin*", each item produced making only a "*tiny gross profit*" – echoing what was said by Mr Axford about the scale of the operation. He also said that Tetra Pak's packaging was expensive, which limited competitiveness in a tight market, and that limiting the Company's client base to start ups (in consequence of the Factory's size) increased the risk of customer failure. This was consistent with Ms Jones' evidence that the Factory was a "*concept factory*" - set up in order to prove the concept of a Tetra packaging factory in northern Europe, after which if successful another larger factory would be necessary and appropriate. Similarly, Mr Marshall said that Mr Chauhan had told him that there were fundamental flaws in the Company's business model, because the Factory was too small (excluding larger clients from the Company's client base) and because the Tetra Pak products were too expensive for the competitive UK retail grocery market (because of the cost of packaging).

127. Mr Chauhan was shown a Report of a Market Fresh meeting held on 20 November 2020, with Ben Cutts (Business Development Director), Mike Jarvis (Business Development Manager), David Earle (Retail Manager) and Sam Dyer (Business Account Manager). The meeting was about developing the relationship with Tetra Pak. One of the "*Discussion Points*" (though nobody was marked to "*action it*") was "*Trisant factory not at full capacity currently, however with current customer base (e.g. Oggs, Muru, Alex &*

Phil's, etc) soon will out grow site and require new larger site to satisfy recent and developing co-packing enquires for larger FMCG players."

128. Mr Chauhan said he could not recall having been told about the meeting, but in any event, the evidence tends to suggest that his and others' concerns about the size and capacity of Factory were justified. For example, he said that in respect of Lidl, when they got to the point of tendering, they realised that they could not compete on price or handle the volume of 8 million units *per annum*, and so declined the opportunity.

129. Ultimately, Mr Chauhan said that by January 2021 he had concluded that significant further cost was required to complete work on the Factory to bring it to its maximum theoretical capacity, that it was highly unlikely that a suitable client base could be found, and that in any event because of the size of the Factory, the Company's profits would still not cover overheads and the business would continue to make losses. Despite having spoken to a large number of potential customers, "*none of them went anywhere*". He said (and I accept) that it would have made no logical sense to have ignored genuine opportunities, and that every lead was pursued as far as possible. He also said (and again, there is no reason to reject this evidence) that he explored the possibility of cutting overheads, but it proved to be impossible (for example by reducing the number of staff, but if anything, greater staff numbers would have been required).

130. Mr Chauhan has long experience in the food industry, holding positions of significant responsibility at Tesco in particular. I cannot ignore his evidence and explanations, or that the Company failed despite his and others' best efforts (including those of Mr Axford, whose evidence was, in many respects consistent with that of Mr Chauhan).

131. In March 2021, when the Factory's High Shear Mixer broke (caused, said Mr Coll, by the inappropriate use of frozen product, contrary to instructions) Mr Chauhan said that Market Fresh decided not to pay for the repair and that it should terminate its lending facility to the Company. Mr Marshall described the breakage as the "*straw that broke the camel's back*" and said that he was advised by Mr Chauhan against injecting the money necessary to repair it.

132. The Company eventually went into liquidation on 9 November 2021, on a petition presented by a creditor on 21 June 2021. Before then, in about March 2021, there had

been some discussion about the possibility of an administration. Mr Marshall accepted that had the Company gone into administration in March 2021, whilst it still had its client base, he might have made a "*small offer*" for it, but that Mr Seneschall had refused to agree to administration so that instead, the Company went into liquidation. He pointed out that Mr Seneschall made no offer either to buy the business or any of its assets from the Official Receiver, or to buy the business or any part of it from administrators (in the event of an administration), and suggested that this was because he knew, by then, that it was not a good investment, and that the (Mr Seneschall's) business model was and had from the outset been fatally flawed.

133. In the statement that she made on oath on 23 November 2021 (under section 235 of the Insolvency Act 1986) in the context of the Company's liquidation, Ms Jones said, amongst other things:

> "*Factory went live December 2019, money was very tight. Payment plans in place, was hard but the future was looking good*." And then, after October 2020, "*For myself and David McCormick, day to day conversation happening. New business was coming in. John, then decided to sue us all, me, David McCormick, Dave Marshall and the company. Which is still ongoing and I suspect is ongoing for sometime yet. At the start of this year, Market Fresh had put more money in and were going to put more. They wouldn't put more money in until shares discussion. Had 3 attempts at board meeting, John wouldn't come. Finally he did and Market Fresh said we'll put x amount of money in and by x date until we agreed to how you were going to sustain the business, it would be a loan. February this year was when this happened. Solicitors were back and forth, were going to have a meeting to agree a way forward. Valuer showed valuation of company as zero and advised to put into administration. I will have that somewhere; I can provide copy. We had a mediation meeting, me, Dave Marshall, David McCormick, John and 2 legals. To try and thrash it out. Market Fresh were prepared to put money into business. John wouldn't agree. Dave Marshall offered to buy John out, but he refused. John offered Market Fresh £20k to buy them out and me nothing. Mediators stepped in and out of zoom rooms, one to another. This is hearsay, suggested John had use of factory certain times and Market Fresh to have certain times. They pay only costs*

associated with their times. Market Fresh said Lynne works for us on designated days with prior notification. John wouldn't agree and mediation failed."

134. From this, it appears that even as late as March 2021, the Company or its business might conceivably, in some form, have survived (albeit possibly following an administration, shorn of debt) but that the relationship between the parties was so damaged (and possibly, their respective views of the Company's value were so different) that nothing could be agreed. Rationally, Market Fresh would not have stopped investing (and so lost the whole of their very considerable investment) had that been avoidable.

135. Other documents also referred to the contemplated administration, and supported the conclusion that the business might, in some form, have survived. For example, Mr Chauhan was asked about an email which he sent to Mr Marshall and others on 14 April 2021 (Subject: "*Trisant Projections (optimistic view)*") to which he attached "*a revised view, based on more optimistic trading conditions as we come out of lockdown*", a five-year summary for the Company, a breakdown by year, and cash flow requirements for the first three years. He concluded, "*If you have any questions, please let me know. I will start working on the "roadmap" with Eileen for Market Fresh to file for Administration and understand the opportunities for a "pre-pack" buyback, as well as understanding what costs/provisions that maybe needed*."

136. Despite accepting the substance of much of what Mr Chauhan said in evidence, his explanation of the projections dated April 2021 was unimpressive. He said he could not remember anything about them; his answers were evasive; he attempted to suggest that his optimism was in relation to the recovery of the national economy after the end of the Pandemic rather than specifically about the Company's prospects. The figures attached to his email showed sales of £9.4m in 2025 - 2026 and moved to positive net profit and positive EBITDA in 2023 – 2024, and in my judgment, Mr Chauhan's evidence in this regard was influenced by a desire not to accept the possibility of any value of any sort in the Company's business. Having said that, the figures also showed a loss of £1.6m in the year 2021-2022 which the Company would have had to overcome, and implied the necessity of a larger facility. Mr Chauhan accepted that Market Fresh had examined the possibility of an administration order and a connected purchase of the business, but said that their plans had not progressed as far as agreeing a purchase price. The documentary evidence was equally plain that a pre-pack sale and purchase had been considered (as

also shown, for example, by the reaction to the letter before action sent on behalf of Oggs by Mishcon de Reya on 23 April 2021).

137. As to the ultimate cause of the Company's liquidation, the substance of Mr Marshall's evidence was that it was a result of Mr Seneschall's dishonest or incompetent business forecasts combined with his concealment and/or incompetent underestimation of the Factory's actual construction costs (which I accept to have been significantly inaccurate) which meant therefore that the investment was not enough and which caused the Company to suffer cashflow problems (which undoubtedly it did) combined also with certain capacity issues, in particular (but not exclusively) concerning the supply of electricity to the Factory, to which I now turn.

Electrical Capacity

138. As to the electrical capacity issue, the Respondents' allegation was that the Factory had insufficient power to run more than one production line at any one time, and that - potentially - it would have costs "*millions*" to upgrade.

139. At the outset, I note that neither in Mr Seneschall's suspension letter of 20 July 2020 nor before then in any written criticisms of Mr Seneschall or when he was eventually dismissed, was there was any mention of the electrical capacity issue or of issues concerning the Factory's capacity more generally, despite the Respondents (including Ms Jones, who had responsibility for the electrical installation within the Factory) having both the opportunity and motive to raise them. Furthermore, in her statement referred to above at paragraph 133, Ms Jones made no mention of the alleged electrical capacity issue as a cause or contributory cause of liquidation. I agree with Mr Northall's submission that the complete absence from the (extensive) documentary record of any reference to concerns about electrical capacity, is only consistent with a conclusion that no such concerns really existed.

140. Mr Marshall's evidence was that once production for Muru had commenced, in December 2019, it "*brought to light the fact that the factory was significantly underpowered with equipment shorting out when attempting to run production simultaneously*". He said that the problem had been brought to his attention by Mr Chauhan (and therefore, not until October 2020, at the earliest, when Mr Chauhan began to work for Market Fresh). He referred to Mr Seneschall's witness statement at the

Liability Trial in which it was said, in relation to work done in December 2018, that the Factory's capacity had been increased to 230KvA, and that it had taken "*all the remaining power from the sub-station, but it still wasn't enough to run all the machines at the same time*". Mr Marshall said that as had been "*verified by Western Power Distribution*", the whole of the electricity on the industrial estate (in which the Factory was situated) had been absorbed by the other tenants, and that potentially it would have costs "*millions*" to upgrade. The alleged "*verification*" was not supported by any documents or communications produced in evidence, although Ms Jones said that it would have been contained in emails (not now available, or at any rate, disclosed).

141. Mr Seneschall's response was that the supply figure stated in his witness statement at the Liability Trial was "*wrong*" and that he had been given it by Ms Jones. The correct figure he said was 276KvA, but there was a single cable supplying the Factory and it was the capacity of the cable that limited the supply of electricity to the premises. He said that they had taken what the cable could manage, and that in any event they had never intended (and it would not have been safe) to run all three production lines at once, all of which would needed to run at their peak to reach or surpass the limit. He said that there was sufficient supply for what they could do at the time.

142. At the Liability Trial, in evidence, Mr Seneschall had said that one solution to the problem of supply would have been to pay some £60,000 to Western Power for the construction of a new substation, which would have taken between 12 and 18 months; he said that this is what Ms Jones had been told.

143. However, in his evidence at the Remedies Trial he said that this was what he had believed both at the time and at the time of the Liability Trial, but that since then, he had discovered that the reality was different. He referred to an email sent to him by the National Grid on 28 July 2023 (since I handed down the Liability Judgment) which suggested that an augmentation to 500 kVA would take about 14-18 weeks and cost about £100,000. It is difficult to attach any real weight to that email. It was produced long after the events in question, at a time when circumstances might well have changed (Ms Jones said for example that the industrial park had been expanded, although there was nothing to substantiate that evidence) and it was produced informally, not for the Company itself, and not for the purposes of giving or providing evidence in proceedings.

144. In any event, Mr Seneschall referred to the fact that there were no contemporaneous documents to suggest that there was a supply issue thought to be insurmountable. Had it been a genuine problem, Ms Jones would have known about it and would have raised it – but she did not. Moreover, he said, an alternative solution would have been to buy an additional generator, second hand and inexpensive, to use with the 2,500 kg cooker. Ms Jones' evidence was that the electricity problem arose after Mr Seneschall had returned from Finland having agreed (with Tetra Pak) to the installation of the 2,500kg cooker. She said she was told by Mr Seneschall not to tell Tetra Pak. I do not accept that evidence: it was unsupported by any documents, has not previously been said (despite Ms Jones having good reason to say it had it been true) and is inherently unlikely – had there been such an issue, there would have been little incentive to conceal it from Tetra Pak, which in any event, would likely at some point have discovered it.

145. Similarly, Mr Williams' evidence was that he was aware that the electrical capacity of the factory was "*limited*", but not that this was "*a problem*", and that a limited or inadequate supply issue was one which he had seen overcome previously in his professional life, by the installation of additional supply.

146. As to the electrical fault that arose during the Muru production run in December 2019, Mr Seneschall said that the problem was caused not by an inadequate supply as suggested by Ms Jones, but by a fuse blowing on a large dryer unit. He said that an engineer was called, and that the problem was rectified by means of the installation of a larger fuse.

147. In an email that he wrote to Ms Jones on 7 January 2020, he said:

> "*In the circumstances, I think it would be sensible to offer them* [this was a reference to Muru, the customer] *the option of just taking the existing stock but saying we are happy to produce a second batch if they feel they needed.*
> *As for the reasons it "blew" I think we say it was a major electrical failure, caused by either the Surdry retort itself or the cardboard packer/drier; investigations with Tetra are ongoing, with Mark on-site and Lund looking at the data from the technical link. This suggests it is a Tetra issue, one which they are working to understand and resolve. Product safety has to be our priority and under the circumstances given the delay in being able to retort we had to take the decision to dispose of the batch. I think they will agree this was the right action to take*. …"

148. This was written in response to Ms Jones' email earlier that day, sent to Mr McCormick and Mr Seneschall:

> "*Are you both aware on Christmas Eve we lost just over 10,000 cartons of Muru Greek Lamb product.*
> *The root cause of this is still indefinable.*
> *Possibilities include-*
> *Surdy Retort malfunction*
> *Pumps ceasing on the cooling fans*
> *Lost phase on the electricity supply due to either the above faults or the checkweigher/blower/handling system/compressor*
> *The cost of this would be the finished product cost (as we lost packaging) including labour, plus another days direct labour and disposal costs.*
> *The current stockholding of lamb cartons is 11,000 units. If we rerun this will deplete all cartons and Muru could hold us responsible for the cost of the last cartons.*
> *Do we plan to rerun the lamb or do we offer Muru the option of just taking the current stock?*
> *As Muru are on site tomorrow, I think we should also be aligned on our version of the events.*
> *We could either admit there was a major electrical failure and due to us not wanting to jeopardise product safety we made the decision to dispose of the product we can put some of the blame on Tetra here as was indicated in my emails before Christmas.*
> *Thoughts please?*"

149. In this exchange, Mr Seneschall and Ms Jones were together deciding how best to deal with their customer, Muru, and I infer, hoping subtly to suggest that Tetra Pak was at least to some extent responsible for the problem, not the Company. But I also surmise that there had been a major electrical failure of some sort, not caused by an insufficient supply (of which there is no mention at all). Having said that, the actual cause of the problem appears not to have been quite as straightforward as Mr Seneschall would now have the Court believe: the cause appears not to have been quite as simple as a mere blown fuse caused by "*too much load on the first phase*". Clearly, at the time, Ms Jones

did not know what the root cause was (it was "*indefinable*") and she was unable to explain in her evidence how an undersupply of electricity would or could cause a fuse to blow.

150. Mr Coll (of Tetra Pak) said that he was not aware of any reason why the Factory could not run both the Tetra Recart Line and either of the pouch lines at the same time (although even Mr Seneschall conceded that was not possible). He said (in support of Mr Seneschall's evidence) that Ms Jones' evidence about the electricity problem during the Muru production in December 2019 (that it was caused by a lack of electricity supply) was not correct, and that all that happened was that "*a fuse blew*", because too much of the required supply for the Tetra Recart Line had been placed on just one of the three phases that came into the building; he said that by spreading the load more evenly across the three phases, he believed that there were no further issues with electrical supply to the building. He accepted that he was not on site when the problem arose, but said that he had had conversations with people who were on site, although not the electrician (and although he did not identify them). More generally, he said (and I accept) that nobody had ever mentioned to him an issue in respect of electrical capacity including the project managers who planned the project and who he said would have considered the point. As to the reason for the problem in December 2019, his evidence was of no real weight, since it was based on what he had been told by unidentified others.

151. As to the issue of electrical supply capacity, my conclusions on the evidence are that:

151.1. as was plain from the contemporaneous emails, there was an electrical issue of some sort which manifested itself in December 2019 during the Muru production run. It was solved but its root cause was unknown then and remains unknown now (and is now very probably unknowable). It is however unlikely to have been an insufficiency of electrical supply, which was not mentioned in the contemporaneous documents. In any event, had that been the problem, it would have remained a problem, and although Ms Jones said that subsequently it recurred once, during production for Oggs, there was no documentary evidence to support that, and in any event, she referred only to a single occasion.

151.2. undoubtedly however there was (essentially it was common ground) some or a potential insufficiency of electricity supply to the Factory and it would have taken some time and some money to solve it. Although in principle, it is likely

that the issue was soluble, the cost of meeting it is now impossible to know. Having said that, it is very unlikely in my judgment to have been in the order of "*millions*"; much more likely is something in the region of what Mr Seneschall himself said at the Liability Trial. Had it been some much larger amount, there would have been more documentary evidence of the problem, and reliance would likely have been placed on it in respect of the actions taken against Mr Seneschall by the Company in 2020.

151.3. Ultimately however, that insufficiency - whatever it might have been - did not in fact cause any interference with the business as it was and came to be conducted, and there is no evidence to suggest that it caused or contributed in any significant sense to its liquidation. Insofar as relevant, I reject the suggestion that had the problem, such as it was, been told to Mr Marshall in 2019, he would not have agreed to make any investment.

Other Capacity Issues

152. In addition to the electrical capacity issue, the Respondents raised, in particular in their representations to Mr Haddow (and albeit unpleaded, and albeit previously unheralded, whether at the Liability Trial or in their Remedies Points of Defence) a series of additional "capacity" issues. Their purpose was to persuade or demonstrate to Mr Haddow that the Company could not (ever) achieve its forecast earnings (and was inevitably unprofitable) because of inherent limitations on production volumes and on the level of achievable gross margin. Included within their representations, in support of their case, were 4 "scenarios" in which they took the August 2019 Forecast (as defined below at 182.5) and amended its content and assumptions in different respects, to show that it was in practice unachievable.

153. Although I deal in detail with the evidence of Mr Haddow below, and his treatment of various forecasts, it is convenient to set out here my assessment of the evidence in this respect.

154. At the outset, I accept the overarching, fundamental objections made on Mr Seneschall's behalf, that:

154.1. the manner and timing of production of the representations about capacity was unsatisfactory: it was wholly unclear who or what was the source or author of any particular part (and it was accepted by Mr Marshall and Ms Jones that a range of people had contributed); moreover, having not been raised previously, Mr Seneschall was not in a position to construct any sort of reasoned rebuttal, and no or inadequate disclosure was given;

154.2. the representations contained numerous undocumented (effectively bare) assertions and allegations about capacity;

154.3. in the circumstances, it was not fairly possible to meet, interrogate or assess those representations; and,

154.4. in any event, the baseline production performance used in the assessment of the Factory's capacity was its ***first*** ever production run, in December 2019, for Muru. As a matter of common sense, later production runs for different customers, making different products (of which no evidence at all was produced) would likely have been more representative - I accept for example, that there would probably have been teething problems and inefficiencies that would probably have been eliminated over time. But in any event, evidence of those later runs (of which there must have been many) would obviously have been relevant. Even taken alone, that deficiency wholly undermined and rendered unsafe the Respondents' capacity representations in this regard.

155. Having said that, Mr Haddow's evidence (as he said in his Report) was not based on the scenarios set out in the Respondents' representations. Ultimately, his view of value was not based on capacity limitations, but on the Company's financial state, combined with the profound uncertainties surrounding its acquisition and conduct of future business. In the circumstances, in closing, the Respondents did not in this regard seek to place any substantial reliance on these representations.

156. In any event, more specifically, the Respondents' capacity representations were unreliable for the following additional reasons, which I shall consider only briefly given the broader and more fundamental objections explained above, and also their eventual irrelevance to Mr Haddow's opinion.

The Rate of Production

157. Mr Marshall referred to a "*Process Flow*" apparently produced by Ms Jones, which he said illustrated the realistic capacity of the Factory, containing notes and timescales, and identifying which equipment could not be run together. He said that it showed that the maximum capacity on the Tetra line was of 154,000 units per month, and on the pouch line, of 113,124 units per month based on 21 or 22 working days per month, 12-hour shifts, three days per week production and two days packing and assembling. Even that, he said, may still have been optimistic. Based on the Process Flow, and on the Muru price of 67p/unit, he said that the maximum value of sales the Factory could have achieved was £103,000 per month, far short of the forecast figures. In the circumstances, he suggested that in order to break even and repay its debts within two years, the business would have needed to secure customers and produce products at nearly 9 times the rate which was in fact possible.

158. As to production rates (based, as I have said, on the Factory's first ever production run, using the Tetra Pak line) the parties were agreed that the December 2019 production run for Muru produced a total of 110,232 units. The issue was how long it had taken to complete that run. The Respondents' evidence was that it took 20 days. Mr Seneschall's evidence was that production was complete within 5 days. He also complained that the Respondents' calculations were based on the smallest carton size (200 ml) in respect of which margins were tightest, and in respect of which production times were longest. The production rate was important because it would determine the Factory's maximum output on the Tetra line, said by the Respondents to have been 154,000 units per month, and would, for example, affect the calculation of direct labour costs (shorter but equally productive runs obviously cost less).

159. Ms Jones' evidence was that the December Muru production began on 16 December 2019 and that retorting finished on 24 December, 8 days later. However, in addition she referred to the day of preparation (the day before 16 December) and she referred to various steps (such as stacking and palletising) required after retorting to make the product ready for collection.

160. Mr Coll's evidence supported that of Mr Seneschall. He said that although he could only estimate the likely production rate (having not himself been present or involved) he

thought a more realistic monthly rate would have been 400,000 units per month, and at least 308,000 units per month. Overall, he considered Ms Jones' estimate of 11,500 cartons per 12-hour shift, to be "*very low*". His "*understanding*" was that during its first ever production run, in December 2019, 110,032 units were produced in 5 days (from 16 – 20 December), meaning 22,000 units/day, which he thought a much more accurate indication of the capacity (particularly since it was the first ever full operation of the line) and which for reasons of efficiency (in particular in respect of cleaning times) corresponded with the minimum order quantities in the Muru contract. Although Mr Coll was not able to give direct evidence of what happened at the Factory, I do attach some weight to what he said, given his experience in relation to Tetra Pak production elsewhere.

161. Mr Coll was cross-examined by Ms Jones, and agreed that in making those estimates he had taken no account of wastage arising from "*burn and spillage*", but said that it was possible to clean the system using a specially designed "*drop-in ball*" - even in a modified system as at the Factory, albeit he accepted that had never seen it tried and could not say definitively whether it was possible.

162. In common with much of what was contained in the Respondents' representations to Mr Haddow in respect of capacity, the issue of the time taken to complete the run in December 2019 was not one in connection with which I was assisted by any relevant documents. Nonetheless, having heard the witnesses' oral evidence, it seemed unlikely to me that the various processes required after the completion of retorting would have taken 12 days. It is therefore unlikely that the Muru run took 20 days - although it is not possible to reach any safe conclusion about the length of time in fact taken, which (with preparation) was more probably in the region of 13-15 days. Moreover, Ms Jones accepted that production rates would have improved and become more efficient with experience, albeit that in their representations to Mr Haddow, they had not used figures relating to any subsequent production runs.

163. Mr Coll also said that although there needed to be batch production so that the filling machine could be paused to allow for batch cooking and for the retort cycle to be completed before starting up again to fill the next batch, at some of the factories where Tetra Lines have been installed the lines were run for 24 hours a day, every day of the week, using 3 x 8 hour shifts or 2 x 12 hour shifts, and that this "*could have worked for*

Trisant". I understood Ms Jones to accept that this "*continental shift pattern*" could have been operated, although of course it would have involved greater labour costs (which may or may or may not have been compensated for by additional profit). In any event, the Respondents' representations took no account of the possibility of simultaneous or overlapping packing and production.

164. Based on this evidence, it would not be safe to assume that an average month of work comprised 21 days apportioned to 14 days production, 7 days packing.

Price and Gross Profit Margins

165. In addition, the representations assumed a maximum achievable gross margin of 12.6%, and an average price per unit of 67p for Tetra, and 70p for pouches. Given that the pouch lines were never operated, and in the absence of proper disclosure in respect of the Company's customers and production, I reject those as safe assumptions.

The Pouch Lines

166. As to the pouch lines, there was also an issue regarding the amount which it would have cost to bring them fully into operation. The Respondents' claim was that it would have cost £223,000, as follows:

1. Racking for materials circa. £30k

2. Lagging on pipes in winter circa. £20k

3. Air compressor circa. £20k (second hand 20 years old)

4. Hot set cover circa. £10k

5. Both pouch lines required – conveyor belts, tables, x-ray / metal detector, check weigh machines and inkjet coders. Second hand this would have cost circa.

a. Belts & tables - £3k x 2

b. X-ray / metal detector £18k x 2

c. Check weighs £18k x 2

d. Inkjet coders £7.5k x 2

6. Plus, to just maintain volume of the Muru launch the factory required external ground works to install a 3-phase interceptor to be complaint with Welsh water for trade effluence circa. £50k

Total required = £223,000

167. Mr Marshall accepted that with further investment, it would have been possible to get the pouch lines running, but there were simply no customers for it (or which would have justified the cost, for which there was in any event no available funding).

168. Mr Seneschall's case was that these figures were unevidenced, and that the true cost would have been in the region of £17,500. In cross-examination, Ms Jones agreed that, in order to run pouch line production "*lawfully*", the Factory would only have required that which was referred to at item 5 (the *"conveyor belts, tables, x-ray/metal detector, check weigh machines and inkjet coders*") in addition to various additional but inexpensive items (for example, hopper pumps). I therefore accept that pouch line production would have been possible, at any rate, at an additional cost of some £100,000 (or £50,000 for one of them) although I doubt that in the absence of at least some of the other items (for example, racking) it would have been practically desirable or operationally efficient.

Conclusions as to the Causes of the Company's Insolvency and Liquidation

169. On the evidence, my conclusions are as follows.

170. First, as at November 2019, the Respondents did not subjectively consider the Company to be doomed to inevitable failure.

171. Second, as to the actual (and underlying) cause or contributory causes of its eventual liquidation, numerous possibilities were raised:

    171.1. that it was a result of Mr Seneschall's and the Company's inaccurate costing and income forecasts, meaning that the investment made by Market Fresh was insufficient to complete the construction of the Factory more quickly and in the meantime to meet the continuing overheads, which created cashflow and overall funding difficulties;

171.2. that it was a result of Market Fresh's decision to drip-feed the investment, meaning that the Factory did not begin in operation soon enough (and again, the business could not secure customers or produce income but still had overheads and expenses);

171.3. that it was a result of the general managerial and manufacturing incompetence and/or dishonesty of those who succeeded and supplanted Mr Seneschall (in particular, Mr McCormick and Ms Jones) and that in any event, had his involvement continued (even more so had theirs been ended instead) the business, under his control, would have prospered; I have rejected that suggestion;

171.4. that it was a result of capacity and/or manufacturing issues, of one variety or another; I have rejected the allegation that the liquidation was caused by electrical or other capacity issues as such;

171.5. more prosaically, that despite the best efforts of those involved, it simply failed to secure enough custom – whether as a result of mischance, or (which is certainly to an extent possible) because of its comparatively small size, and related to that, the variety of potential customer, excluding large manufacturers dealing in "*huge bulk*", albeit low margin;

171.6. that there came a point at which Market Fresh simply decided to stop investing/lending, having already injected c.£2.8m, in circumstances where the Company was not yet profitable or imminently profitable, and in circumstances where there was an unresolved dispute with Mr Seneschall; essentially, this was the point I made in the Liability Judgment at [453].

172. The first two of those (albeit emanating from different sides of this dispute) are very closely related: both of them identify as a fundamental problem that there was not enough money to build the Factory as quickly as might have been possible, and as was necessary to achieve success; but each ascribes a different reason for that cause. As I have explained, the reasons are now unimportant (and both may to some extent be true) but I accept that the delay (and its consequent commercial and financial costs) was a real and substantial problem, and contributed to the Company's failure, in combination with the

fact that for whatever reason, the business simply failed ever to get going: it stumbled and struggled, but never took flight. Mr Haddow's summary of its financial position set out above, makes that fact abundantly plain. In the circumstances, there came a point at which further investment was unjustifiable, and possibly unaffordable – the Company had drained Market Fresh of available funding and support. Mr Seneschall blamed the incompetence of others, but I do not accept that suggestion; more likely, it was a result of chance, and of the Factory's overall scale in very highly competitive markets. The Company's failure therefore resulted from a complex of related reasons. To similar effect, in closing, Mr Northall suggested it failed for "*commercial reasons*".

173. Third, in the circumstances, it cannot be said that as at November 2019, the Company was bound to go into liquidation: none of its inherent weaknesses and none of the ultimate causes of liquidation were such that its failure was already by then inevitable, although its prospects were highly uncertain.

174. Fourth, it cannot be said that the Company's liquidation was caused by the conspiracy to remove Mr Seneschall, or by his absence or exclusion from the business. It cannot be said that but for his exclusion, the business would have survived.

175. In the circumstances, it is not unfair to insulate the Petitioner from (but leave the Respondents exposed to) the consequences of the Company's liquidation.

    175.1. The Respondents did not act to exclude the Petitioner in the expectation of the Company's failure. They wished for the fruits of its success but without the Petitioner's involvement, whether in management or (on my findings at the Liability Trial) as a shareholder; it is not unfair that they should assume the risks of its failure.

    175.2. The scale of the liability in respect of the security given by the Petitioner for the Reward Loan is a natural consequence of the misconduct and the passage of time: had the Respondents excluded the Petitioner but without exploiting his home as security (for example, by themselves providing the security) the liability would not have arisen.

175.3. The Petitioner cannot be said to have been responsible for the Company's liquidation.

175.4. The Company was not bound to go into liquidation as at the Valuation Date or indeed as at the later date of the Petitioner's suspension; it was not doomed to fail.

175.5. The remedy does not put the Petitioner in a better position than he would have been in but for the wrongdoing, in that had he been excluded on fair terms in 2019 (as I have determined them) he would not have been exposed to the risks of insolvency. In any event, that is not the test under s. 996.

175.6. The fact of the subsequent liquidation does not therefore affect the relief that I have decided to grant.

[F] The Company's Value as at the Valuation Date

Mr Haddow's Written Report

176. Mr Haddow is a chartered accountant and a partner at the accountancy firm Menzies LLP, where he leads the Forensic Accounting and Valuations Services team, having specialised in forensic accounting and valuation work for the past 14 years following his qualification at EY in 2009.

177. According to his curriculum vitae, he has produced expert witness and quantum reports, and has acted as an expert in the context of arbitrations, High Court civil litigation and in the Criminal Courts. On several matters, he has been appointed to act as a single joint expert. His relevant recent experience includes acting as a single joint expert in respect of the disputed share valuation arising from an unfair prejudice petition relating to a themed bar and restaurant business and acting as a single joint expert to determine the value of certain property holding companies. He has conducted numerous share and business valuations for commercial purposes, outside the context of litigation. In his oral evidence he described having worked for "*about a year*", albeit as part of a team, on the valuation element of work done for the well-known company Danone, concerning the business of baby food production; he also said that he has worked as a valuer in the

context of craft breweries (and therefore in the food and drink industry) which he said had some similar features to the context in which the Company operated.

178. I accept that Mr Haddow is a suitable and experienced expert, well-qualified to provide evidence in respect of the Company's value.

179. The parties' agreed Letter of Instruction was dated 5 July 2023. It asked Mr Haddow "*to provide an expert opinion to the Court on the price of the 804 Ordinary Shares of £1 each in the capital of Trisant Foods Limited presently registered in the name of the Petitioner …*" on each of three dates, being 9 November 2019, 13 July 2020 and 17 March 2021. It stated that it was for Mr Haddow to apply such basis or bases of valuation as he shall consider appropriate, by reference to the assets, liabilities, profitability and future prospects of the Company as at each of the valuation dates, based on the information which would have been available as at those dates. It then set out various facts and events that were either agreed or which had been found by the Court in the Liability Judgment.

180. Attached to the agreed Letter were various documents, contained in 25 numbered Appendices. In addition, Mr Haddow was told that should he wish to see them, he would be given access to all of the books, records and documents relating to the affairs of the Company in the possession of the parties, and of the Official Receiver, from the date of its incorporation.

181. Mr Haddow produced his written Report on 6 September 2023. At paragraphs 1.4 and 1.5 he recited the essence of his instruction, to "*report on the price*" of Mr Seneschall's 804 ordinary shares in the Company by reference to its assets, liabilities, profitability and future prospects as at each of the valuation dates, and without the benefit of hindsight.

182. At paragraph 1.11, he referred to "*five forecasts*" that had been provided to him with his instructions and which appeared to him to have been available as at each of the valuation dates (and which in any event were certainly created before 9 November 2019). Those forecasts were:

    182.1. a 3-year forecast Cashflow, Profit & Loss and Balance Sheet, prepared by Mr Brian Roberts of Business Wales in July 2018, based on information provided to him by Mr Seneschall.

182.2. an updated version of that forecast produced in January 2019 by Mr Williams, and sent by Mr Seneschall to Mr McCormick and Mr Marshall on 11 January 2019.

182.3. the business forecast and associated documents (certain customer timing plans and income expectations) sent on 9 May 2019 by Mr Seneschall (who said that he was being "*very conservative in my income forecasts*") to Mr Marshall, as a "*rough guide to income over the next six months based on the customers we've talked to so far and what their quantity requirements are*". In the Liability Judgment, I described this email and its contents as "*untrue and misleading*", designed to persuade Market Fresh to invest in the Company.

182.4. an updated costs forecast for the Company provided to Mr Marshall and Mr McCormick when they met Mr Seneschall on 2 July 2019, which showed the total (prospective) investment as £1,050,000, including £700,000 in costs, plus £350,000 to discharge the Nucleus Loan, and also included an income forecast of £300,000 over the 3 months from June to August 2019 for Market Fresh's own products.

182.5. a revised 3-year forecast for the Company prepared by Mr Williams using information provided to him by Mr Seneschall and Ms Jones and sent to Mr Marshall, Mr McCormick and others on 12 August 2019; the forecast was based on certain assumptions, including that all costs other than rent (which was to be paid quarterly in advance) were to be met in the month incurred, and that all overdue payments as at 31 August 2019 had been settled and the bank balance set to zero ("**the August 2019 Forecast**").

183. Having set out the background at Section 2, he summarised his approach and conclusions at Section 3, that:

183.1. he had taken as his approach the assessment of the Company's "*Market Value*" as defined by the International Valuation Standards Council, as "… *the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length*

transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion";

183.2. he had considered all typical valuation methodologies and the terms of the investment made by Market Fresh;

183.3. and that having done so, in his opinion, as at each valuation date, the Company had a nil or nominal value, whether by reference to:

183.3.1. a "*Multiple of Earnings*" or "*Net Asset*" basis (the Company having at each date been loss-making, not fully operational, and balance sheet insolvent), or by reference to a "*Dividend Yield Approach*" (no dividends having been declared, or lawfully possible); or,

183.3.2. the "*Discounted Cash Flow*" method (this being Mr Seneschall's pleaded case) whether because of the difficulties in obtaining reliable forecasts and/or determining an appropriate discount rate (which would in any event be significant) and/or in any event, because of the likely need for additional funding to achieve forecast results); or,

183.3.3. the terms on which Market Fresh invested and became a shareholder as contained in the ISHA and the HoTs (because, amongst other things, that investment resulted in payment to the Company rather than to another shareholder in return for the sale of his shares, and a purchaser would know that the Company itself required further substantial injections of capital, which knowledge would affect his willingness to pay another shareholder in return for shares).

184. In Section 4, Mr Haddow explained a number of different methodologies, potentially relevant to the Company's valuation, in particular:

184.1. those based on the capitalisation of future maintainable earnings, which involve multiplying the expected maintainable earnings by actually observed, comparable market multiples;

184.2. a discounted cash flow approach, which discounts to their net present value (using an appropriate discount factor to account for the risks of failing to achieve the forecast) the company's forecast future net cash flows, and which then requires the deduction of any net debt to produce an Equity Value;

184.3. a dividend yield approach, which involves the capitalisation of forecast future dividends;

184.4. an asset based approach, albeit not ordinarily used in the valuation of a trading entity.

185. In Section 5 (set out above, but repeated here in context) Mr Haddow summarised the Company's financial performance for each of the periods prior to the valuation dates, having considered its financial statements, including full accounts to 30 July 2019, and management accounts and SAGE records for the period from August 2019 to March 2021 (noting some difference between the records in respect of the year to March 2021). He explained:

185.1. that the Company was loss-making throughout its trading life: as at 30 July 2019, it had incurred a net loss of £709,702, and by 28 February 2020, a net loss of £647,026; it failed ever to achieve a positive gross profit margin; in the 7 months to 28 February 2020, its gross profit margin was -336%;

185.2. that the Company was balance sheet insolvent as at 30 July 2019 (net liabilities of £709,602) and (by reference to its SAGE records) as at 7 January 2021 (net liabilities of £1,362,696) and as at 9 March 2021 (net liabilities of £1,455,836);

185.3. that the Company received payments from customers of £6,300 in 2019, of £427,550 in 2020 and of £95,083 in 2021 (a total sum of £528,933 over the whole course of its life), in addition to payments from Market Fresh amounting to £797,930 by 9 November 2019, £1,837,117 by 13 July 2020, and £2,502,188 by 17 March 2021; these sums were used, notes Mr Haddow, "*to pay debts, often overdue, and limit the use of the Company overdraft*"; it follows that the Company received from Market Fresh £1,973,255 more than it received, in aggregate, from all of its customers over the whole course of its existence (in

addition to the sums lent by Mr Seneschall himself, and others); as at 9 November 2019, £7,064 stood to the credit of the Company's bank account;

185.4. as at November 2019, the Company had debts amounting to £89,609.67, payment of which was overdue, despite the loans and investments made by Market Fresh and others; Mr Haddow noted that this "*supports the observations in the Judgment that the Company was undercapitalised*", and that as "*the Company was not cash generative through trading, it could only have generated cash with the injection of further investment, most likely in the form of debt*."

186. In Section 6 of Mr Haddow's Report, he considered the Company's various financial forecasts, referred to above at 182, all of which pre-dated 9 November 2019, but of which the most proximate in time was the August 2019 Forecast, which he therefore considered in greatest detail. In addition, he considered a further forecast provided by the Petitioner's solicitors, dated February 2021. The availability of reliable forecasts is vitally important to the use of earnings-based valuation methods. Mr Haddow repeatedly returned to this point and emphasised it in cross-examination, as I explain below.

187. In respect of the August 2019 Forecast, amongst other things, Mr Haddow concluded that "*whether it could be adjusted or not*" - and that was, in my view, an important part of Mr Haddow's reasoning and conclusions – it was "*not a reliable basis*" upon which to conduct a discounted cash flow valuation. The Petitioner did not produce an alternative cash flow on which to base a valuation as at the Valuation Date.

188. At Section 7, Mr Haddow stated his conclusions. Amongst other things, he said as follows.

188.1. First, that having generated neither profits nor EBITDA before any of the valuation dates, the Company's value (based on the capitalisation of its earnings) was £ nil as at each of those dates.

188.2. Second, for a variety of reasons, contrary to the Petitioner's stated case and submissions, that it was not "*appropriate to adopt a Discounted Cash Flow approach to the value of the Company's equity*". He noted that "*in circumstances where there is a high degree of risk, a DCF valuation is sensitive*

to minor changes to scenarios and risk factors", and that "*if the demonstrably unreliable forecasts were used at all, the risk factor that would be applied to it* [sic] *would be so high that the Company's Enterprise Value would be negligible. This is before considering a necessary adjustment for the Company's net debt which is likely to be significant given the cash required to get the factory fully operational, and would be deducted to calculate the Equity Value and the value of the shares*."

188.3. As he said at paragraph 7.25, "*Doubts about the company's capacity, its ability to fund its operations and settle historical debts without external investment, and its record of forecasting which appears to have been optimistic and were not achieved at the first of the Valuation Date* [sic] *would cast doubt on the ability of the Company to achieve the forecasts it produced. This would increase the risk applied to the forecasts if basing the valuation on a DCF, <u>which is the only basis upon which an Enterprise Value might be achieved given the net liabilities of the company, its historic losses and negative EBITDA</u>*." (The emphasis is mine.)

188.4. Third, that the Company made losses throughout its trading life and had net liabilities as at each of the valuation dates, and that therefore on a net asset basis the Company had no value as at any of the valuation dates.

188.5. Fourth, that he did not consider it appropriate to assume that because Market Fresh ultimately held 50.1% of the Company's shares, having in return invested £1.8 million in the Company, the remaining 49.9% of its shares should be valued at the same "price". This was because, on a purchase of shares from a shareholder, the price would typically go to the seller rather than the company, and because Market Fresh may be described as a special purchaser that may not have undertaken financial due diligence in a manner that a willing buyer acting knowledgeably and prudently would have done, and that in any event it does not follow that having acquired 50.1% of the Company's shares, Market Fresh or any other purchaser would have been willing to pay the same sum per share in order to acquire the remaining shares.

188.6. At paragraphs 7.26 and 7.27, he explained that he had "*spoken to experienced corporate finance professionals at my firm who work on deal structuring and provide detailed financial due diligence for transactions*", and that they had explained "*that in circumstances where a company is in the development phase and working towards operational profitability, it would be common to purchase of* [sic] *shares at nominal value and some sort of option to acquire further shares in the future whilst providing debt in the form of loan notes which may or may not convert in the future*". He noted therefore that "*the low valuation would not necessarily preclude a third party from investing amounts into a company in the hope of future profitability …*" but that this would "*however, mean the share value at the date of transaction would be nominal*". Again, this is important, because it suggests a means by which a company in the very early stages of development, with a highly uncertain future, might nonetheless be able to raise funding.

188.7. At paragraph 7.28, Mr Haddow noted that the Company's cash flow requirements would have necessitated separate funding in the form of further debt until such time as it was able to self-finance by virtue of its operations. However any consequential increase in the Company's liabilities was likely to reduce the Company's Equity Value, especially in circumstances where it was loss-making and had limited assets.

Mr Haddow's Oral Evidence

189. Mr Haddow was questioned by Mr Northall, Counsel for the Petitioner.

190. He accepted that under the International Valuation Standards ("**the IVS**") a valuer must select the appropriate basis of value and consider and use the relevant and appropriate valuation approach(es) and method(s).

191. The basis of value is defined as "*the fundamental premises on which the reported values are or will be based*", and includes market value, equitable value and investment value. Equitable value is defined as "*the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties*".

192. Essentially, there are three possible approaches to valuation: the "*market approach*", the "*income approach*" and the "*cost approach*".

192.1. As defined in the IVS 105 at paragraph 40.1, "*The income approach provides an indication of value by converting future cash flow to a single current value. Under the income approach, the value of an asset is determined by reference to the value of income, cash flow or cost savings generated by the asset.*" As a result, a reliable cashflow is crucial. The IVS 105 at paragraph 50.1 provides that "*Although there are many ways to implement the income approach, methods under the income approach are effectively based on discounting future amounts of cash flow to present value. They are variations of the Discounted Cash Flow (DCF) method …*" In his Remedies Particulars of Claim, Mr Seneschall stated that the DCF approach was appropriate.

192.2. The market approach "*provides an indication of value by comparing the asset with identical or comparable (that is similar) assets for which price information is available*". In this respect, Mr Seneschall relied on the HoTs.

193. In reality, explained Mr Haddow, in any case, a valuer considers each of these approaches. He said that in theory, whatever the method, the conclusion ought to be the same, and that any conclusion is cross-checked by reference to other bases: as is often said, valuation is an art, not a science. In this case, in his view, an "*income approach*" was the only available approach - there was no market and no net asset value. It was, he said, the "*only reasonable path*" to a conclusion of positive value.

194. However, his oral evidence was unambiguously clear, that "*every which way*" he had approached the matter, he nonetheless reached the same conclusion (that the shares held no value) although "*goodness knows I tried*", he said, to produce a positive value. His evidence was that "*in every scenario* [he] *could conceive of there was no conclusion* [of positive value] [that he] *could stand behind*." The availability of reliable forecasts is vitally important to the use of earnings-based valuation methods, but there was no forecast he "*could get comfortable with*".

195. Ultimately, it was put to Mr Haddow by Mr Northall that:

195.1. he had used the wrong valuation basis (having used market value rather than equitable value – in particular because the Respondents, or at least Market Fresh and Mr Marshall, had particular advantages to gain from the transaction); and,

195.2. he had used the wrong method/approach (having failed to use the market approach – in particular because he should have based his valuation on the HoTs).

The Valuation Basis of the Shares

196. In respect of the appropriate valuation basis, Mr Haddow gave the following evidence.

197. First, that not having been instructed to value the shares by reference to an assumed sale to Market Fresh (or indeed, any other specific person/s) he had not done so. In fact, as I explained above, the share sale order was sought against all of the Respondents, each of whom had interests different from the others. Mr Haddow said that he considered that market value would best assist the court, and best captured his agreed instructions.

198. Second, he said that that the market value basis used in his Report, is the "*broadest basis of valuation*", and would represent the "*general position*". A valuer would start with market value, and use it as the basis from which to derive (or in his words, "*boil down*") other valuations, but that in all cases, "*the fundamentals are the same*". In any event, he said that in considering market value, he had not excluded the existence of Market Fresh as a possible purchaser. Furthermore, even if a specific person were to be used as the purchaser for the purposes of a valuation, that person would be aware and would first consider how the market more broadly would value the asset – the two bases are related; the distinction is not "*black and white*" and in many cases (as indeed in the present case, in his view) the two bases will lead to the same conclusion. He said that if market value is zero, as in this case, it is difficult to adjust anywhere to get a positive value.

199. Mr Haddow accepted that his Report could have contained a more detailed explanation of the other valuation bases and of his reasons for not having used them. I accept that acknowledgment, but it does not undermine his conclusions or affect my confidence in their accuracy.

200. Third, in any event and importantly, he said that in his Written Responses to the Petitioner's Written Questions dated 11 October 2023, he had set out his opinion of the shares' value on the equitable value basis as follows:

> "*2.17 .... if I was asked to produce a fair value assessment based on the assumption of specific owners/purchasers or parties with a special relationship, per paragraph 30.2 of IVS 104 Basis of Value, the difference between these approaches would be whether or not the application of a premium for acquiring control, or a reduction of the minority discount that might apply to the sale of a minority shareholding to a third party on a Market Value basis. The underlying Equity Value of 100% of the Company would not change."*
>
> *"2.18 The Market Value basis is appropriate given the context of my instructions and the information available at each Valuation Date. My conclusions would not be different if the Court were to order me to consider the value of the Shares if an existing shareholder were to be to be purchaser."*
>
> *"2.19 .... I consider Market Value is the appropriate basis for valuing the Shares, noting that I do not consider my conclusions as to the Equity Value of the Company would change if asked to value the Shares in the context of an existing shareholder purchasing the Shares*."

201. In other words, whether by reference to the market value basis or the equitable value basis, his stated opinion was that Mr Seneschall's shares were valueless: there were no adjustments that he felt able to make that would produce a positive value.

202. Mr Northall asked Mr Haddow about "*synergistic value arising because of the combination of interests*" (referred to, for example, at IVS 104, paragraphs 50.3 and 70), and in that context - in order to suggest the existence of synergistic value - asked about the Presentation made to Barclays Bank which included the May 2019 Business Plan. That suggestion was rejected by Mr Haddow, and I accept his evidence in this regard.

202.1. First, the Plan involved a quite different investment amount and transaction structure from that which transpired: it was produced in support of an application for a facility of £850,000, to be used to "*pay for and provide the*

equipment to get the factory operational in return for an initial stake of 30%", which (according to the included balance sheet forecast) was to be paid as a loan to the Company and not as such in return for shares, which on that basis, were to be issued for no or a nominal consideration.

202.2. Second, it was dated May 2019, and based on assumed sales of a wide variety of products (manufactured at the Factory) to Aldi, Tesco, Sainsbury's, Morrisons and Asda, which did not ever come to fruition, whether by 30 November 2019 or subsequently. I bear in mind that in the Liability Judgment (at [115]) I found that the forecast sent to Mr Marshall on 9 May 2019, was "*untrue and misleading*"; the utility of the forecast must be assessed on the basis of what was known to Market Fresh at that time.

202.3. Third, it predated the August 2019 Forecast, and is, for many of the same reasons, equally hopeless as a basis upon which to rest a reliable valuation of the Company: it was entirely hypothetical, created at a time when the Company had neither customers nor Factory (nor indeed, at that point, any funding).

202.4. Fourth, it was produced for a particular purpose, to secure borrowing from Barclays.

202.5. Fifth, by the Valuation Date, circumstances were fundamentally changed: Market Fresh had by then agreed to the HoTs, invested some £1.3 million, and already held 50.1% of the Company's shares; the cost of building the Factory had greatly exceeded that which had been estimated in May/June 2019 (and even then, its construction was significantly incomplete).

203. Although Mr Haddow accepted that the Business Plan is perhaps useful as a means of understanding what motivated Market Fresh to invest in the first place, it did not provide sufficient material (given his view of the shares' market value – the fundamental basis) to enable him to derive a positive value on the equitable value basis.

The August 2019 Forecast

204. Fundamentally, Mr Haddow was unable to conclude that the Petitioner's shares (or the Company as a whole) held a positive value as at the Valuation Date because he did not

have and could not construct a reliable forecast as at that date of the Company's business and financial position which was capable of supporting that conclusion.

205. In Section 6 of Mr Haddow's Report, he considered the Company's various financial forecasts, referred to above, all of which pre-dated the Valuation Date, but of which the most proximate in time was the August 2019 Forecast, which he therefore considered in greatest detail.

206. At this point, it is convenient to refer to my findings about the August 2019 Forecast at the Liability Trial.

207. At that stage, insofar as it was said to be relevant, it was in particular relied on by Counsel for Market Fresh in the context of its counterclaim. That counterclaim was advanced on two bases: first, that there had been a fraudulent misrepresentation because, contrary to the response to Question 3.3.5 of the Due Diligence Questionnaire, it was not true that the Company had "*not stopped payment of its debts, become unable to pay its debts as they* [fell] *due or … otherwise become insolvent*"; and second, that as at 7 August 2019, contrary to the terms of Clause 5 of the ISHA, it was not true, as Mr Seneschall knew, that no indebtedness of the Company was due and payable and/or that the Company had not received notice from any of its creditors requiring payment of any such indebtedness and/or that all outgoings in respect of the Factory premises and rent, insurance and service charge payments had been paid on the relevant due date.

208. The counterclaim was pleaded in terms that Market Fresh would not have made its investment had it not been for the responses and warranties "*in faith of*" which it invested and lost £2,054,095.58. It was pleaded that in fact the Company had "*undisclosed outstanding creditors of £327,493.22 and without external investment had no prospect of surviving*", and that both rent and rates were overdue as at the date of the ISHA.

209. It is important to understand the boundaries of the counterclaim (and therefore what was not, as a result, put in issue): for example, it was not alleged, by way of the counterclaim at any rate, that Mr Seneschall or the Company misrepresented to Market Fresh the likely ultimate cost of the Factory's completion, or, more broadly, of commencing in operation, or when that point in time would arrive, or indeed, if it ever did so, how successful or otherwise the Company might then be. To the extent that those or similar issues arose in

evidence or otherwise (and notwithstanding any contribution any of them might have made to the breakdown of relations) I did not ultimately consider them to justify or render "*fair*" that which I found to have been "*unfair*" – in other words, in essence, the Respondents' concealed (and therefore dishonest) plan, involving the exclusion from the business of Mr Seneschall, combined with the continuing use of his home and other financial support, in all the surrounding circumstances set out in the Liability Judgment, including that no offer of any sort was made to manage fairly the situation that had developed.

210. I dismissed the counterclaim for a number of reasons there is no need to repeat, but amongst them was that Market Fresh (and Mr Marshall and Mr McCormick) knew perfectly well - both because they had been explicitly told and because it was in any event entirely obvious - both that the Company, both as at the date of the ISHA and before, had substantial outstanding debts (some of which were nonetheless specifically pleaded to have been "*concealed*") and that it was reliant on further investment by Market Fresh to pay them (and indeed, simply to survive).

211. To repeat some examples: on 31 July and 2 August 2019, Mr McCormick referred in emails to overdue debts owed to Alfandari and to the Company's landlord, and which "*if not paid can bring it to a close very quickly*"; on 5 August 2019, Mr McCormick emailed Ms Coyne, Mr Marshall and Ms McKendry-Gray with a statement of Company debts, to be paid immediately, in the sum of £126,000; on 8 August 2019, Mr Seneschall messaged Mr McCormick (who forwarded the message to Mr Marshall) "*Good morning. Any news? It's all getting a little difficult now. Timings are going out the window and I've run out of things to say to people who are expecting payment. With everything signed I don't get the hold up. Let me know when you can. Thanks. Very Best J.*"; and on 22 August 2019, Mr Seneschall emailed Mr McCormick a substantial list of payments overdue and required to be made "*over the next few days to get things back on an even keel*".

212. It was in that context that the August 2019 Forecast was sent to Market Fresh on 12 August 2019, at a time when Market Fresh was well aware that the Company was not free of debt. In his submissions at the Liability Trial, Counsel for Market Fresh nonetheless sought, in connection with the counterclaim, to rely on the August 2019 Forecast (based as it was on the assumption that <u>all</u> outstanding debts had been paid) for

a particular purpose - in order to show (or attempt to show) that Market Fresh had indeed been deceived about the Company's indebtedness (and believed that there was none) and that it continued to labour under that misapprehension, caused by the fraudulent misrepresentation and breach of warranty, and to invest further "*in faith of*" that alleged misunderstanding. As I have said however, Market Fresh did not base any separate counterclaim on the Forecast (it came after the Due Diligence Responses and after the ISHA); it was not said in itself to comprise an element of a further, discrete wrong.

213. It was therefore in that specific context and for those purposes that I considered the August 2019 Forecast, and found that it was not "*intended to mislead*" Market Fresh because Market Fresh well knew that the Company was not free of debt, and for the same reason, that it cannot in any event have been understood by Market Fresh as a statement that the Company was in fact free of debt. I therefore accepted instead that the Forecast was at least intended by Mr Seneschall to show the Company's immediate future trading prospects, and intended by him to show how the Company could perform in a normal operating environment, if stripped of its various debts. I did not however consider or make any findings about the accuracy of the Forecast as such, whether as at 12 August 2019 when it was sent, or as at the November Valuation Date, although manifestly, as a forecast of how the Company would in fact perform in September 2019 – the month after it was sent (or indeed, in November 2019, 3 months after its production) - it transpired to be seriously inaccurate.

214. It follows that in the circumstances, for the purposes of the Remedies Trial, neither Mr Haddow nor the parties were constrained to accept that the August 2019 Forecast was (or indeed, was not) in substance accurate, as a forecast, whether as at August 2019 (or more relevantly, in November 2019) whatever Mr Seneschall's intentions might have been in producing or providing it to Market Fresh.

215. In his Report, in respect of the August 2019 Forecast, amongst other things, Mr Haddow observed and concluded as follows.

    215.1. that it forecast total sales of £4,615,680 and operating profit of £129,202 in 2020; total sales of £8,559,600 and operating profit of £1,280,600 in 2021; total sales of £14,270,960 and operating profit of £2,951,038 in 2022; and that the

total forecast sales figure for the period to the end of 2022 was therefore £27,446,240;

215.2. that it forecast net assets as at August 2020 of £652,894, as at August 2021 of £1,933,494, and as at August 2022 of £4,884,532;

215.3. that it was based on an assumption that all Company debts had been satisfied (which they had not, meaning that a substantial and immediate cash injection was required) and that 30-day credit terms would be offered by suppliers (despite the Company's "*limited*" trading history, and its balance sheet insolvency) the absence of which would "*make a big difference*" according to Mr Williams (albeit not a difference which he more fully explained);

215.4. that as at November 2019, having incurred further costs in the meantime, the Company was yet to commence operations, and had therefore failed to meet the sales forecast for the period since August 2019; in fact, the Forecast anticipated that by 31 October 2019, the Company was to have generated sales of £469,440 whereas in reality as at that date the Factory was yet to be operational, and the Company had therefore generated no sales at all, although it had continued to incur costs;

215.5. that in respect of the Respondents' proposed adjustments (the 4 "*scenarios*" discussed above at paragraphs 152 and following) he did not know whether the supply of electricity to the Factory was sufficient to support and enable the forecast sales, but that even on the Petitioner's case (that the required capacity could be increased and achieved) it was "*not necessarily in place at the material time*" and that the cost of its achievement, whatever that might be, had not been included (a point consistent with my findings above);

215.6. that the August 2019 Forecast anticipated a gross profit margin in year 1 of 23%, year 2 of 26%, and year 3 of 28%, in contrast to which the Company's management accounts for the year to March 2021 showed a negative gross margin of about -46% by reference to the SAGE records (and the management accounts provided on behalf of Ms Jones showed a negative gross margin of -0.65%); given that a company's gross profit margin should reflect cost of sales

which are variable in nature, he commented that "*it does not seem likely that the Company's poor gross profit margins can be solely attributed to the reduction in sales that may have been impacted by the wider economy, including the Covid-19 pandemic*";

215.7. that the Forecast assumed substantial revenue from numerous customers within months of the Factory becoming operational but that by November 2019 the Company in fact had only one customer (Muru), and that to secure other customers and their revenue streams would mean further delay and uncertainty;

215.8. Mr Haddow also noted that Mr Williams and Mr Seneschall had apparently assumed (albeit incorrectly) that the Market Fresh investment would be paid in "*sizeable chunks*" (that it was not, was one of the grounds on which unfair prejudice was alleged, but which I rejected); amongst other things, it follows that they wrongly assumed that the Factory would become operational sooner than was in fact the case;

215.9. that after December 2019 (when to some extent it became operational) the Company's performance continued to fall significantly short of the Forecast: whereas the Forecast predicted that in the first and second months of trading, the Company would achieve total sales of about £211,000 and £258,000 respectively, the management accounts stated that in fact it achieved sales of about £74,000 in January 2020 and £11,000 in February 2020; moreover, in the year to 1 March 2021, the Company achieved sales of about £370,000 compared with the Forecast, which predicted invoiced sales in the first year of about £4.6 million; as Mr Haddow said, "*this may indicate that the August 2019 forecast projected optimistic sales that did not reflect the factory capacity, customer demand and/or other ongoing difficulties resulting from delays in commencing production*";

215.10. overall, in conclusion, that the August 2019 Forecast, "*whether it could be adjusted or not*", was "*not a reliable basis*" upon which to conduct a discounted cash flow valuation.

216. Mr Haddow's evidence was that although issues of capacity (electrical and otherwise) - if and to the extent they existed - would have been important to a purchaser at the Valuation Date, he could neither comment on nor resolve them; he could not (unsurprisingly) assess what would have been revealed by due diligence. In his Report, he said (at 1.14) that he was "*aware of disputes regarding the relevance of points raised and note that my report is based on my view of the value,* ***based on the contemporaneous data available and what can be assessed from it rather than submissions and forecasts by the respondents that may have been prepared with the benefit of hindsight***" (emphasis added). He therefore: (a) ignored the Respondents' 4 "scenarios", (b) made no attempt to resolve or determine issues of fact himself, and (c) based his opinion on "*contemporaneous data*" only.

217. In other words, essentially, he said he was unable to reach a positive valuation based on future cashflows not because of capacity issues, but more simply because of the uncertainty and unreliability of the Forecast itself, such that either a DCF method would be inappropriate, or in the alternative, if used, would produce a zero valuation because of risks arising out of its unreliability. He described his approach as "*well-trodden territory*": "*this is the forecast, can it be achieved*?" He found no way to find a forecast accurately predicting performance so, as he put it, "*the comfort was not there*". He did not arrive at the point of discounting future cashflows to a specific or mathematically identifiable degree, because there was nothing to discount – he could not justifiably construct a positive cashflow.

218. It was put to Mr Haddow (and repeated in Closing) that the August 2019 Forecast could not be described as unreliable by reference to "*underperformance*" as at the Valuation Date, because by that Date, there had been "*no performance at all*", and that although the business had not yet "*kicked off*", there was nothing to indicate that the fulfilment of the Forecast would not in time be possible.

219. There are at least four answers to that submission:

    219.1. it is not unreasonable (or literally untrue) to describe a complete failure to perform (at all) as "*underperformance*"; a forecast of substantial income in a particular month or period which fails to eventuate is simply not accurate;

219.2. the Company's complete failure to perform meant that the August 2019 Forecast - in common with its predecessors - remained firmly rooted in the territory of Mr Seneschall's imagination; it was a statement of what the Company might one day have achieved if in the meantime it completed the Factory's construction, gained customers, agreed certain terms, found itself capable of manufacturing the desired products at certain cost, achieved certain margins, was able in the meantime to meet expenses and pay debts, and so on and so forth – but none of which had been tested or reflected in any actual production; the evidence set out above (including that given in support of Mr Seneschall's case) makes plain the commercial and manufacturing problems that might be encountered in achieving that hoped for success;

219.3. at most it might mean that the Forecast could not be shown conclusively to be inaccurate (in the sense that <u>if</u> and when business at some point were to commence, it might, in principle, have been at the forecast rates; it was not necessarily a statement of the impossible);

219.4. in fact, at no time did business ever even remotely approach that which was set out in the Forecast, and it is difficult, effectively impossible, to find the necessary support for its accuracy and reliability for valuation purposes in any other facts or circumstances: so contingent were its contents, that the Forecast represented, at best, a mere statement of hope. Ultimately, it is difficult to disagree with Mr Marshall's description of it as "*pie in the sky*". A company's valuation must be based on some real evidence of substance, not merely the beliefs of its owners, however confidently expressed.

220. In the Petitioner's Written Questions to Mr Haddow, at 15(a), Mr Haddow was asked to value the Company as at the Valuation Date based on an adjusted August 2019 Forecast to account for (i) the Tetra Line commencing in operation in December 2019 (as it did, and as would have been apparent as the Valuation Date); (ii) the two pouch lines commencing in operation in January 2020 (said to be possible at a further cost of £17,500, which possibility I have dealt with above, and rejected), and (iii) "*any other adjustments that would need to be made to account for information which would have been available prior to November 2019*".

221. Mr Haddow's response to that question is worth setting out in full.

> "*2.57 The August 2019 Forecast includes sales income from the Tetra Recart line of c.£3.27 million in the first year (September 2019 to August 2020). Of this, c.£528,000 was anticipated to be received between September 2019 and November 2019. Management accounts do not record income throughout this period.*
>
> *2.58 I have been asked to consider the value of the Company assuming that the pouch lines were operational in January 2020. The Petitioner states that they became operational in mid-2020 (paragraph 14, bullet point 4 of the Petitioner's written questions). It is unclear how the costs of £17,500 would be financed, and note that this would add to the net liability position.*
>
> *2.59 The August 2019 Forecast includes Pouch Line Sales of c.£883k, trending upwards from September 2019 up to and including May 2020 (which may represent "mid-2020"). It is not clear whether this income represents fully operational pouch lines at the factory. No income was reported in the management accounts until January 2020.*
>
> *2.60 As stated at paragraph 5.7 of my Report, by November 2019 the Company's financial performance had fallen behind the August 2019 Forecast. The August 2019 Forecast projects income of c.£211k in month one, c.£258k in month two and c.£301k for month 3 of trading (i.e. September 2019, October 2019 and November 2019 respectively). Therefore, by 30 November 2019 the Company was forecast to have generated a total of c.£771k in revenue. However, the Company's management accounts record no revenue over the period August 2019 to December 2019. While the factory became operational, albeit it is disputed to what extent, I consider that a prudent buyer in November 2019 would carefully review the assumptions of the August 2019 Forecast in view of the historic underperformance against forecasts and the liabilities at that time.*
>
> *2.61 The August 2019 Forecasts were prepared on the basis of various assumptions applied by Mr Williams to show the Company's "normal operating environment in the absence of having to catch up with any liabilities". Mr Williams stated that*

the forecast was prepared on the assumption that all overdue payments were settled, that the bank balance at the outset was £nil and that credit terms could be agreed with suppliers. As noted at paragraph 7.7 iv. of my Report, these assumptions were not supported and therefore the August 2019 Forecast represents an artificial position.

2.62 As set out at paragraph 6.29 to 6.33 of my Report, the Company had secured only one customer at November 2019 and had been unable to secure others until the factory had become operational. On this basis, it would have been apparent that the Company was unlikely to achieve the substantial forecast growth from the first month of factory operations of £211k.

2.63 I do not consider it appropriate to assume that the projected income would commence in December 2019 in circumstances where only one customer had been secured at November 2019, the assumptions underpinning the August 2019 Forecast were unsupported, and the Company had historically underperformed against all forecasts."

222. In the event, on my assessment of the evidence set out above, and also by reference to Mr Haddow's evidence and for the reasons that he gave, the August 2019 Forecast was profoundly unreliable and its forecast figures were highly uncertain: I accept Mr Haddow's opinion that it does not comprise a secure basis upon which to value the Company (or more accurately, to value it positively).

223. To the limited extent that the use of hindsight is permissible, it would support rather than undermine that conclusion, but nonetheless (albeit principally in respect of later valuation dates) Mr Seneschall referred also to various subsequent forecasts of business.

224. First, Mr McCormick's communications with Tetra Pak by email sent on 3 March 2020 to Mr Cutts and Mr Samuel Dyer, attaching a cashflow "*summary overview with an outline of projects that we are currently working on*". However, that was a communication with an outsider, Tetra Pak, and Mr Seneschall conceded for example, that although in his email, Mr McCormick had said that Little Sauce Pot had a listing in Tesco, and that there were 3 listings for both microwaveable rice and microwaveable sauces, along with a commitment from Home Bargains and H&B for soups, "*To my*

knowledge, none of these products was ever produced at Trisant …". Mr Marshall also confirmed that none of this business was secured.

225. Mr McCormick's email is not a secure basis upon which genuinely to assess the Company's prospects at that date; it was a communication with Tetra Pak, and was in my view designed to give Tetra the impression that the business was or would soon be prospering, at a time when there were indications in the language that the relationship had become strained ("*The slight delay is to ensure we capture the correct detail. We do not wish to put ourselves in the same situation previously experienced*" and "*We are working through a lot of prospects at the moment, and by your own admission during the meeting, you were surprised at the progress that had been made on new business since the meeting in High Wycombe*") and that Tetra's support was required ("*We fully recognise that your support is crucial to now making sure we can manage the cash flow to realise the short and medium term projects*"). It is not a secure basis upon which to assess the Company's prospects in fact; it was, at the very least, deliberately and markedly optimistic; more probably, it was known not to be accurate.

226. Similarly, in May 2020, there were communications with Reward, at a time when the Company was negotiating what became the Reward Loan. On 12 May 2020, Mr Marshall sent a forecast described as "*very light, worst case scenario as it does not include less advanced conversations but where a strong interest exists, namely: <u>Retailers</u>* [and then referred to Tesco, Aldi, Lidl, Asda and Waitrose and] *<u>Brands</u>* [and then referred to Ella's Kitchen and a Russian brand leader in baby food]". The forecast showed the Company consistently making gross profits from June 2020 (£24,988) through to December 2020 (£69,686) (in aggregate for the period, £371,870).

227. As it unfolded in fact, the business was nothing like this "*forecast*". Again, it is or would be an unreliable and inadequate basis upon which to value the Company (and in any event, again, post-dates the Valuation Date): it was created for a particular purpose (to persuade Reward to lend); it was, in certain respects, manifestly wrong (for example, there was no listing in Teso); and it was patently exaggerated (for example, it said that "*we are absolutely sure we will secure*" the Aldi baby food business – whereas in fact, that business was not secured, and there is nothing to suggest that as a prospect it ever reached the point of practical inevitability). Although Mr Marshall was constrained to deny in cross-examination that the forecast was a "*big fact lie*" (saying instead that it was

based on what he had been told, and that he did not know about the electrical capacity issue at that time) I think it much more likely that it was known not to be accurate – the Company urgently needed to borrow, and provided inaccurate, exaggerated forecasts to achieve its aim. More to the point, the forecast is not useful for the purposes of valuation – again it was, at the very least, deliberately and markedly optimistic.

228. Although the forecast sent to Reward was sent to Mr Seneschall, it appears that he was not sent the list of prospective customers, and whether it was a reference to that omission, or some other omission, it appears that the decision not to share that information was deliberate, because on 22 April 2020, Mr McCormick sent a text to Mr Marshall in which he said "*Can you call me as soon as you can. Need to get something to Reward Capital but want your advice on them first. You know them better than I. I'll explain properly when you call, but it involves info sharing and Me trying to keep the value of potential business from John. Cheers*". Whilst this evidence tends to support the conclusions I reached at the Liability Trial (that Mr Seneschall was being excluded, and that there was in the minds of the Respondents, or some of them, at least the possibility of an offer to Mr Seneschall for his shares or in any event, to bring about his removal) it does nothing to support a particular (objectively assessed) valuation. If the Company's prospects had been, for example, deliberately exaggerated, then there was all the more reason not to tell Mr Seneschall.

The Market Approach & the Cost Approach

229. Given his conclusion that the "*income approach*" was not capable of producing a positive value, Mr Haddow was asked about the applicability of both the "*market approach*" and the "*cost approach*".

The Market Approach

230. The IVS 105, at paragraph 20.2 states: "*The market approach should be applied and afforded significant weight under the following circumstances: (a) the subject asset has recently been sold in a transaction appropriate for consideration under the basis of value, (b) the subject asset or substantially similar assets are actively publicly traded, and/or (c) there are frequent and/or recent observable transactions in substantially similar assets*."

231. On behalf of Mr Seneschall, the market approach was said to be appropriate because the HoTs comprised either or both "*a transaction appropriate for consideration*" in which the Company's shares were sold, or a "*recent observable transaction in substantially similar assets*".

232. Mr Haddow was asked whether it would "*offend against common sense*" to find that the Company's shares were worthless in circumstances where both under the ISHA and the HoTs, Market Fresh had agreed to invest significant sums in return for an allotment of shares. He said not. In particular, he explained that investment sums paid by Market Fresh were paid to and received by the Company for the purposes of its business; they were not received by Mr Seneschall in return for his shares; neither represented comparable market activity in respect of the shares, from which their value could be inferred or implied; neither transaction was for a sale of shares by Mr Seneschall to Market Fresh.

233. Indeed, as a result of the investments, Mr Seneschall's shareholding had been <u>diluted</u>: not only had he not received payment (having not sold any shares) but in consequence of the investment he came to hold a smaller proprietary stake in the Company. Accordingly, the context and effect of the two investment agreements was such that neither could be used to provide a value for Mr Seneschall's shares in the context of their sale to another shareholder; the transactions are of a different nature (both in law and commercially) and have a different effect. I accept Mr Haddow's opinion in this regard.

234. Having said that, it is very likely that Mr Seneschall, at the time, subjectively held a genuine belief, albeit based in my judgment on a misconception, that the Company and his shares were "worth" at least the sums implied by those agreements. In this regard, Mr Seneschall's views appear to have been supported and shared by Mr Williams.

235. For example, Mr Williams gave evidence concerning the "*Original Forecast*" produced by Mr Brian Roberts at Business Wales, and shared with Mr Williams on 25 July 2018. That forecast showed "*total cash generated at £7.96 million*". On that basis, according to Mr Williams, "*Using a Net Present Value calculation and deducting tax at 19% and the initial debt on day 1 of £840k, this resulted in a value of Trisant of £5.4m. In my view, <u>this remains Trisant's minimum worth as at January 2019</u> …..*" (emphasis added).

236. As at July 2018, and at January 2019, the business of the Company existed to a very considerable extent in the minds of its founders: it had been incorporated in February 2018; there were no committed customers; the Factory required significant and expensive refashioning; and albeit that substantial sums had already been invested (and were owed by the Company) it was plain, or becoming so, that significant additional outside investment would be necessary; it had very little available cash. I do not consider it to be credible that as at either of those dates Mr Seneschall and Ms Jones could have joined together and sold all of their shares (and thus the Company) for over £5 million; indeed, I consider that suggestion to be quite incredible. That is not to say that an investor in the Company might not have been willing to "buy" and receive an equity stake in the Company in return for substantial payment to the Company, but that is a quite different transaction, and a quite different matter.

237. Returning to the evidence of Mr Williams, he explained that "*In the January 2019 Forecast, the total cash generated over the three years modelled was £4.04 million (down from 7.96 million in the Original Forecast). After adjusting for inflation and deducting the initial debt and tax, this would give you a minimum value after three years of £3 million. The decrease in value (from £5.4 million) was because there was now debt mounting up, but with revenue only likely to start some 6 months later than in the Original Forecast*." He added that "*The January 2019 Forecast demonstrated that as at that date Trisant was "technically insolvent" and in need of an immediate injection of cash*."

238. Again, this evidence illustrates the care necessary in considering issues of value, value to whom and value for what purpose.

    238.1. First, the fact that as time passed, and as the Company came closer, presumably, to the commencement of business, moving slowly from the conceptual to the actual, its value nonetheless decreased in the mind of Mr Williams, ought perhaps to cast some doubt on its supposed value six months earlier, and, importantly, on the basis upon which that value was calculated.

    238.2. Second, it makes absolutely plain that when considering questions of value, the reliability and genuine, realistic substance of financial forecasts is absolutely fundamental; the Company was incorporated in order to operate a business in

order to generate revenue and thus profit; it was in its ability to do so that its value might principally or even exclusively be found.

238.3. Third, according to Mr Williams, in January 2019, the Company was insolvent, albeit only "*technically*" (whatever that might mean) with "*good prospects for a short-term turnaround to solvency if funds were provided*"; again, it is fanciful to suggest that Mr Seneschall and Ms Jones could at that time have sold their shareholding for several millions of pounds.

239. Mr Williams' approach to the Company's valuation as at the dates of the ISHA and the HoTs was the same as at earlier dates (and therefore subject to the same, continuing flaws). Thus, he took the August 2019 Forecast, and on that footing, "*By applying the same valuation method as I have to the two previous forecasts (using the forecast figure for total cash generated of £4.36 million and adjusting for inflation and deduction of debt and tax) I believe that Trisant was worth approximately £3.6 million in August 2019 to a buyer outside the supply chain, and much more to a buyer like Market Fresh who would benefit from the supply chain margin …*".

240. Mr Seneschall's evidence was to similar effect. He said that had he known of the plan to remove him from the business of the Company in November 2019 he would have suggested negotiating a "*leaving package*". He referred to the voicemail that he left Mr McCormick on 25 October 2019, in which, amongst other things, he said, "*You know… I might as well fucking pack up and go home. If that's what Dave wants, fine, he can pay me £6m for my shares and walk away. I'm very happy to do that, as I know is Lynne*." Although he acknowledged that his "*£6 million price tag might have been ambitious because the factory was still not operational …*", nonetheless he said that "*For my stake (both 60% in August 2019 and at 34.9% from October 2019), I believed it would be possible for me to take out something in the region of £6 to £8 million. More if we had started to build a bigger Tetra Pak facility at that time.*"

241. In terms of the "*settlement*" that he said he would have wanted (this being in support of the suggested counterfactual approach and its suggested outcome) his evidence was that he would have:

"*walked away, but not at any price, and certainly not for less than Dave had paid to buy the shares from me. I started with 75% of the Company and "gave" 40.1% of that to Market Fresh at a price of £1.4 million to be reinvested in the business. Pro-rata, £1,218,450 should be the minimum that Market Fresh would have been willing to pay me for my remaining 34.9% stake*."

242. That evidence was revealing: it suggested that Mr Seneschall believed himself in effect to have transferred and sold his own shares to Market Fresh, in return for a sum, a payment, which was "*reinvested*" by him in the Company. However, that does not at all describe what happened; in fact, it fundamentally misdescribes it. Under the investment agreements, Market Fresh paid money to the Company directly in return for shares issued by the Company; nothing was sold by Mr Seneschall; indeed nothing was sold by the Company; nothing was "*reinvested*" in the Company by Mr Seneschall; nothing was invested by him. In fact, as I have said, Mr Seneschall's shareholding was diluted, from 75% to 34.9%, in return for which he himself received no payment at all.

243. As to the Company's valuation, in common with Mr Williams, he said that as at March 2019, based on the forecasts originally produced by Business Wales, "*and considering my and Lynne's existing relationships in the sector, the three of us considered £5 million to be a realistic value for the business*." As at August 2019, at about the time when the ISHA was signed and Mr Seneschall additionally agreed to the acquisition by Market Fresh of a further 30.1% of the Company's shares, he said that his approach to the discussions with Market Fresh was based on "*an estimated total value for the business of £4 million*". Ultimately, by reference to the HoTs, he said that the "*value of the company which was agreed 2 ½ months later in October 2019 … was therefore consistent with the value agreed in both March 2019 and August 2019 at c. £3.6m*."

244. Mr Seneschall's genuine belief in the value of his shareholding is reflected in other documents. For example, on 5 February 2019, in an email which he wrote to Mr Williams and Ms Jones, Mr Seneschall said (in relation to what was at that time an investment proposal outlined by Mr Marshall):

> *"Dave Marshall Proposal. First thoughts.*
> *Current value of business set at £5,000,000 (do we feel this is realistic?)*

Offer is 10% business (75:25% J/L) for £400,000 as of now. Money in account by end of March.
Some flexibility (lowest price to be agreed).
A further 7.5% of the business (all from J) to be taken up (no option) at a higher valuation of £6,000,000 by end of July, money in account end August (£450,000). Part of the money (£336,000) then loaned to the business to pay off the loan against J's house by 7/9/19.
An option to buy further 77.5% of the remaining shares in the business in June 2021 for £30,000,000 or at a price agreed by an independent valuation, whichever is the lower, but minimum £15,000,000. Money in account by end of July."

245. Again, this email reflects both Mr Seneschall's beliefs about the extraordinary value of the Company (possibly £30m, but at least £15m, in return for 77.5% of its ownership, within two years, at a time when it had not yet commenced in operation, or even finished the conversion work on the Factory) but also, by reference to the possibility of shares being sold by him personally and the proceeds of sale being "*loaned to the business*" by him, the very same confusion about the structure of the investment as seems to have persisted throughout, and which seems also to have coloured his views about the value of his shares for the purposes of their possible sale.

246. I accept Mr Seneschall's evidence that he believed his own shares to be worth at least the sum which he explained was implied by the investment agreements, or something in that order; I accept that as at November 2019, had the occasion arisen, he would not have agreed willingly to their sale to Market Fresh or anyone else for less than payment in the region of the sum implied by the HoTs. For essentially that reason, should I have thought it relevant to ask what would have been the outcome of a negotiation for the sale of his shares in November 2019, I would have considered it highly likely that no agreement at all would have been reached. However, in the event, I do not consider Mr Seneschall's views about value to have any real bearing on the appropriate remedy in this case; plainly, a petitioner's mistaken, exaggerated view about the value of his shareholding in a company cannot provide a secure or sensible basis upon which to construct the terms of a fair remedy.

247. In conclusion therefore:

247.1. Mr Seneschall's views of the Company's value were based on a misconception, which on any view it would not be fair to use as the basis upon which to value his shares for present purposes;

247.2. the market approach is inapplicable and inappropriate in the present case because the HoTs do not comprise a genuinely comparable transaction; the transaction was fundamentally different, economically, legally and commercially. Mr Haddow said that the HoTs were not material, albeit they might appear to be so "*at first glance*". He set out his reasons for that conclusion in his Written Responses at 2.31-2.34 and orally, and I accept his evidence.

The Cost Approach

248. The IVS 105 at paragraph 60.1 states: "*The cost approach provides an indication of value using the economic principle that a buyer will pay no more for an asset than the cost to obtain an asset of equal utility, whether by purchase or by construction, unless undue time, inconvenience, risk or other factors are involved. The approach provides an indication of value by calculating the current replacement or reproduction cost of an asset and making deductions for physical deterioration and all other relevant forms of obsolescence*."

249. Mr Haddow had considered this approach, and rejected it, in his answer to Question 11 of his Written Responses:

> "*... The Cost Approach is typically relevant to assessing asset value on the premise that one would not pay more for an asset than the cost to obtain its utility.*
>
> *Accordingly, a third party may acquire an asset based on the cost to replace it and / or at a premium to obtain its immediate use. In this case, many of the assets were leased and the liabilities of the business are likely to be in part or entirely representative of the cost to get the assets to the position they were in. Therefore, the price achieved for the asset acquired would, at best, offset those liabilities. If a third party wished to acquire the assets (which may include the*

trade), the Company would no longer hold the assets it would otherwise use to generate income in the future. Therefore, it is unlikely that the Shares would have value."

250. Mr Haddow said that this would have been the least favourable basis because it ignored trade, but in any event, the point was a short one: the Company was significantly insolvent on an asset basis, and the sum which a person would pay to acquire the assets of the business would be less than or would at best offset the Company's debts and leave it with no means of producing income; therefore to value its assets on this basis would not produce a value for the Shares. I accept that opinion as plainly correct.

Other Suggested Valuation Methodologies

251. In addition to the market approach and the cost approach, the Petitioner suggested to Mr Haddow (in his Written Questions, at Question 12) a broad panoply of other approaches (and indeed, more than that, asked for a valuation on each basis as at each of the three proposed valuation dates, being a further 15 separate valuations, in addition to those already provided by that stage). The bases proposed were "*the Fixed Ranges Approach*", "*the Scorecard Method*", "*the Venture Capitalist Method*" and "*the Berkus Method*" – although scant detail was given of any, and it was not explained on what basis any one or more of these alternative approaches would be appropriate (other perhaps than because the Company was a "start-up").

252. Faced with that broad enquiry, Mr Haddow answered:

2.41 The Fixed Ranges Approach relates to valuation by development stage. Although forecasts were available, this approach would require a detailed business plan highlighting the different planned stages of development. Although there were investments made by Market Fresh, the investment does not mean another party would make a further investment (for shares or otherwise) that would produce a value for the Shares.

2.42 The Venture Capitalist Approach is equivalent to a DCF in so far as it relies on the estimated net present value of the estimated exit value. This would necessarily rely on the existence of detailed reliable forecasts. It would also take account of the net debt of the Company.

2.44 The Berkus Method and the Scorecard methods are based on attributing a value to factors in the business and are used by investors. This is a subjective approach and as such it would necessarily assume a "special" purchaser. These approaches depend on reliable information and would be influenced by investment criteria. I do not consider them relevant approaches for valuing the Shares at the Valuation Date.

253. In addition, in cross-examination, Mr Haddow was asked about a number of documents that had been obtained by the Petitioner and/or his advisors by searches conducted using the internet, and previously sent to him with the Petitioner's Written Questions.

254. First, were various pages from the website of a company called "*Eqvista*", which opened with the words, "*Get your startup valuation in minutes from Eqvista, one of the leading and advanced business valuation software in the industry*", and continued, "*Knowing the worth and value of your company is important in the business world, especially if you are a startup. Getting a startup valuation reveals your company's ability to employ new cash to expand, exceed consumer and investor expectations, and achieve your other goal. There are many valuation methods available to determine your company's value, but at Eqvista we have* ***developed a special software*** *that will help determine your company's valuation in just a short period of time.*" It advertised the prospect of "*A quick and easy way to get your company valuation: all online and done in 20 minutes*", at a cost of $89 for a startup valuation. It referred to the methods stated above - the Berkus Method, the Scorecard Method, the Risk Factor Method and the VC Method.

255. Mr Haddow's response was in substance to repeat that which he had explained in his Written Responses. These methods, he said, are not inherently unreliable, and in a given circumstance, each would or might for some purpose be useful. However, his opinion was that none were applicable (or caused him to reach a different conclusion) in the present case, if for no other reason than that he had not been given either a reliable forecast or business plan. I have no basis on which to doubt Mr Haddow's evidence in this regard. In any event, the printed pages from the Eqvista website were of no real probative weight (whatever the qualities of Eqvista's services, about which I was told nothing and express no view) and although the valuation methods referred to (and simply presented to Mr Haddow) appear to be genuine methods, they do not undermine or cause or allow the Court to doubt Mr Haddow's conclusions.

256. Second, and to similar effect, was an article headed "*PwC Deals insights: How to value a start-up business*", which opened with the words of a Deals Manager at PwC Lithuania, "*When starting a new business, it can be a challenging task to establish a sustainable financial infrastructure from the very beginning. For the investors focusing on start-ups, one of the most difficult tasks is to determine how to price the investment. In other words, the investors need to decide on the amount of equity or ownership interest they should gain in exchange for the invested capital, whereas the entrepreneurs are concerned about the amount of equity they will need to issue. Deciding on the amount of ownership interest requires determining the enterprise value (EV) or business idea value. For that purpose, below we provide some start-up-specific information that will help you to understand and ensure a reasonable estimation of your start-up business value.*"

257. Essentially, the point put to Mr Haddow was that in the early stages of a company's development, it might not always be appropriate for potential investors to use "traditional methods" of valuation such as the income, market or net assets approach. Leaving aside that the Petitioner's own pleaded case (and written representation to Mr Haddow) was that the appropriate method of valuation of the Company was by reference to "*a multiple of expected maintainable earnings or discounted cash flow model*", the article provided no basis upon which to doubt Mr Haddow's conclusions, first because it was simply a short article drawn down from the internet, and second, more fundamentally, because Mr Haddow explained that the article was directed at a different issue, being the assessment of <u>investments</u> in start-ups (rather than, as explained above, the value of shares in the context of a sale of the shares themselves) and that as he had said previously, these various alternative methods were not such as to change his opinion.

258. In this context, I would add that on 30 October 2023, I heard Mr Seneschall's application to adduce the evidence of his own share valuation expert to challenge that of Mr Haddow. As I have explained above, the issue of share value (in respect of Mr Seneschall's principal remedy under s. 994) was raised at the outset of these proceedings by the Respondents in their Defences served in April 2021. From the beginning, the Petitioner has sought a share purchase order, and from the beginning has known that the Respondents explicitly deny that his shares are or have ever been worth anything. The Company's value has been in issue since the outset. I rejected Mr Seneschall's application on grounds, amongst others, that there was not enough time before the

Remedies Trial for the proposed evidence to be introduced fairly and to be properly considered by Mr Haddow and the Respondents (of whom, by then, Ms Jones and Mr McCormick were unrepresented, having been represented previously when the process of instruction of a single expert, paid for in the first instance by Market Fresh and Mr Marshall had been agreed, and when Mr Haddow was instructed).

259. Faced therefore with the evidence of Mr Haddow as the single expert, the Petitioner sought (in addition to the arguments that I have considered above) by various other means and accusations of impropriety to discredit him, and so to undermine his evidence, which, so it was said, "*should be disregarded in its entirety*".

260. For the following reasons, I wholly reject each of the Petitioner's criticisms of Mr Haddow.

Lack of Transparency

261. First, Mr Haddow was asked about the circumstances in which he came to be chosen by Market Fresh as one of the three valuation experts which it nominated under paragraph 3(a) of the May Order. In closing, it was submitted on behalf of Mr Seneschall that "*Although not the most substantive reasons for disregarding his evidence, Mr Haddow's lack of transparency in the matters which led to his appointment coloured the evidence which he gave from start to finish.*"

262. Mr Haddow said that he has acted as a single joint expert about "*half a dozen times*" and confirmed that only rarely in those circumstances had he spoken to one of the parties directly before receiving his instructions; normally, an enquiry would come through legal representatives. In this case however, his nomination had come about in the following way.

263. On 26 May 2023, Ms Estelle Tague, a partner at RWK, emailed Mr Craig Hughes at Menzies, copying in Mr Marshall. Mr Hughes is a partner in the tax department. The email said, "*I would like to introduce you to Dave Marshall. David is a very good client and friend of mine; I'm also a non-exec on one of companies* (sic)*. We need a company valuation as part of on-going litigation. The company is insolvent. Is this something that you would be able to deal with please*." 26 May 2023 was a Friday. Under the May Order, Market Fresh had to nominate three accountants by 4pm on 30 May 2023, the following

Tuesday; time was comparatively short. About an hour later, Mr Hughes replied. He addressed Mr Marshall directly, and said that "*As promised, with pleasure I would like to introduce Georgina Davis, head of our wonderful valuations team. …. Given the on-going litigation, our valuation work would be supported by Matt Haddow, also copied in. Matt is a partner in our Forensic Accounting team. Matt is out of the office next week but Georgina would be available to move matters forward until Matt is back in the office. If I may, I shall leave you and Georgina to connect directly*."

264. The following morning, at 11.30am on 27 May, Mr Marshall wrote to Ms Davis and Mr Hughes, copying in Mr Haddow and Ms Tague. He asked whether it would be possible to speak "*quickly*" either on that day or on the day following: "*Apologies for the urgency but I need select* (sic) *the firms to put forward by Monday*." The next email in the chain, at 4:53pm, was from Mr Haddow to Mr Hughes, and said simply, "*I have already spoken to him*."

265. In his oral evidence (and in his email to Ms Liebling (Mr Seneschall's solicitor) sent on 9 November 2023) Mr Haddow described the conversation that he had had with Mr Marshall. He said that they had spoken briefly whilst he was on a beach on holiday with his family; he had confirmed that he undertakes expert work including company valuations, and that he would send his details. He said that he regularly receives enquiries of this nature, about "*five times a week*"; that he could not recall whether Mr Marshall had told him the name of any of the parties, although had he been in the office he might have asked and carried out some sort of initial conflict check; he said that he thought that his task would have been framed in the context of adversarial litigation, in which Mr Marshall was a participant; he could not recall the specific details of the conversation, but thought that he had understood that Mr Marshall was an investor shareholder but could not recall any understanding that he was to value the shares of another party, or that the business of the company was in the food industry. He could not really recall but thought that he had not been told that the Company was worthless. In any event, he said that had he been told that, he would have taken it "*with a pinch of salt*": such comments are commonplace. Essentially, he said that the conversation was " *basic*", more a question of whether he had the relevant experience to do the job; he considers it important "*not to say too much*"; he treats his independence as a paramount consideration.

266. Later that day, using his mobile telephone, Mr Haddow emailed Ms Tague and Mr Marshall, copying in Ms Davis. He said that "*Further to the brief discussion earlier today, we are well placed to assist the court on this case. … I will be happy to be put forward as Single Joint Expert for the parties to the dispute and would be pleased to speak with the joint instructing solicitors*." He said that a capped fee estimate would be provided, and sent links to his own and to Ms Davis's professional biographies. He said that typically, following an enquiry, he would send a "*pack*" to the enquiring party, but that in this case, because he was "*on the beach*" rather than in the office, his response took a more abbreviated form. On 30 May 2023, Mr Haddow was emailed by Mr Sanjit Lal at Armstrong Teasdale, telling him that he had "*just recommended*" him to Ms Liebling, who would be in contact.

267. On 14 June 2023, Ms Liebling emailed Mr Haddow (and the others parties) and told him that the parties had agreed to his instruction as a single joint expert valuer. As well as explaining the timetable, she gave him the parties' names, and the names of their solicitors and counsel, so that he could carry out conflict checks. He said that this was the first time that he could recall having been told the parties' names. At that time, Mr McCormick was still represented by RWK Goodman Solicitors. Later that day, Mr Haddow replied that "*We have undertaken initial conflict checks and have not identified anything. I will let you know if anything arises but do not anticipate it will*." Mr Haddow described in broad terms his firm's process in that regard, using software to check client records, and also that he would have emailed other partners, directors and managers, to ask them directly about possible conflicts. He said that nothing was raised. On 6 July 2023, he was sent the parties' agreed Letter of Instruction.

268. On 8 November 2023, the week before the Remedies Trial began on 13 November 2023, Ms Liebling emailed Mr Haddow and asked him first, whether he could explain how and by what means he had agreed to cap his fees, and second, "*if you could kindly provide to us a copy of any documents relating to this matter which had not been copied to Armstrong Teasdale (including copies of any correspondence to and/or from Menzies). If no such documents exist, please could you kindly confirm this by return. We apologise for the request but it has just come to light …. that the Respondents had exchanged private communications with the previous joint expert valuer appointed by the parties in March 2021 (which had been withheld from the Petitioner and which he was unaware).*

We would like to ensure that this practice has not been repeated with you and/or anyone at Menzies."

269. Later that day, Mr Haddow replied. He explained that he not agreed or discussed the fee cap with anyone before offering it: "*I did not speak to any parties separately to agree it, it is something I tend to offer, usually generously, to provide some certainty to the parties*." In relation to "*documentation*", he replied that "*I am not aware of any correspondence or information that was provided to me or by me that was not copied to all parties in the submissions phase or when you submitted questions. If I ever became aware of that happening on an SJE appointment I would forward to all parties*." Mr Haddow explained that when he wrote this reply, he had understood Ms Liebling's concern to be that he had received certain documents, or sent them, from or to one or more of the parties, but not all of them: that Mr Seneschall's representatives had been excluded from relevant communications. In reply, also on 8 November, Ms Liebling asked if he could "*check the firm's system … to see whether there have been any communications in relation to this matter (including with any other person at Menzies) to which I have not been copied* …"

270. Mr Haddow replied, "*To the best of my knowledge correspondence and documents* (sic), *all parties and/or their representatives have been copied save for an email from the insolvency service to you and me regarding the limited books and records held by it.*" He said that he did "*not wish to be drawn into issues between the parties nor any suggestions about the conduct of others*." Mr Haddow said (and I accept as being natural, rational and indeed true) that when he gave this answer, he had in mind, and was referring to, the flow of information concerning the affairs of the Company, and its value; that he was not thinking about the initial telephone enquiry that had come from Mr Marshall, which "*wouldn't have entered his mind*". He said that had it not been for the subsequent instruction, he would not even have recalled Mr Marshall's name; he was not party to the process by which Menzies formally advanced him as a potential nominee. He said that he found the suggestion that he had not been transparent in his dealings with the Petitioner to be "*baffling*". He emphasised that a large part of his professional work comprises giving expert evidence, and that his duties as such are extremely important to him.

271. On Thursday 9 November 2023, Ms Liebling renewed her enquiries. She repeated her request that Menzies' records be checked "*to see whether there have been any communications in relation to this matter with any other person at Menzies to which Armstrong Teasdale has not been copied. When you and I spoke on around 13 June 2023 to discuss your potential instruction, you said that you were unaware of your nomination at that time. As an expert appointed jointly by the parties, but nominated by Market Fresh, there must have been some form of communication with your Firm (you have confirmed not with you) prior to your appointment in which your credentials and availability for the role were discussed.*"

272. Mr Haddow replied later that day, at 7.13pm. It was by this email that he forwarded the various pre-appointment emails referred to above, and explained the circumstances of Mr Marshall's enquiry and his pre-nomination conversation. He confirmed, "*as I have said twice*", that he did "*not have any information/documents that have not been disclosed as part of the process and … did not receive anything prior to* [his] *appointment*."

273. In cross-examination, it was not put to Mr Haddow that he was, as a result of these circumstances (whether his short conversation with Mr Marshall in May or the connection, such as it is, between Mr Hughes, Ms Tague and Mr Marshall) consciously or otherwise biased in favour of the Respondents, or predisposed to a particular conclusion in respect of value; it was not put to him that his evidence was not true, or that he was deliberately misleading Ms Liebling in his recent email correspondence and explanations.

274. Nonetheless, somewhat more boldly, in Mr Seneschall's written Closing, it was said, amongst other things, that his "*lack of transparency in the matters which led to his appointment coloured the evidence which he gave from start to finish*"; that "*had Mr Haddow merely* "*forgotten*" *to mention the communications which took place between him and Mr Marshall at the outset of his instruction, this would be one thing, but the fact that he repeatedly denied that any such communications existed is quite another*"; that the statement in his email of 8 November ("*To the best of my knowledge correspondence and documents (sic), all parties and/or their representatives have been copied save for an email from the insolvency service to you and me regarding the limited books and records held by it*.") was "*plainly untrue*" because Mr Haddow knew that correspondence

had been exchanged before his appointment and knew that he had had a conversation with Mr Marshall to discuss his nomination, "*which he has similarly failed to disclose*"; that Mr Haddow's explanation of his reasons for failing to disclose these communications more quickly "*does not withstand scrutiny*"; that he "*can have been in no doubt that Ms Liebling wanted to know*" whether "*there have been any communications passing*" between him and or anyone at Menzies and any of the Respondents; that he should have told Ms Liebling of the true circumstances when first she made contact with him, but that he "*did not see fit to disclose the existence of this unusual/rare call*"; that "*Mr Haddow's suggestion that there is no relationship between his firm and RWK Goodman does not withstand scrutiny*", and that in that respect he did not make proper enquiries with his partners at Menzies or with Mr Hughes.

275. Mr Haddow has never met Ms Tague; he spoke to Mr Marshall once, briefly, on 27 May 2023, as described; he has never been instructed by RWK Goodman. Plainly, there is a relationship between Mr Marshall and Ms Tague, and between Ms Tague and Mr Hughes; it was by virtue of those relationships that Menzies was approached, and ultimately that Mr Haddow was instructed; no doubt many or even most of his and other experts' appointments are in consequence of some relationship or recommendation, often personal; such would be a commonplace feature of everyday commercial and professional affairs.

276. Nonetheless, I reject entirely the Petitioner's assault on Mr Haddow and on his evidence in these respects. As said above, I accept his evidence about his conversation with Mr Marshall, to the understandably limited extent to which he could recall it, and I accept that when Ms Liebling opened her various lines of enquiry on 8 November 2023, his mind was drawn to the possibility that he had been told relevant matters of substance concerning the valuation (as apparently was a previous valuer, this being the stated reason for Ms Liebling's enquiries) rather than that he and/or his firm had, before he was nominated, had some communication with the Respondents. I cannot and do not find that his or Menzies' conflict checks were in any sense flawed, or produced a wrong response in this case. In any event, Ms Liebling's enquiries having begun on Wednesday 8 November, very shortly before the trial, Mr Haddow provided copies of emails and a full explanation of the circumstances of his appointment in his email of Thursday 9 November, at 7.13pm; he had never before been asked about the ultimate cause of his

initial nomination, albeit it must at all times have been obvious to everyone that some such cause necessarily existed. In the circumstances, I do not accept that his responses "*lacked transparency*", or any suggestion that they were made despite consciously knowing of their falsity. Ultimately, these circumstances have no effect on the weight which I attach to his evidence.

Lack of Independence

277. It was also submitted in closing that it was "*clearly not true*" that Mr Haddow would have expressed the same opinion had he been instructed by the Petitioner; that his opinion was "*unsupported by any sources and went against the entire body of research which the Petitioner had found*" (which I took to be a reference to the articles referred to at paragraphs 254-256 above) and that his opinion also contradicted that of Mr Williams "*who although not appointed to provide expert evidence on valuation, is qualified to do so*".

278. Again, these were serious allegations, that again, I wholly reject.

278.1. First, there was no basis whatever on which to submit that Mr Haddow's evidence (that he would have expressed the same opinion had he been appointed by the Petitioner) was not true.

278.2. Second, I have dealt above with Mr Haddow's responses to the Petitioner's own research, and accepted those responses. Insofar as I understand the submission that his opinion was unsupported by any sources, I reject it. It was supported by his assessment of the information and documents, and was expressed by reference to his expertise in the application of a variety of different valuation bases and methods explained in the IVS. I do not understand what other "*sources*" he is said to have ignored. It follows also that I reject the further submission that Mr Haddow failed to identify "*any sources to support his opinion*" (the emphasis is in the original).

278.3. Third, Mr Williams is not qualified as a valuer. He was not called to give expert evidence and did not purport to do so. In any event, I have dealt with (and rejected as misconceived) his views.

Acting as an Advocate for One Party

279. Further, it was submitted that in responding to the Petitioner's Written Questions, Mr Haddow was "*argumentative*" and had "*acted as an advocate for*" the Respondents, including by the adoption of a "*heavily contrived position to defend his opinion*" in respect of the August 2019 Forecast (by reference to his refusal to accept the argument set out above, that there had been "*no performance at all*" as opposed to "*underperformance*" as at the Valuation Date) and by failing or refusing to take into account materials that supported the Petitioner's case.

280. Again, these are serious allegations which I reject as plainly unjustified.

281. Mr Haddow answered the questions put to him in writing and orally during his examination, when I was able to observe him. He did so in a manner that was both rational and careful. If to some extent he failed to do so, it was not such as to affect my assessment of his conclusions. He was far from "*argumentative*"; he merely expressed opinions which I have accepted but which the Petitioner disputes, presumably for the reasons set out above, on the basis of various misconceptions.

282. I have also rejected the notion that a complete failure to meet a forecast performance by virtue of failing to perform "*at all*", does not (or did not in this case) comprise underperformance. Furthermore, as at the Valuation Date, there was no material that was available to Mr Haddow but which he wrongly failed to take into account. As to later forecasts (in 2020 and 2021), they had no effect on his opinion insofar as relevant to the outcome of this case, and in any event, Mr Haddow's assessment of them and their relevance (based on the purposes and circumstances of their production, and their availability to market participants) did not support the conclusion that he was acting as an advocate for the Respondents.

Failure to Provide Separate Opinions on Different Factual Bases/Assumptions

283. In this respect, the criticism was that Mr Haddow had provided "*only one opinion*", and had "*refused*" to provide an opinion on alternative versions of disputed facts. I reject these submissions.

283.1. First, as set out above at paragraph 221, Mr Haddow did consider the possibility of assuming different facts.

283.2. Second, although he provided "*only one opinion*" in the sense that his opinion was and remained that the Shares were without any positive value as at each date, he did so as at three different dates and on various different bases and methodologies.

283.3. Third, he rested his opinions on the contemporaneous financial documents and information. I have considered the evidence about the Company's affairs, capacity and financial condition, and reached conclusions that do not undermine the basis of his opinion. There is no other relevant "*different version*" of the facts based upon which an opinion is necessary (and none specifically was proposed in closing). It follows also that I reject the submission that Mr Haddow failed to account for all material facts. In any event, the gist of that criticism was that he had failed to take into account forecasts produced after the Valuation Date (which even the Petitioner accepted it "*may have been appropriate to discount*"). Insofar as he might be said to have failed to refer to a relevant forecast produced before the Valuation Date (the Market Fresh Business Plan referred to at 202 above) he dealt with it in cross-examination, and I accept its irrelevance for the reasons I have explained.

Lacking Credibility & Lacking Common Sense

284. Essentially, it was suggested that it was not credible and defied common sense to conclude that the Petitioner's Shares were valueless at each suggested valuation date, and that in particular by reference to the HoTs, his opinion as to their value as at November 2019, failed "*a sanity check*", and that in cross-examination he had demonstrated an "*unassailable urge to reach for the same conclusion*" as set out in his Report. It follows from my conclusions above, that I reject these submissions.

285. Mr Haddow explicitly considered a variety of bases, methods and approaches. To say, for example, that there was no "*evidence that he had carried out any valuations based on any alternative basis of valuation, or using any alternative approach, or alternative methodology*" is simply not correct. On the contrary, as explained above, he explicitly did so. Similarly, to say that "*he had not in fact carried out any valuation calculations*"

as at any of the valuation dates, or sought "*to tweak the forecasts, or to apply any mathematical calculation to ascertain if the Company might become profitable*" is again not correct. Again as explained above, Mr Haddow repeatedly emphasised that the forecasts were too uncertain and unreliable, and that the Company was valueless, "*every which way*".

286. It was not that he had not "*carried out a calculation*" (as if on some scientific or mathematical basis); it was that his opinion, as an expert, assessing the available information, was that no value could be attributed to the Petitioner's Shares. Given the condition of the Company as at each valuation date, given its short lifespan, and given its eventual fate, that is not a wholly surprising opinion; it is certainly not one that lacks common sense or lies beyond the boundaries of "*sanity*".

Mr Haddow's Approach Overall

287. As has been said many times, share valuation is an art not a science; Mr Haddow described it as a "*process*".

288. Mr Haddow:

288.1. was an expert, suitably experienced;

288.2. answered the question that was put to him in the parties' agreed instructions (and also answered the questions that were put to him in writing on behalf of the Petitioner and in cross-examination);

288.3. took into account the materials and various matters that were provided and put to him;

288.4. expressed a clear and reasoned conclusion based on stated grounds; and,

288.5. expressed a conclusion which was not obviously wrong or unrealistic. Indeed, in my judgment, his conclusions were entirely justified, and plainly correct.

289. In respect of the price to be paid for (or in respect of) the Petitioner's Shares, I accept that:

289.1. the Court is not in any event bound by the opinions of an expert, even a single joint expert; and,

289.2. that there is a distinction (reflected in the language of the Order made on 15 May 2023) between the issue to be determined by the Court (which concerns the appropriate, fair remedy, and in this respect, the appropriate price) and the issues in respect of which Mr Haddow gave his opinion (which concern the Company's value on various bases), albeit the former is certainly informed by the latter.

290. In the present case however, I have no reason or basis upon which to depart from Mr Haddow's opinion, which I accept. Accordingly, the sum to be paid to Mr Seneschall for, or in respect of his shares in the Company, is £ nil. It follows of course that no questions arise of either an interest payment on the purchase price, or of a minority discount.

291. Overall, I am content that the relief granted is fair, and respects all the circumstances of the case. Essentially, its effect is that the Petitioner has been compensated in respect of the circumstances of his wrongful exclusion, and that the serious risks of the Company's subsequent failure were assumed, exclusively, by the Respondents (and were ultimately suffered by them).

[G] Damages for Conspiracy

[G1] The Legal Principles

292. Damages for unlawful means conspiracy are "*at large*" (Noble Resources SA v Gross [2009] EWHC 1435 (Comm), per Gloster J at [223]), an expression best understood as meaning that once a claimant has discharged the burden of showing that he suffered loss as a result of the conspiracy, the Court is not limited to awarding those damages which are strictly proven. A claimant does not have to quantify its losses precisely, and in coming to a view as to the level of damages which a defendant ought to pay, the Court will consider all the circumstances of the case, including the conduct of a defendant and the nature of his wrongdoing. The exact factors going to precise assessment are not to be "*weigh*[ed] *in golden scales*": Huntley v Thornton [1957] 1 W.L.R. 321, at 350. The claimant is not limited to damage which can be precisely measured and specifically proved, but is entitled more generally to compensation representing the court's best

assessment of financial loss in fact suffered and proved: Lonrho Plc v Fayed (No.5) [1993] 1 W.L.R. 1489, at 1509B.

293. The concept of damages being "*at large*" does not, however, mean that the Court is possessed of some general discretion to make awards of (or akin to) general damages. It is necessary to show that actual damage has been suffered by the acts carried out pursuant to the conspiracy; there must be some nexus between the act causing the loss and the damage for which compensation is claimed: Lonrho Plc v Fayed (No.5) [1993] 1 W.L.R. 1489, at 1505B-E.

294. Expenses resulting from the tort are also recoverable. Thus the expense of managerial time spent in investigating and mitigating the conspiracy was held to be properly claimable in Lonrho v Fayed (No.5) [1993] 1 W.L.R. 1489 CA. Similarly in R-V Versicherung AG v Risk Insurance and Reinsurance Solutions SA (No.3) [2006] EWHC 42 (Comm) Gloster J held that the expense of managerial and staff time spent in investigating the conspiracy was recoverable provided that the expenditure was shown to be directly attributable to the conspiracy.

295. The defendants to a successful conspiracy claim will be jointly and severally liable to the claimant in respect of the damage caused by the conspiracy. The only exception to this principle is that a defendant will not be liable for damage caused before he joined the conspiracy and may equally not be liable for damage caused after he left the conspiracy (if that can be shown to have happened). The exception is of no application in the present case.

296. In the absence of contribution proceedings between the Respondents pursuant to the Civil Liability (Contribution) Act 1978, the Court has no discretion to apportion an award of damages for conspiracy as between the participating conspirators. I agree therefore with the submission that to the extent of an award, all Respondents should be held jointly and severally liable.

[G2] The Pleaded Claims

297. As set out above, the claim in conspiracy was for damages comprising:

297.1. compensation for the loss caused by virtue of the Petitioner's personal liabilities under the Reward Loan, because had he been aware of the conspiracy he would not have agreed to consolidate the Nucleus and Alfandari Loans or to grant the further security, but would instead have inhabited the "counterfactual" world which (in the context of s. 994) I have examined above; in other words, his case was that he ought to be awarded damages to put him in the position that he would have been in had his involvement in the Company been ended lawfully and "fairly" in 2019/2020 and therefore on the terms of a negotiated exit, without continuing personal liability;

297.2. compensation for legal fees incurred in connection with the disciplinary process and Employment Tribunal proceedings in the sum of £167,855.24 plus VAT;

297.3. compensation for lost gross earnings from 7 September 2020 to May 2023.

Compensation in respect of the Reward Loan

298. In respect of this head of loss (which was not included in the Schedule of Loss, but appeared for the first time in the Petitioner's Remedies Particulars) the Respondents pleaded that:

298.1. the Reward Loan was in a sum smaller than the aggregate of the Nucleus and Alfandari Loans (both of which it replaced); shortly before the refinancing, liability in respect of the Alfandari Loan was (on 28 June 2020) £127,757.12 and in respect of the Nucleus Loan (on 6 July 2020) was £563,142.88, being a total of £690,000, whereas the Reward Loan was for £636,000, and at a lower rate of interest than the Nucleus Loan;

298.2. the Nucleus Loan had been secured by the Petitioner; the Alfandari Loan by his mother;

298.3. the refinancing was necessary – without it, the Nucleus Loan would have been enforced within less than an hour, as was being threatened;

298.4. the loss was not caused the conspiracy.

299. There are therefore two different suggested approaches.

299.1. First, the Petitioner's: he alleged that had he known of the conspiracy, he would have negotiated a fair exit, relieving him of all personal liability; in any event (albeit not a pleaded alternative) he said that he would not have assumed responsibility for the Alfandari liability.

299.2. Second, the Respondents': they alleged that but for the conspiracy, the Petitioner would nonetheless have provided the security and assumed personal liabilities (as in fact, for good and pressing commercial reasons, he willingly did, in ignorance of the plan to dismiss him) but would not have been wrongfully dismissed; he cannot claim damages unless, in those circumstances, he can show that Company's subsequent demise (or his personal liability) would have been avoided but for the conspiracy; because that was not pleaded and cannot be shown, he cannot claim compensation.

300. In my judgment, on the basis pleaded and advanced by the Petitioner, this head of loss (which in the event I have awarded in substance under s. 996, albeit not against each Respondent as would be the case in respect of damages) is not recoverable.

301. My reason for that conclusion is that the true counterfactual in this context (of damages for tort) is not one in which Mr Seneschall accepts a hypothetical "fair offer" made in awareness of the conspiracy, but one in which there is no conspiracy at all, and therefore no concealed plan to exclude, remove and unlawfully dismiss him; the suggested counterfactual, adding an imagined element to the history (albeit not one which would have been in compliance with a pre-existing obligation, as in British Gas Trading Ltd v Shell UK Ltd, referred to above, in the context of contractual damages) is wrong in principle. Furthermore, it was not articulated in a pleading, but ought to have been, and ought also to have been raised before the Liability Trial. In any event, had there been a negotiation between the parties in, for example late 2019, or July 2020, I do not accept that it would have led to a "fair" agreement in the terms contended for on Mr Seneschall's behalf. Far more likely is that there would have been no agreement at all, if for no other reason than that Mr Seneschall held a significantly exaggerated view of the value of his shares; that point alone is sufficient to defeat this element of the claim. The best evidence of what would have happened had it not been for the conspiracy, is what did happen before the suspension and dismissal, in ignorance of the conspiracy: but for the conspiracy, the Petitioner would have provided the security and assumed personal

liabilities (as indeed he did, in ignorance of the plan to exclude him) and would not have been wrongfully dismissed.

302. In my judgment, the Petitioner's losses in this regard were not caused by the conspiracy, but, in substance, by the Company's insolvent liquidation, but for which he would not have been called upon as guarantor or charger. Having failed to allege (or ultimately in any event, to show) that the conspiracy (his exclusion in particular) caused the Company's collapse, it equally follows that he cannot show that his losses in this regard are attributable to the conspiracy. He has not shown that he would not have suffered them in any event.

Compensation for Legal Fees

303. In respect of this claim (to compensation for legal fees incurred in connection with the disciplinary process and Employment Tribunal proceedings) the Respondents' pleaded case was, in summary:

303.1. that the claim had not been pleaded;

303.2. that as a matter of principle, it was not open to the Petitioner, and that it would be invidious to order compensation for costs incurred in Tribunal Proceedings in which no costs order was made;

303.3. that in any event, the costs sought were not reasonable or proportionate (or necessarily caused by or incurred in respect of the breach of employment contract rather than more broadly, in respect of the unfair prejudice case, or in seeking to raise a claim against Ms Jones) and should be assessed (in support of which they cited Gomba Holdings (UK) Ltd & others v Minories Finance Ltd & others (No.2) [1993] Ch 171).

304. Although no directly comparable authority was cited to me, I disagree that this claim is unavailable to Mr Seneschall as a matter of principle. Like the expenses of managerial time considered in Lonhro and R-V Versicherung AG, the sums that were paid by Mr Seneschall, and the costs that he incurred, were directly attributable to the conspiracy, a central element of which was his wrongful (and indeed, dishonest) suspension and dismissal. Moreover, had it been necessary to do so, I would have held it possible to

make this award, in substance, under s.996 (and in that regard, I do not consider that any objection of principle would have arisen).

305. The circumstances considered in Gomba Holdings (UK) Ltd were not the same; in that case, the Court was concerned with the assessment of costs recoverable (as costs) under contractual provisions in various mortgage deeds. The Court construed those provisions as entitling the mortgagee bank to costs in sums that were not unreasonably incurred or unreasonable in amount. Amongst other things, it concluded (at [1993] Ch 171, 194A-D:

> "*In our opinion, the following principles emerge from the cases and dicta to which I have referred.*
>
> *(i) An order for the payment of costs of proceedings by one party to another party is always a discretionary order: section 51 of the Act of 1981.*
>
> *(ii) Where there is a contractual right to the costs, the discretion should ordinarily be exercised so as to reflect that contractual right.*
>
> *(iii) The power of the court to disallow a mortgagee's costs sought to be added to the mortgage security is a power that does not derive from section 51 but from the power of courts of equity to fix the terms on which redemption will be allowed.*
>
> (iv) *A decision by a court to refuse costs, in whole or in part, to a mortgage litigant may be a decision in the exercise of the section 51 discretion or a decision in the exercise of the power to fix the terms on which redemption will be allowed or a decision as to the extent of a mortgagee's contractual right to add his costs to the security or a combination of two or more of these things. The pleadings in the case and the submissions made to the judge may indicate which of the decisions to which we have referred has been made. ….*"

306. I was also referred to The Church Commissioners for England v Ibrahim & Daoud [1997] 1 EGLR 12, in which the Court considered the appellant landlords' claim to costs in the context of their contractual rights under the lease. Roch LJ (with whom Butler-Sloss and Hobhouse LJJ both agreed) said:

> "*The Recorder is, in my view, correct that parties to litigation cannot tie the hands of the court on the question of costs by agreement whether that agreement is one made after the commencement of proceedings or in the contract, breach of the terms of which gives rise to the proceedings. The court's power to decide by whom costs should be paid could probably not be fettered by a prior contract*

between the parties to the effect that a successful litigant should have to pay costs to an unsuccessful litigant. Clearly it would be contrary to the public interest that the court should be deprived of the powers given under section 51(6) to disallow wasted costs. Further, section 51(8) requires the person responsible for determining the amount of costs to take account of the factor there mentioned if it exists and that duty placed on that person cannot, in my view, be abrogated by a term in the contract. Whether the court's discretion to decide by whom the costs of proceedings should be paid could be fettered by a contractual agreement made before the litigation is started is a more difficult question which does not arise in this appeal.

Having made these observations, in my judgment, the statements of principle in the Gomba Holdings case are not confined to mortgage cases and have a wider application. The successful litigant's contractual rights to recover the costs of any proceedings to enforce his primary contractual rights is a highly relevant factor when it comes to making a costs order. He is not, in my view, to be deprived of his contractual rights to costs where he has claimed them unless there is good reason to do so and that applies both to the making of a costs order in his favour and to the extent that costs are to be paid to him. Indeed I would adopt the citation in the Gomba Holdings case from the judgment of Vinelott J which appears at page 193A, namely:

"If the parties have agreed the basis of taxation it would, I think, be an improper exercise of the court's discretion to direct the taxation on some other basis, unless satisfied that there had been some conduct on the part of the mortgagee disentitling him to costs or to costs on the agreed basis."

A good reason for depriving a successful litigant to part of the costs to which the contractual term would entitle him would be that that part of the costs came within the definition of wasted costs in section 51(7), that is to say they were costs incurred by him as a result of improper, unreasonable or negligent conduct on his part or that of his legal or other representatives. There may well be other sufficient reasons for interfering with the basis of taxation.

In my opinion it is not a proper exercise of a judge's discretion to refuse to allow a successful litigant to recover his contractual entitlement to costs because the judge considers that a lessor has an unfairly strong bargaining position or it is desirable that the courts keep a careful control of costs in undefended possession claims. Of course a landlord cannot by contract provide that he should recover a greater sum by way of costs than the costs that he has actually and reasonably incurred."

307. Again therefore, the case concerned the right of a party to a costs order as such in a case in which there was a contractual right to payment. In the present case however, the award sought is not of costs; it is of damages for conspiracy; costs assessment issues of "reasonableness" and "proportionality" are both therefore irrelevant (although of course, issues of causation are not, and there may be some overlap) as are issues of the court's discretion (which inevitably arise in respect of costs). It follows that the sum claimed is

not to be reduced by means of a costs assessment (or by reference to the principles of assessment) as the Respondents suggest.

308. As to the sum claimed, Mr Seneschall relied on the evidence of Mr Granger. In my view, Mr Granger was a patently honest and straightforward witness, who answered questions directly and according to what he was able to recall. In cross-examination, he did not depart from the content of his statement, in which, between paragraphs 13 and 15, he set out in some detail the nature of the work done and the period over which it was undertaken. He said:

> "*This work* [carried out by the Employment Team] *was divided broadly between the following stages:*
>
> *(a) 14 July to mid-October 2020 – work involved in investigating and responding to the allegations set out in the Respondents' letter of suspension and the large "dossier" of some 46 exhibits; assisting John with making submissions and collating evidence to rebut the 472 allegations made against him (including proofing witnesses and drafting witness statements – 14 in total, I believe); collating documents and preparing a draft chronology; preparing John for the "investigation" carried out by Rue Harries; preparing John for the disciplinary meetings conducted by Karen Fleming (which took place over two days); drafting correspondence with Karen Fleming and Trisant/Market Fresh's lawyers, Tees; preparing the grievance brought by John against the Respondents; and drafting the appeal to Dave Marshall against the decision to dismiss John.*
>
> *(b) August to November 2020 – work involved in making Data Subject Access Requests to Market Fresh and Trisant in August 2020, reviewing their responses (3 months later) and providing a detailed response complaining about the Respondents' serious failures to comply with the GDPR in responding to the DSAR.*
>
> *(c) October 2020 to October 2021 - work involved in corresponding with Tees and in the preparation, commencement, and prosecution of the Employment Tribunal proceedings, including liaison with ACAS, preparation and filing of*

the ET1, Grounds of Complaint and Schedule of Loss. For cost efficiency reasons much of this work was handled by a trainee solicitor under my supervision, with support from Daniel Northall, the barrister who we had in October 2020 instructed to represent John in both the employment and shareholder claims given his experience in both fields."

309. His evidence was that there was no overlap between the work done relating to Mr Seneschall's employment, and the work done in connection with his continued membership of the Company. Separate files were maintained and the teams providing the work were separately constituted. In addition, he said that his firm, Collyer Bristow, applied a goodwill discount of 20% (in the event, averaged at 22.3%) to the fees outstanding to it which was reflected in the amount claimed as damages (and which provides me some comfort regarding the nexus between the fees and the conspiracy). I have no real reason not to accept Mr Granger's evidence, despite Mr Marshall's endeavours in cross-examination to show that costs must have been incurred in respect of the shareholder dispute, or that the employment claim was merely part of Mr Seneschall's "*overall strategy*" (and that costs should therefore be considered together).

310. The Respondents complained that the claim in the Employment Tribunal would not have provided a "*fair return*" on the costs expended. That complaint is irrelevant: Mr Seneschall was entitled to seek relief in the Employment Tribunal (and in respect of statutory claims, was confined to that forum) and to that end, was entitled to seek legal advice and support; whether or not, economically, the costs incurred would have been "justified" by the return is not relevant; in my judgment they flowed naturally from the tort – there were no issues of causation. In any event, on the evidence, the (reduced) costs were not obviously unreasonable or disproportionate; it is irrelevant that they would not have been recovered as costs in the employment proceedings themselves.

311. In the event, I will allow Mr Seneschall's claim to compensation in respect of costs incurred in the tribunal and disciplinary proceedings, and award damages accordingly.

Compensation for Lost Earnings

312. Finally, the Petitioner sought £159,287.67, said to represent lost gross earnings from 7 September 2020 to May 2023 – a date some two years after the Company ceased to operate.

313. In essence, the Respondents' pleaded response was that:

313.1. this claim had not been included in the Amended Petition;

313.2. Mr Seneschall's employment would have ended on the failure of the Company in any event and/or before then, its insolvency would have affected its ability to pay salaries;

313.3. Mr Seneschall had failed to mitigate his loss by looking for and/or taking other work;

313.4. any award should be net of tax.

314. Again, Mr Seneschall's case in this regard - at any rate, as advanced in submissions at the Remedies Trial - was expressly based on the notion that he is "*entitled to such further earnings as he would have received within the counterfactual, without deduction*", the counterfactual being the world of a negotiated agreement in 2019/2020, by means of which he would have been relieved of his liabilities and the security provided in respect of the Company, would have been paid a substantial sum for his shares, would have avoided this litigation (and its very considerable costs of time and money) and would therefore have been free and able to commence again in business, as he would have wished, setting up a new co-packing operation with Ms Jane Stobie (who gave evidence on his behalf at the Liability Trial).

315. The Respondents' complained that Mr Seneschall had shown no intention and made no effort to mitigate any income losses by seeking paid work. They pointed out for example, that they themselves had all continued to work since the unhappy events surrounding the collapse of the Company, and that on his own evidence, Mr Seneschall has spent over £1 million on legal fees which he might more profitably have used to begin and fund a new venture.

316. I reject this claim for the following reasons.

317. First, because - as advanced at the Trial - it depended on an alleged causal connection with the conspiracy (by means of the alleged counterfactual world in which Mr Seneschall agreed a hypothetical "fair offer" made in awareness of the conspiracy in

2019) that as I have said above, was not articulated in a pleading but which ought to have been, and which ought also to have been raised before the Liability Trial. In any event, I have rejected that counterfactual as inappropriate in principle, and unlikely in fact.

318. Second - as more narrowly pleaded - the claim was for loss suffered as "*a consequence of the unlawful termination of his employment*". However, if advanced in those narrower terms, the claim would have failed because it was neither alleged nor demonstrated that but for the breach of contract, the loss claimed - being £159,287.67, said to represent lost gross earnings from 7 September 2020 to May 2023, a date some two years after the Company ceased to operate - would not have been suffered: it was neither alleged nor demonstrated that but for the breach, the Company would have survived and that it would have continued to employ and remunerate Mr Seneschall (assuming that to be how the sum, which was unparticularised, was calculated). In respect of loss, no alternative case was pleaded or advanced.

[H] <u>Overall Summary of Relief</u>

319. In the circumstances, in short summary, I will order as follows.

320. First, under s.996, that:

320.1. the Petitioner should be given relief equivalent to the purchase of his shares in the Company at a price (which I have determined to be £ nil) calculated by reference to the value of the Company as at 30 November 2019;

320.2. that in addition, the Petitioner should be given relief (whether by payment of compensation or the provision of an indemnity) equivalent to a release from the personal guarantees and security given in connection with the Company's business and borrowing (which is to say, in respect of the Reward Loan; the hire purchase of steriflow retort equipment through Hampshire Trust Bank; and the hire purchase of Thimmonier equipment through Ultimate Finance);

320.3. that in effect, the Petitioner is therefore insulated from the consequences of the Company's insolvent liquidation.

321. Second, as damages for conspiracy, the Petitioner is awarded compensation for his legal fees incurred in connection with the disciplinary process and Employment Tribunal proceedings.

322. The relief under s.996 is ordered jointly and severally: (i) as against Market Fresh and Mr Marshall, (ii) as against Ms Jones but only to an extent reflecting her 15% shareholding in the Company; (iii) but not against Mr McCormick. The relief in respect of conspiracy is awarded against each of the Respondents (bar the Company) jointly and severally.

323. I will hear further submissions as to the form of order, and as to costs and other consequential matters.

Dated 11 March 2024