Neutral Citation Number: [2022] EWHC 3272 (Comm)

Case No: LM-2021-000192

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before :

Mr. NIGEL COOPER K.C.
sitting as a Judge of the High Court

- -

Between :

(1) MR. SERG BELL **(formerly known as Serguei Beloussov)** **(2) MR. ILYA ZUBAREV**	**Claimants**
- and -	
(1) MS. RATNA SINGH **(2) DR. OLIVER BERNATH**	**Defendants**

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Mr. Jason Robinson and Ms. Julia Gibbon (instructed by **Quinn Emanuel**) for the **Claimants**
Mr. David Drake and Mr. Mark Wraith (instructed by **Aavagard**) for the **Defendants**

Hearing dates: 18, 20, 21, 22, 25 and 26 July 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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NIGEL COOPER KC SITTING AS A JUDGE OF THE HIGH COURT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 21 December 2022 at 10:30am.

Mr. Nigel Cooper K.C. sitting as a Judge of the High Court:

Introduction

1. At the time of the events with which this action is concerned and when this action was commenced, the First Claimant was named Sergei Beloussov. However, he has since changed his name by deed poll and is now known as Serg Bell. An Amended Claim Form was issued on 15 July 2022 amending the name of the First Claimant to Serg Bell. I shall refer to the First Claimant hereafter as Mr. Bell notwithstanding that at the time of the events with which I am concerned, he appears in correspondence and other documentation as Sergei Beloussov.

2. In this action, the Claimants seek to recover damages for alleged breach of warranties and fraudulent misrepresentation in respect of the Claimants' investments (totalling US$2.5 million) in a start-up company, Integrated Health Partners Limited ("IHPL"). IHPL sells a fitness bike, "CAR.O.L". The Claimants were part of a third round of fund-raising by IHPL and were known as the "Round 3" investors. Each Claimant subscribed for shares in IHPL. Mr. Bell was an original party to a subscription agreement dated 31 December 2019 ("the Subscription Agreement"). The Second Claimant ("Mr. Zubarev") agreed to purchase shares in IHPL pursuant to a Deed of Adherence and Subscription Deed made in around February 2020, the effect of which was that he became bound by and entitled to the rights conferred by the Subscription Agreement. Mr. Bell claims a direct loss of US$650,001.00 and a consequential loss of US$143,975.00. Mr. Zubarev claims a direct loss of US$975,000.00 and a consequential loss of US$215,962.00.

3. The Defendants are spouses who founded and managed IHPL. The First Defendant, ("Ms. Singh") developed the original idea for the bike in around 2012 and was the Chief Executive Officer of IHPL prior to the Claimants' investments. Ms. Singh remained the CEO of IHPL until 05 November 2020 when she was summarily dismissed. Dr. Bernath was a non-executive director of IHPL and also a partner in PwC, IHPL's accountants. Dr. Bernath resigned as a director of IHPL on 02 December 2020.

4. Ms. Singh and Dr Bernath together with Mr. Ulrich Dempfle formed IHPL's executive management and were collectively "the Founders" as defined in the Subscription Agreement.

5. The Claimants allege misrepresentations, which fall into three broad categories:

    i) Misrepresentations made by each of the Defendants in their answers to Founders' Questionnaires supplied on 27 November 2019 ("the Founders' Questionnaires") before the Claimants' investments.

    ii) Misrepresentations made by each of the Defendants during negotiations and due diligence as to whether and on what basis their existing (Round 1 and 2) investors were willing to participate in Round 3.

    iii) Misrepresentations made by the Defendants in Schedule 5 to the Subscription Agreement.

6. The Claimants also say that each Defendant warranted the truth and completeness of the representations made in their Founders' Questionnaire both in the body of the Founders' Questionnaire and in the Subscription Agreement.

7. The Claimants plead that the Defendants failed to explain in answer to Questions 30 and 31 of the Founders' Questionnaires and in their representations as part of the due diligence process that:

    i) By around November 2018, the relationship between (a) the Defendants (as the founders of IHPL) and (b) existing Round 1 and 2 investors (and the Board more specifically) had broken down or was extremely strained;

    ii) There was tension or acrimony between the Founders and Existing Investors; and

    iii) Existing Investors were unwilling to invest further in IHPL (including by participating in the Round 3 fund-raise) unless:

        a) As part of a down round (i.e. at a lower share price than their original investment); or

        b) Ms. Singh was replaced as CEO or her role changed materially because Existing Investors lacked confidence in her ability to lead IHPL.

8. In support of the above pleas, the Claimants allege that the deterioration in the relationship between the founders of IHPL and the existing investors and Board members involved the following matters:

    i) Ms. Singh had failed to materialise the sales revenue she had promised the existing investors, such that they had concerns over her ability as a CEO.

    ii) Ms. Singh was unable to put aside her own interests and accept help from investors for the betterment of IHPL. Rather she was difficult to work with and harboured an "us versus them" mentality. They say that she was unprofessional and rude to existing investors and her behaviour was often, if not always, histrionic and combative.

    iii) The Defendants wanted to run IHPL as a family business and not as a serious and professional organisation.

    iv) The Defendants resisted attempts by existing investors to hire professional personnel in the United States to promote the bike in such a way as to be able to break into that country's market. Instead, the Defendants subsequently appointed Rahul Bernath as head of the US sales operation and used IHPL to pay for his accommodation in New York, fund his expenses and fund his *per diems* (at a rate of $102.50 per day).

    v) At a meeting in October or November 2018, at a time when tensions were already strained between the Defendants and the existing investors, one of those investors, Mr. Gal, had a meeting with Dr. Bernath. At that meeting, Mr. Gal explained that there were two options available. IHPL could continue to function as Ms. Singh wanted, in which case the existing investors could not

agree to assist IHPL further. Alternatively, if the Defendants wanted to continue to use the resources and connections of the existing investors, then the Defendants needed to employ a professional management team to run the company. Mr. Bernath subsequently informed Mr. Gal that Ms. Singh wanted to run IHPL her own way without the continued help and assistance of the existing investors.

vi) At a board meeting in November 2018, the existing investors made clear that they were unwilling to inject more money into IHPL unless as part of a down round or a professional CEO was hired to run the company or Ms. Singh's role was changed materially. The Claimants say that Ms. Singh was particularly rude during the meeting using foul language in her exchanges with the Board members. They also say that as the existing investors were unwilling to invest further in IHPL and Ms. Singh was unwilling to accept their conditions for further investment, Ms. Singh resolved to find new funding herself which culminated in the Claimants' investments.

vii) Thereafter Ms. Singh attempted to have Mr. Gal and Mr. Kalimtzis removed from the Board.

viii) The position did not improve during 2019. By around 2019, the Board members representing the first round of investors still refused to invest further in IHPL. Ms. Singh accused Mr. Bensoussan, the Chair of the Board, of always berating her and being "always angry" and encouraged him to resign. By around October 2019, Mr. Gal's position remained that he would only invest in IHPL further if Ms. Singh was replaced as CEO or role was changed materially. The rift between the Defendants and Mr. Gal continued until after the date on which the Claimants acquired shares in IHPL.

9. The Claimants further plead that the Founders' Questionnaires contained additional misrepresentations. They say that the answers to questions 22, 30 and 31 failed to disclose to the Claimants that Ms. Singh and Dr. Bernath had been serially misusing (or had authorised the misuse of) IHPL funds to finance personal expenses and to lavish gifts or gratuities on their friends, which were then misrepresented in IHPL's accounts and records or to the Board. More specifically the Claimants allege:

i) That in September 2018, the Defendants authorised and approved the use of £1,330 of IHPL funds to finance Rahul Bernath's application for UK citizenship recording the sum in IHPL's accounting records as 'General Expenses'. The Claimants say that Rahul Bernath did not become an employee until 17 September 2018 and that his duties did not require him to hold UK citizenship. They say that the Defendants misrepresented the expenditure as 'General Expenses'.

ii) That in October 2018, the Defendants used IHPL funds to purchase mobile telephones for her mother and her daughter at a total cost of around £2,600.

iii) That in November 2018, Dr. Bernath authorised expenditure to pay for Rahul Bernath's flights and six bottles of Louis Roederer Cristal.

iv) That in April 2019, Dr. Bernath authorised the use of IHPL funds to reimburse Rahul Bernath for unidentified expenditure.

v) That in May 2019 to November 2020, the Defendants authorised the use of IHPL funds to pay for the rent of one or two apartments occupied by Rahul Bernath and to pay his per diem costs at a rate of US$102.50 per day at a total cost of £10,828.61. The Claimants say that none of this expenditure was a legitimate business expense and that none of it was reported as a benefit in kind to HMRC.

vi) That between May 2019 and September 2020 over £12,000 was expensed to IHPL for 53 'psychological kinesiology' sessions with Lifeline Technique UK, which were attended by Ms. Singh, her son Rahul Bernath and her daughter Aria Bernath. The Claimants say that these were personal expenses which Dr. Bernath charged to IHPL variously as 'consulting', 'staff training', 'travel and subsistence' and 'general expenses'.

vii) That in June 2019, the Defendants approved the use of IHPL funds to pay for Rahul Bernath's bed and bedding at a cost of US$1,753.98 and in the same month approved unknown expenditure made by Rahul Bernath using the company's credit card saying "*Leave it. I make something up for our accountants"*.

viii) That CAR.O.L bikes (IHPL stock) were used by the Defendants as currency for personal benefits, for example, in August 2019 a year's supply of organic wine and in October 2019 a week-long trip for the Defendants and their extended family to the "Six Senses" spa hotel in Portugal.

ix) During the holiday to Portugal, the Defendants ran all their expenditure through IHPL including their flights.

10. The Claimants also allege a series of separate misrepresentations made by the Defendants to them.

i) That in April 2019, Ms. Varvara Russkova e-mailed Ms. Singh who forwarded the e-mail to Dr. Bernath who then responded. Dr. Bernath represented to Ms. Russkova that the existing shareholders had the right to participate in the same investment round as Mr. Bell but had not expressed an interest to do so at that point. The Claimants say that in fact the existing shareholders had expressed an interest to do so but only on a conditional basis that was concealed from Ms. Russkova. The Claimants say that this representation was included in a due diligence memorandum, which was then reviewed and relied on by Mr. Bell when deciding whether to invest and that Mr. Zubarev is to be imputed as having relied on the representation because Mr. Bell introduced IHPL to him as an investment opportunity which he would not otherwise have done.

ii) That in a WhatsApp message dated 10 April 2019, Ms. Singh represented to Mr. Bell that her current investors do want to invest but want the same terms as last time.

iii) That in an e-mail dated 25 April 2019, Ms. Singh represented to Mr. Petr Lukyanov (now known as Mr. Peter Luke and the person appointed by Mr. Bell to carry out due diligence on behalf of Mr. Bell) that she had a few investors who would follow and that her current investors would love to do the round and she was certain that they would follow. The Claimants say that because of this representation Mr. Luke did not identify in the investment memorandum as a red flag the fact that existing investors were only willing to invest in the same round as the Claimants on certain conditions.

iv) That in an e-mail dated 25 April 2019, Ms. Singh represented to Mr. Luke that she could easily get a group of high-net-worth individuals together and do crowd funding but she did not want that. The Claimants say that because of this representation Mr. Luke did not identify in the investment memorandum as a red flag the fact that existing investors were only willing to invest in the same round as the Claimants on certain conditions.

v) That in a WhatsApp message dated 23 September 2019, Ms. Singh represented to Mr. Bell that her current investors would invest (and even asked her the day before) but that she did not want them to have too much power. The Claimants say that the investors had not made any such request and that it was in fact Ms. Singh seeking to persuade her current investors to invest further due to concerns that Mr. Bell would not invest.

11. The Claimants plead that each of the misrepresentations made by the Defendants was made by the Defendants knowing it to be false or being reckless as to whether it was true or false and with the intention that the Claimants should rely on it by entering the Subscription Agreement and the Deed of Adherence/Subscription Deed.

12. In Opening, Mr. Robinson for the Claimants summarised their case on misrepresentation by saying that the Defendants knowingly or recklessly concealed from the Claimants four fundamental facts about IHPL ("the Four Fundamental Facts"):

i) That the relationship between the existing investors on the board on the one hand and the founders on the other had broken down and become acrimonious.

ii) That the existing investors were unwilling to invest further in IHPL unless it was at a lower share price than the price at which they had bought their original shares and, or possibly alternatively, that Ms. Singh was replaced as CEO.

iii) That IHPL funds were being serially misused to finance personal expenses and gifts and gratuities for friends and family.

iv) That the Defendants' son was the occupant of the apartment that the company was renting in New York.

13. The Defendants deny breach of warranty and deny that they made any fraudulent misrepresentations. They also deny any reliance by the Claimants on the misrepresentations. The Defendants further say that:

i) The Claimants' investments came after a negotiation and due-diligence process lasting nearly a full year and was the third round of external fund raising by IHPL with previous rounds having taken place in around January 2018 and in around May 2018 with different investors being involved in each of those rounds. The groups of investors involved in those rounds had, as is typical, the right to appoint a number of directors to the board of IHPL and had done so.

ii) None of the warranties in the Subscription Agreement make direct or specific reference to the state of relations between the Founders and the other board members or the existing investors' willingness to invest.

iii) The questions in the Founders' Questionnaires were vague and ambiguous and the alleged Four Fundamental Facts too open-ended to fit within scope of the questions.

14. The Defendants challenge the quantum of the Claimants' alleged losses and deny that the alleged consequential losses were caused by any breach of warranty or misrepresentation on their part. Rather, they say that any drop in value of the company was caused by failures of management since Ms. Singh was removed as CEO in November 2020.

15. Both parties complained that the other sought to advance their case by reference to un-pleaded issues. Save as specifically stated below, I am satisfied, however, that both parties' cases were adequately pleaded so as to cover the issues raised before me. In particular, the Defendants alleged that the Claimants had not pleaded a case that the answers to the Founders' Questionnaires were fraudulent misrepresentations. However, having considered paragraphs 15 and 16 and Section D of the Re-Re-Amended Particulars of Claim and paragraph 7D.2 of the Re-Amended Reply, it seems to me that the Claimants have sufficiently pleaded their case that the Defendants' answers to the Founders' Questionnaires were fraudulent misrepresentations. Both the Claimants and the Defendants also challenged in relation to various issues whether the case against them had been adequately put in cross-examination. Again, save in so far as specifically identified below, I am satisfied that each side had adequately put its case.

16. Finally, during the hearing, I had detailed oral and written submissions from counsel for each party and extensive factual and expert witness testimony as well as considering the substantial quantity of contemporaneous documents in the trial bundles. I have considered the submissions and evidence carefully for this judgment and the fact that I do not refer to a particular submission or piece of evidence does not mean that I did not consider it in forming the views expressed below.

The Parties

17. Mr. Bell is a professional investor who describes himself as an entrepreneur, investor, speaker and philanthropist who has founded more than two dozen companies around the world since 1992. He is a co-founder of Runa Capital, a global venture capital firm and of Acronis, a global technology company.

18. Mr. Zubarev is also a professional investor and co-founder of Runa Capital and Acronis.

19. Alongside her undergraduate degree, Ms. Singh has an MBA with a specialism in marketing. She describes herself as having spent most of her working life in consumer advertising and consumer packaged goods and as having been since 1997 an entrepreneur. She has worked for a number of major advertising agencies and was recruited by McKinsey & Co. to be their first entrepreneur in residence. She founded IHPL with Dr. Bernath in 2007.

20. Dr. Bernath qualified and worked as a medical doctor before taking a position with McKinsey & Co., London where he worked primarily in the healthcare and pharmaceuticals business as well as in the private equity practice. Between 2007 and 2015, he was a founder and managing director of IHPL. He joined PwC in 2016 as a strategy consultant (partner) focussing on healthcare and strategy. At that time, Dr. Bernath's role with IHPL became more supportive or administrative and financial.

The relevant contractual documentation

21. The Claimants rely on the following warranties found in the subscription agreement dated 30 December 2019 ("the Subscription Agreement") which provided as follows:

> *"…*
>
> ***"Fundamental Warranties"** means those statements set out in paragraphs 1 and 2.1 of Schedule 5;*
>
> ***"Warranties"** means the warranties given pursuant to clause 5 (reference to a particular **"Warranty"** being, unless otherwise specified, to a statement set out Schedule 5);*
>
> ***"Warrantors"** means each of the Founders and the Company*
>
> *…*
>
> ***5. Warranties***
>
> *5.1 Subject to clause 6 each Warrantor severally warrants in the terms of the Warranties as at the Completion Date.*
>
> *5.2 Each Warranty is a separate and independent warranty, and, save as otherwise expressly provided no Warranty shall be limited by reference to any other Warranty or by the other terms of this Agreement.*
>
> ***6. Limitations on Claims***
>
> *6.1 The limitations set out in this clause shall not apply to any Claim which is the consequence of fraud, dishonesty, wilful concealment or wilful misrepresentation by or on behalf of the Company, or the result of a breach of the Fundamental Warranties, save that the limitation at clause 6.2 shall apply to the warranty set out in paragraph 1.3 of Schedule 5.*

6.2 The Warrantors shall be under no liability under the Warranties to the extent that the matter or circumstance giving rise to such liability is disclosed.

…

6.4 The aggregate liability of the Warrantors in respect of any and all Claims shall be limited to:

…

(b) In the case of each of the Founders, an amount equal to 1.5 times such Founder's annual salary from the Company.

11. Entire Agreement

…

11.3 Without limiting the generality of the foregoing, each of the parties irrevocably and unconditionally waives any right or remedy it may have to claim damages and/or to rescind this agreement by reason of any misrepresentation (other than a fraudulent misrepresentation) having been made to it by any person (whether a party to this agreement or not) and upon which it has relied in entering this agreement.

Schedule 5

…

2. Information

…

2.3 The responses to the Founders Questionnaires are at the Completion Date true, accurate and complete and not misleading in all material respects.

…

11. Contracts with connected persons

…

11.2 There are no existing contracts or arrangements to which the Company is a party and any of its Directors or shareholders and/or any person connected with any of them is interested other than this agreement and the Shareholders' Agreement."

22. The Founders' Questionnaires referred to in clause 2.3 of Schedule 5 were dated 25 November 2019. They included the following questions and text:

"…

22. Are there any circumstances known to either you or your spouse or your civil partner which are likely to lead to either you or your spouse or your civil partner becoming a party to any litigation or court proceedings?

If so, please provide full particulars.

…

30. Are there any other facts or circumstances relating to your spouse or civil partner or yourself and your respective business careers which could in your reasonable opinion be relevant to a prospective purchaser of, or subscriber for, shares in, a business, company or firm in whose management you or your spouse or your civil partner are involved when deciding whether or not to make such purchase or subscription.

If so please provide full particulars.

31. Are there any other facts or circumstances which could reasonably be expected to impair your suitability to be a director of a publicly quoted company.

If so, please provide full particulars.

I hereby declare and warrant to Phystech VC Ltd that the answers to all the above questions are true, complete and not misleading in any way and I authorise Phystech VC Ltd and its advisers to make such enquiries and searches in respect of me as Phystech VC Ltd shall in its discretion deem appropriate."

23. Each of the Defendants completed a separate Founders' Questionnaire and answered questions 22, 30 and 31 'no'. Each also signed the declaration at the end of the Founders' Questionnaire. Phystech VC Ltd is a venture capital firm associated with Mr. Luke, which was assisting Mr. Bell with due diligence.

The witnesses

24. This is one of those cases where the words of Mr. Justice Leggatt in Gestmin v Credit Suisse [2013] EWHC 3560 (Comm) at [22] are apt not least because of the level of acrimony between the parties and because of the nature of the allegations made.

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

25. I heard oral witness evidence on behalf of the Claimants from Mr. Bell, Mr. Zubarev, Mr. Peter Luke (a fund manager and responsible for heading up the due diligence team acting on behalf of Mr. Bell), Mr. Eldad Gal (an existing investor and board member at the time of the Claimants' investment in IHPL) and Mr. Robert Bensoussan (also an investor in IHPL and Chair of the board at the time the Claimants

invested in IHPL). I heard oral evidence on behalf of the Defendants from Ms. Ratna Singh, Dr. Oliver Bernath and Mr. Rahul Bernath (their son and an employee of IHPL). To avoid confusion between the Second Defendant and Mr. Rahul Bernath, I shall refer to Mr. Rahul Bernath below as "Rahul". I do not intend any disrespect to him by doing so.

26. Inevitably each party was critical of the credibility of the witnesses for the other party. Having heard their oral evidence, I consider that each of Mr. Zubarev, Mr. Luke, Mr. Gal and Mr. Bensoussan gave their evidence in a straight-forward manner and were doing their best to assist the Court. Mr. Bell struggled at times to answer questions directly and to confine himself to answering the question he was asked. His answers would occasionally drift off on tangents that had no relevance to the issues in the case. He also had limited recall of conversations and correspondence unless directed to the documents. When directed to certain contemporaneous documents, such as the investment memorandum prepared by Ms. Russkova, Mr. Bell claimed to be unable to recall what he understood them to mean at the time. It was also notable that he had a surprising difficulty in recalling whether he was a shareholder in certain companies that also invested in IHPL. Mr. Bell's limited recall and his inability to answer questions about how he understood contemporaneous documents means that I have approached his evidence with caution save where it is supported by the contemporaneous documents.

27. Having heard the evidence of Ms. Singh, Dr. Bernath and Rahul, it seems to me that much of their evidence relating to the relationship between the Founders on the one hand and the existing investors on the other and their evidence as to the expenses paid by IHPL was the product of work done in preparation for this hearing to justify their actions by reference to documents rather than necessarily reflecting their state of mind at the time of the events in question. Both Dr. Bernath and Ms. Singh also had difficulty confining themselves to answering the questions put to them. It was clear from her oral evidence that Ms. Singh was passionate in her defence of her actions and those of Dr. Bernath and Rahul. She had to be reminded on several occasions to answer the questions being put to her and not to make submissions. Her manner of giving evidence reflected the criticisms made of her in her dealings with the board of IHPL prior to Mr. Bell's investment in the company in that she had difficulty listening to the questions being put to her and was clearly unwilling to accept that she was at fault in any way. Again, given my concerns about the evidence of Ms. Singh, Dr. Bernath and Rahul, I have approached their evidence with caution save where it is supported by the contemporaneous documents.

28. I also heard oral evidence on valuation from Mr. Andrew Caldwell, a senior Managing Director with Ankura Consulting (Europe) Limited on behalf of the Claimants and from Mr. Mark Berenblut, a consultant with NERA Economic Consulting. I will set out my conclusions as to the weight to be given to their evidence below when I come to deal with quantum.

The Facts

29. I set out below my findings as to the history of the events, which are the subject of this action.

30. IHPL was incorporated on 14 February 2007. Ms. Singh had the idea for the CAR.O.L bike sometime in 2011 or 2012. Dr. Bernath became a non-executive director of IHPL at a fee of £0.00 per annum on 01 January 2016.

31. The Shareholder Subscription Agreement for round 1 investment in IHPL was executed on 21 September 2017 providing for the issue of 1.9 million A ordinary shares at a price of $0.50 per share to a group of new investors. The round 1 shares were issued on 11 January 2018. Prior to the issue of those shares, the existing shareholders of IHPL were the Defendants and Mr. Dempfle. Mr. Robert Bensoussan and Mr. Robert Darwent became shareholders in this first round and were appointed to the board with Mr. Bensoussan becoming chair. The other investors in round 1 were George Bensoussan, Lyndon Lea and Jean-Pascal Crametz.

32. However, by May 2018, IHPL required further investment. The board minutes for a board meeting on 02 May 2018 record that round 2 fundraising was required because otherwise IHPL would run into liquidity challenges by the end of June 2018.

33. Round 2 investment took place on 19 June 2018 pursuant to a Shareholders Subscription Agreement of that date. 1.69 million A ordinary shares were issued to new investors at a price of $0.50 per share. Mr. Eldad Gal and Mr. Evan Kalimtzis invested in this round and were also appointed to the board. The other new investors were Mr. Richard Abbe, Eli Gabso, Peter Marshall and Idan Moskovich.

34. On the same date, Ms. Singh signed a Chief Executive Officer's Service Agreement. That agreement provided for Ms. Singh to receive a basic salary of £120,000 per annum. Clause 5 of the agreement set out Ms. Singh's duties to the company, including an obligation to faithfully and loyally serve IHPL to the best of her ability and to use her best endeavours to promote IHPL's interests. Clause 6.3 of the agreement also included an obligation on Ms. Singh to disclose fully to IHPL any circumstances which might arise during her employment and which gave rise to or might give rise to a conflict of interest between IHPL and Ms. Singh or her immediate relatives.

35. It appears that immediately after the Round 2 investment, there was a breakdown in the relationship between the Founders and certain of the existing investors with a difference of views as to sales strategy going forward. Mr. Kalimtzis and Mr. Gal were concerned that there was no sales plan in place. A series of WhatsApp messages between Mr. Bensoussan and Ms. Singh on 19 June 2018 illustrate the differences between Ms. Singh and other members of the Board:

- D1: "There is a huge knowledge gap between us and the Board and you need to understand the terrain"

- RB: "[…] Will explain to you the issues between board and u And Why i was really unhappy at you today."

- D1: "I am also very unhappy and fed up with being the punch bag. It was a blood bath today and I don't want a destructive Board. I think you all should try and spend time to understand the situation and why we do what we do and say what we say. There is no understanding of the industry at the Board and no interest in understanding. RD spends most time doodling and pipes up to join the bashing. I

must say that I was extremely sorry when I said that about the Chairman and that was immediately mortifying that I showed such disrespect and I hope you can accept my heartfelt apology. But I am standing firm in that I need you all to understand first then talk."

- D1: "Eldas [Eldad Gal] and Evan [Kalimtzis] saw that presentation yesterday and discussed it for 2 hours and were happy but today it was like "huh"? I seriously just don't get why it has to be so destructive. I want […] to explain the whole thing to you. Bit of all you want to do is bash me some more then it's not helpful […]"

- RB: "No need to apologize. Im Ready to go . Don't need the aggravation. The problem is you don't listen. When five people who have different experiences tell you the same thing and you don't profit from the experience, it is very frustrating. You want to do your own thing. That is fine. Don't count on me to approve if you're not ready to listen."

36. It is clear from the internal correspondence between the Defendants that Ms. Singh considered that Mr. Kalimtzis and Mr. Gal did not understand the business and were consistently attacking her. In turn, the board was becoming frustrated that documents for board meetings were produced without proper notice and that no sales data or forecasts were being provided despite requests. The situation was sufficiently poor that in June 2018, Mr. Kalimtzis was threatening the Founders with litigation. By July 2018, Ms. Singh was also considering the need for an alternative source of investment. It is clear from the correspondence that her view was that Mr. Gal and Mr. Kalimtzis had their eyes on the Founders' shares and were keen to get rid of the Founders. It appears that Dr. Bernath shared these views.

37. Tension between Ms. Singh and other board members continued through September and October 2018 as illustrated by a series of exchanges between Mr. Kalimtzis and Ms. Singh on 23 September 2018 and again in October 2018 about the lack of sales over a four-month period and the lack of a trackable, scalable sales strategy.

38. Rahul Bernath began working for IHPL on 17 September 2018. The fact that he had been recruited to a sales position was reported at a board meeting on 26 September 2018 as was the fact that Mr. Doug Bell's employment had been terminated. Mr. Doug Bell was at the time the commercial director for IHPL. There was no explanation at the board meeting of the terms on which Rahul had been employed. On 11 October 2018, payments made in respect of Rahul Bernath's UK citizenship application, were expensed to IHPL as 'general expenses' and reimbursed on the authority of Dr. Bernath.

39. In October 2018, Ms. Singh used IHPL's funds to purchase a mobile phone for her mother and a SIM card for her daughter. Ms. Singh says that this was done because at the time she was also purchasing phones for employees and it was easy and convenient for her to purchase a phone and a SIM card for her family members at the same time. She says that she then forgot to repay IHPL.

40. On 24 October 2018, Dr. Bernath treated as an expense of IHPL the cost of a return flight from London to New York City for his daughter, Aria. In cross-examination, Dr. Bernath said that this was because he had paid for a similar flight for Rahul using his Avios points when Rahul's flight was a business expense for IHPL. His evidence

in relation to this expense together with Ms. Singh's evidence regarding the mobile phone and SIM card illustrate the extent to which the Defendants were treating IHPL as a family business without considering the need for proper control of the division between their personal expenditure and the business expenses of IHPL.

41. In the same month, the Founders realised that they were low on cash because Mr. Dempfle had made a large stock order for bikes. On 22 October 2018, Dr. Bernath sent messages to the other Founders asking if anyone was watching the cash and also warning that the company was getting close to running out of cash 'very very soon'. The following day, Ms. Singh informed Mr. Kalimtzis that she was going to New York with Rahul who would be staying on and *"getting a flat share with some students"* and would return in November. A few days later, Rahul and Ms. Singh instead agreed that he would get a one-month rental on his own.

42. On 11 November, Rahul informed his parents that he was *"cash poor atm"* to which his father replied *"do expense stuff so I can pump money over"*. By this time, Rahul had nearly US$9,000 of expenses waiting to be paid to which Ms. Singh's reaction was *"Lol!"*. When Ms. Singh inquired how he had accrued expenses in this sum, Rahul replied *"I've purchased 6 bottles of Crystal!"*. It is now accepted that this was a joke. Nevertheless the exchanges illustrate again, the extent to which Dr. Bernath was willing to allow Rahul to expense items to IHPL without making proper inquiries as to the basis for the expenses. Dr. Bernath did give evidence that he believed Rahul was covering advertising expenses for IHPL using his personal credit card but the contemporaneous correspondence does not suggest that this was the reason why Dr. Bernath was prepared to encourage Rahul to expense stuff as a way for him to transfer money to Rahul. On 15 November, Dr. Bernath informed Ms. Singh and Rahul that while they were in New York, they could claim $102.50 per day by way of *per diems* without the need to keep receipts. He later clarified for Rahul that these *"per diems"* would not be available to him once he moved to New York and lived there. Dr. Bernath suggested that it may be necessary to increase Rahul's salary.

43. On 16 November during a discussion between the Founders about whether Ms. Singh should take a first or premium economy flight to New York, Ms. Singh responded to a suggestion from Dr. Bernath that taking a first class flight would not go down well with the investors in the following terms: *"Who cares about investors? They won't l ow [sic] and I work for free. I could stay with [Rahul] but that's not great. I need to take care of myself. ..."*. Dr. Bernath agreed but then the following day urged better controls on unexplained expenditure, to which Ms. Singh replied *"Sorry, my bad"*.

44. The following day on 17 November 2018, Dr. Bernath e-mailed Ms. Singh and others within IHPL about the need for tighter controls on cashflow management and suggested procedures for implementing those controls.

45. On 19 November, after Ms. Singh circulated a proposed organisation chart to Mr. Gal and Mr. Kalimtzis, Mr. Gal complained about senior roles being allocated to Rahul on the basis that he did not have sufficient experience for those roles. Ms. Singh's response was to be *"seriously annoyed"*. About this time, the Founders were also discussing a third round of fundraising although at this point in time the issue was apparently to confirm which Round 1 and 2 investors would participate in Round 3 and to keep new investors out.

46. The difficulties between Ms. Singh and other board members were continuing. On 22 November 2018, Ms Singh complied to Mr. Bensoussan that she *"just had to let loose on Eldad […] I basically told him and his cronies to take a hike"* adding *"It's now an abusive relationship"*. She also told Mr. Gal that she was *"fed up with constant slamming from you all"* and *"fed up with Evan's tirades"*. Mr. Gal passed this criticism on to Mr. Kalimtzis prompting further acrimony between Mr. Kalimtzis and Ms. Singh that evening. On 23 November, Ms. Singh told Dr. Bernath and Rahul that she thought she should step down as CEO on the basis that *"After Evan's behaviour yesterday, I simply cannot see it improving and we need the money. They don't like me. That's the problem. We need to think of the company."* It appears that the principle point of contention between the Founders and the other board members was the lack of sales achieved against what was promised.

47. A board meeting took place on 26 November 2018 at which Mr. Darwent suggested a down-round and Mr. Gal suggested a further round of fund-raising at $0.50 per share but only if Ms. Singh was replaced as CEO or her role changed materially. After the meeting, Ms. Singh described it as being *"beyond ugly"* and explained that Mr. Gal had asked the Board (minus the Founders) to stay behind and suggested to them *"1. Fire Ratna 2 Put a lot of money in 3 Recruit his team 4 Growl CARol to 10X"*. If any of these courses of action had been taken Ms. Singh's role would have changed significantly. Dr. Bernath described the proposal of a down round as being non-feasible on the basis that it would make it close to impossible to raise further funds in the near future at a substantially higher valuation.

48. On 27 November, Ms. Singh wrote to Mr. Bensoussan both by e-mail and by WhatsApp to say that the Founders had decided on a course of action with regard to the Board, namely that Mr. Bensoussan should ask Mr. Gal and Mr. Kalimtzis to resign. In her WhatsApp messages, Ms. Singh referred to Mr. Gal and Mr. Kalimtzis having failed in their fiduciary duty. Mr. Bensoussan replied by e-mail on 28 November in terms that made clear that he could not understand why Ms. Singh "*wanted to start a war with two shareholders"* and made clear that he considered the existing investors' frustration was justified: *"investors have invested based on a business plan which had not been met by miles … management hasn't delivered, as simple as that"*. Mr. Bensoussan said that existing investors did not think that Ms. Singh could lead IHPL as CEO and that her proposal regarding Mr. Gal and Mr. Kalimtzis was a *"a simple vendetta and ego trip against people you dislike"*. He was clear that he would not support any attempt to force Mr. Gal and Mr. Kalimtzis to resign. It was in this message that Mr. Bensoussan also warned Ms. Singh that *"no new investor will want to invest in a business where there is a shareholder's dispute"*. Ms. Singh's reaction was that she needed to find funds. On 28 November, Dr. Bernath shared his views that there was a hostile atmosphere and the Founder needed to minimise interactions with the Board. The Founders agreed that it was unlikely that any of Mr. Gal, Mr. Kalimtzis, Mr. Darwent or Mr. Bensoussan would invest in Round 3 and that a down round was unacceptable.

49. On 23 December 2018, Mr. Dempfle and Dr. Bernath were discussing the worsening financial situation of IHPL by WhatsApp. Their exchange included the following message from Dr. Bernath:

> *"I suspect we need to keep expenses on our personal cards for a while - and maybe "lend" money to IHP. via "expenses" I am nervous about a proper loan to IHP from*

us personally as it may later be difficult to get it back if new investors consider that as what the founders put in.

For now – do not enter your expenses into Xero – I do nkt [sic] want PwC accountants to get ideas about our solvency."

50. This exchange provides support for the view that Dr. Bernath was managing IHPL's expenditure so as to avoid the true picture of IHPL's financial situation being apparent to its accountants. Given that the e-mail exchange was prompted by Mr. Dempfle's concern that IHPL's cash situation was dramatically worse that he had thought such that he considered it necessary to slam the brakes on things that were not essential, it also emphasises the extent to which IHPL was in need of further funding. Mr. Dempfle went on to say that the situation which had arisen with the large order for bikes meant that the Founders' reputation as a savvy and capable top management team in front of the board had suffered.

51. Given the situation, the Founders were discussing a possible further share subscription to raise funds. Later in December 2018 Mr. Gal questioned whether proper corporate governance had been complied with in relation to a further share subscription without a Board decision. Ms. Singh e-mailed Rahul and Mr. Dempfle on 30 December 2018 saying that Mr. Gal *"is being a C***. I am going to enjoy it. I am now going to get my Kalashnikov out. And he will regret it!"*. Later, she e-mailed Dr. Bernath saying *"I am enjoying this :) and am loading me Kalashnikov. Please let it be that there is no Board needed and that we have voted amongst ourselves :)".* Although these e-mails were e-mails sent by Ms. Singh to other Founders, they do show her personal and aggressive manner and are illustrative of Ms. Singh's attitude to her responsibilities as CEO and to her approach to her relationship with the other board members.

52. Further messages were sent by Ms. Singh in late December and early January emphasising her desire to remove Mr. Gal and Mr. Kalimtzis from the board. In early January 2019, she also consulted Mr. James Klein of Shoosmiths, a firm of solicitors, about possible steps to deal with what she described in a message to Mr. Klein on 03 January 2019 as *"the toxic Board members"* and whether proper corporate governance has been followed with respects to complaints made by Mr. Gal and Mr. Kalimtzis about the top-up round.

53. The context of the fall-out between the Founders and the other board members is helpfully summarised in an e-mail from Mr. Bensoussan to the Defendants and to Mr. Dempfle on 03 January 2019, in which he urged that Mr. Kalimtzis has a point. He put the position in the following terms:

"*I am sorry to agree with him but he had a point.*

From a corporate governance point of view, this is not acceptable. I can understand that you are unhappy at them, but if there is a vote, they have to be notified, given a chance to vote, even if you already have your 75%.

No need to rub it into their faces. We have now another point of antagonism, which could have been avoided, and I am incomfortable [sic] *with the outcome.*

As the Chairman, I refuse to be put in this situation. This is my reputation with people like RD [*Robert Darwent*], *with who, I am still in business with. Im suppose to guarantee the proper governance for all shareholders, and this is a very bad example. All of that useless back and forth for a very small top up.*

I urge management to get financial elements in place asap, so that we don't wait for end Jan for launching a raise. Actual Shareholders need to understand what are the financial needs of the business, and the business

plan attached. […]"

54. It is apparent from this message that Mr. Bensoussan considered that Ms. Singh and the other Founders were failing in their management of IHPL and also failing to engage with proper governance for all shareholders.

55. The tensions between the Founders and Mr. Gal and Mr. Kalimtzis over how funds were to be raised continued through January and February 2019. Both Mr. Gal and Mr. Kalimtzis raised concerns over IHPL's corporate governance while Ms. Singh was complaining about a toxic board and how to deal with them. In early January 2019, Mr. Gal and Dr. Bernath had a meeting to try and clear the air. In an e-mail exchange on 05 January 2019, Dr. Bernath set out his understanding of Mr. Gal's views namely (i) existing investors would disengage and withdraw their existing outside resources and contacts leaving the Founders to run IHPL or (ii) the existing investors would participate actively with resources and contacts but each side would let things cool off and find a different way to work together going forward. In response, Mr. Gal clarified that he lacked confidence in Ms. Singh and that time would tell whether confidence in her could be recovered. In the interim, Ms. Singh could maintain her CEO title but *"in name only"*.

56. On 19 January 2019, Mr. Dempfle together with Mr. JP Crametz and Mr. Tamar Ravid, subscribed for 300,000 further A ordinary shares at $0.50 per share.

57. On 01 February 2019, IHPL and Ms. Singh entered into an agreement to defer her remuneration as CEO such that she would only receive £1,000 per month between February and August 2019.

58. The breakdown in relationship continued through February and was neatly summarised by Mr. Bensoussan in an e-mail to the Founders on 07 February 2019, in which he said:

"*... It is clear that management have taken an attitude against your board members who were willing to re-invest if there was an evolution of management or a down round.*

As majority shareholders, you're saying no, and you will go out and find the money with funds or HNWI [*High Net Worth Individuals*].

They are all clearly skeptical [sic] that anything is going to happen. The product is excellent, there is a story to tell, but they think the momentum is not ours (around 20 bikes a month) and that the management is not credible enough to raise the money. Body language and comments were quite clear around the table. […]

Your options to raise money are limited. You may have to go through a fire sale of the business, a serious down round with existing shareholders, with a change of management, and maybe a loss of majority.

If you want the business to continue, that is.

This is the famous plan B, to which you collectively need to think about. I can be part if I can help. Cause in three months, if we don't have any perspectives to raise money, you will have to produce this plan B and make

concessions. […]"

59. It is clear from this message that at this time Mr. Bensoussan considered that the management, by which I understand him to refer to Ms. Singh and Mr. Dempfle but possibly also Dr. Bernath, saw their relationship with other board members, such as Mr. Gal, Mr. Kalimtzis and Mr. Darwent. as having broken down.

60. Ms. Singh replied the same day to say:

"… In terms of the diffusion of innovation curve we are tracking exactly as we should but yes not enough. We all 100% agree. The situation just makes us more cash hungry. […] Let's raise some dollars absolutely but I also wish the Board (not you) would help. It's easy to criticise."

61. Ms. Singh and Mr. Bell were introduced on 07 February 2019 and he informed her on 11 February that Ms. Russkova would be helping him to look at this investment.

62. On 06 March 2019, Ms. Singh informed the board that Rahul would be relocating to New York at the end of the month. Later that month on 25 March 2019, there is an exchange of e-mails between Rahul and Dr. Bernath in which Rahul asks to be reimbursed for expenses notwithstanding that he is missing loads of receipts. Dr. Bernath agrees although he reminds Rahul that in future proper receipts are required.

63. On 04 April 2019, Ms. Russkova e-mailed Ms. Singh to ask if any of the current shareholders were interested in following the new round of investment. Dr. Bernath replied on Ms. Singh's behalf the following day to say:

"Existing shareholders: existing shareholders have the right to come at this round and buy shares at the same valuation and under the same terms up to the amount to maintain their current % equity holding. However, existing shareholders have not expressed an interest to increase their investment at this point."

64. In view of the fact that existing board members had already indicated that they would be prepared to invest further if there was a down round or if Ms. Singh resigned or stepped aside, it is clear that the final sentence of Dr. Bernath's e-mail was not correct.

65. Ms. Russkova completed the investment memorandum later on 05 April 2019. Mr. Bell provided his comments on the memorandum on 08 April 2019 including noting that it is *"Bad sign, if existing shareholders do not want to participate."*

66. Mr. Bell subsequently provided Ms. Singh with a copy of the investment memorandum, and she objected to the analysis done by Ms. Russkova. On 10 April 2019 Ms Singh sent Mr. Bell a WhatsApp in the following terms:

"BTW – my current investors do want to invest but they want the same terms as last time. This means that I give all my company away. I also don't want to increase their power. I can take their money."

67. Later on the same day, Mr. Bell had an exchange of e-mails with Ms. Russkova about the investment memorandum. Ms. Russkova repeated her concern that existing investors were not investing, to which Mr. Bell replied that was mostly related to the terms that Ms. Singh was offering. It is apparent from this message both that Mr. Bell was unaware of the demands of Mr. Gal and Mr. Kalimtzis that Ms. Singh resign or step aside and understood from his exchange with Ms. Singh that the reason why the existing investors were not coming on board was that Ms. Singh was not prepared to give them the same terms as last time.

68. On 24 April 2019, Rahul rented an apartment at 261 N 9th Street in New York. The rent for the apartment was paid by IHPL.

69. On 25 April 2019, Ms. Singh e-mailed Mr. Luke to ask if Mr. Bell would lead the investment round and said:

"If so, I have a few investors that will follow. My current investors would love to do this round but as I have told SB – I want to have an institutional lead and also control the balance of power.

We do have to offer my current guys the investment though and I am certain that they will follow. But we are now ready for professional institutional investors to take CAR.O.L. to the next level. Hope that makes sense."

70. In cross-examination, Ms. Singh sought to suggest that what she meant with this message was that she had a few investors who would love to do this round but on their own terms. I do not accept that this is what Ms. Singh meant at the time or that read objectively that is a natural meaning of the words used. The message does not suggest that existing investors have conditions before they will invest further. Ms. Singh went on to say that in any event Mr. Bell would know what she meant because she had said to him and Mr. Luke *'ad infinitum'* in several e-mails and phone calls before. I am unable to accept this evidence because no messages have been shown to me in which Ms. Singh provides this information to Mr. Bell or Mr. Luke and neither of her witness statements refer to any such messages or phone calls.

71. In the same passage of her cross-examination, Ms. Singh accepted that when she was liaising with Mr. Luke at this time, she knew that anything she said to Mr. Luke as head of the due diligence team might ultimately be relied on by Mr. Bell and Mr. Zubarev.

72. Later the same day, Ms. Singh e-mailed Mr. Luke again and stated:

"… I want to do this right. I can easily get my current investors to get a Merry band of HNW [High Net Worth] guys together and I can do crowd but I don't want that. I

want institutional round and bring in professional investors. We are self-sustaining until that happens. Remember I am obliged to offer the current investors the option to come in with a lead in place. So if we need followers, plenty abound. Hope that makes sense.

73. Ms. Singh sought to explain that what she meant by this message was that Mr. Gal had introduced a couple of his investors to her but she did not like them or want their money. Ms. Singh also suggested that she would be able to get finance from funds put together by Harvard or by MIT such that once she had a lead investor in place she could get followers. When pressed on this evidence, Ms. Singh qualified her statement to say that she could get the funds on their terms if she needed it and if she was desperate. She also repeated her position that Mr. Luke and Mr. Bell already knew that existing investors would only invest on their terms. I find that Ms. Singh's explanation for the terms of her message do not reflect either the ordinary meaning of the words she used or what she meant at the time. The message clearly suggests that her relationship with her current investors is such that she could easily get them to bring in other investors. This was not in fact the position nor was it the case that Mr. Bell or Mr. Luke knew of the terms on which existing investors were prepared to invest.

74. On 05 May 2019, Mr. Luke e-mailed his team's review of the CAR.O.L technology to Mr. Bell, Ms. Russkova and others. That review included a discussion of the Founders. In relation to Ms. Singh, the due diligence team commented *"Ratna is very emotional and proactive (it could not be bad for a fitness start up)"*.

75. Mr. Bell forwarded the review to Ms. Singh. The next day, Ms. Singh had an e-mail exchange with Dr. Bernath and Mr. Dempfle in which, she said *"We won't have him [Mr. Bell] as investor [sic]. I just want to be able to say F off"*. Dr. Bernath responded *"What a bunch of idiots. Arrogant to the extreme. Never, ever, do we want their money. So we do need to throw out the net again."*

76. It was on 06 May 2019 that Mr. Bell and Ms. Singh had an exchange of e-mails about the technical review done by Mr. Luke's team. In the course of this exchange, Mr. Bell commented *'Sure, and my instinct tell me when one gets 4+ emails – founder must be … unusual person* 😊*'*. Ms. Singh's response to this is revealing in so far as it points to her own understanding of the importance of her role within IHPL: *'Of course Founder is unusual person. If he/she wasn't, you should run for the hills!'*

77. On 07 May 2019, Mr. Bell e-mailed Mr. Luke in response to the review done by the due diligence team to say that he would not mind investing up to $1 million on very good, protected terms. This exchange between Mr. Bell and Mr. Luke suggests that Mr. Bell did consider the views of his team when deciding whether to invest.

78. Between May 2019 and September 2020, Ms. Singh expensed IHPL for a number of sessions with Lifeline Technique UK and was reimbursed for the cost of those sessions. On the first occasion that Ms. Singh asked Dr. Bernath to put the cost of the sessions through IHPL, she did so in the following terms: *"Pls can you pay using IHPL? Consulting services thank u"*. Dr. Bernath confirmed that he would. There is no suggestion in the correspondence at this time that Ms. Singh was taking the sessions to deal with stress in the workplace or her dealings with Mr. Bell or existing investors. Indeed, the e-mail which Ms. Singh forwarded to Dr. Bernath attached a

copy of the report prepared by Lifeline Technique UK, which suggested that Ms. Singh's stress, energy levels and balance were all optimal. Nor is there any mention in the correspondence that Ms. Singh was taking the sessions with Lifeline Technique UK pursuant to the health and safety policy of IHPL.

79. There were further exchanges between Mr. Bell and Ms. Singh during May 2019 concerning the possibility of Mr. Bell investing in IHPL. During one of those exchanges, Mr. Bell commented by WhatsApp:

> - D1: "*Can I reach out to Petr? I have my Board on Thursday and would love to tell them we have a draft and I mean draft TS*"
> - C1: "*sure, you can. but board members are not important in your size of business :)*" […]
> - D1: "*LOL!*" "*They are a major pain*" "*But they gave me a start and that I am grateful for*"
> - C1: "*you should not have had them. I do not have functional boards in my businesses before several million in revenue (5 or so)*"
> - D1: "*Yes…lesson also learned.*"

80. On 22 May 2019, PwC asked Dr. Bernath if there were any employee benefits that required P11Ds for the 18/19 tax year. Dr. Bernath's response was *"no other than NEST pension"*. In light of Dr. Bernath's evidence in cross-examination that he relied on PwC to advise him on tax matters, it is notable that Dr. Bernath answered PwC's question without qualification and without any query as to what might constitute benefits for tax purposes. Bearing in mind the terms of Blick Rothenberg's letter to HMRC on 28 January 2022, it is clear that this answer from Dr. Bernath was wrong.

81. WhatsApp exchanges between Ms. Singh and Mr. Bensoussan in late May and June 2019 and between Ms. Singh and the other Founders highlight that at this time:

    i) There was on-going confrontation between the Founders (particularly Ms. Singh) and Mr. Gal and Mr. Kalimtzis.

    ii) That, as he put it, Mr. Bensoussan was *"tired of this useless bickering"* and regarded Ms. Singh as being confrontational. He was also continuing to point out that nobody on the board would make a proposal for further funding until they had a clear idea of management and governance particularly in relation to US development.

    iii) That Ms. Singh and the other Founders did not trust either Mr. Gal and Mr. Kalimtzis on the one hand or Mr. Bell on the other.

    iv) That Ms. Singh was continuing to look for a plan to get rid of Mr. Gal and Mr. Darwent from the Board.

82. It was in an exchange of e-mails with Rahul on 04 June 2019 about unauthorised expenditure that Dr. Bernath said:

> *"Leave it. I will make something up for our accountants. But I just cannot have a mess with finances and accounting … So no company credit card for you as I would be endlessly running after receipts.*

83. This exchange was about a minor expense, which in cross examination, Dr. Bernath suggested was the cost of a screwdriver set. Dr. Bernath also said in cross-examination that in saying he would make something up for our accountants, his choice of words was wrong. Dr. Bernath did not accept that this message suggested a willingness on his part to make things up for IHPL's accountant. He suggested that the expense was a triviality. While I agree that an expense of US$6.12 is a triviality, the message is in my view another example of Dr. Bernath's failure to properly supervise the expenditure of Rahul and Ms. Singh and of his lack of regard for the question of whether expenditure was properly business expenditure.

84. On the same day Rahul asked about recovering as expenses the bed and bedding he had purchased for the New York apartment at a cost of $1,753.98. He was reimbursed for the cost by IHPL notwithstanding that Dr. Bernath thought the cost was expensive and that Rahul thought it was bizarre to treat the cost as expenses. On the same day, Rahul traded a CAR.O.L bike for a year's supply of organic wine to be delivered one case per month. The first case of wine was delivered on 14 June 2019. Rahul accepted in cross-examination that this wine was originally for his own use.

85. Ms. Singh and Mr. Luke executed the Memorandum of Terms in respect of the Series A fundraising round on 03 July 2019.

86. The problems with Rahul's recording of expenses continued. On 16 August 2019, Dr. Bernath pointed out to Rahul that:

> "*... Receipts – snapshots of your credit card statement are not good enough. I hope we get away with it this time. You need to submit proper receipts or invoices – with VAT, or sales tax itemised.* […] *Sorry to be pedantic – but if we got audited, all of these "undocumented" expenses would bounce back and we would have to turn them into an additional salary and pay taxes on them ... and probably get fined a penalty.* […]"

87. Dr. Bernath sought in cross-examination to suggest that the purpose of this e-mail was to dramatize for effect so that Rahul would be more diligent with his expenses. However, I find that what this e-mail shows is that Dr. Bernath was prepared to approve expenditure for his son without proper documentation. It also supports the view that Dr. Bernath was using the expense system within IHPL to subsidise Rahul's salary and that he knew that it was inappropriate to deal with expenses in this way because if HMRC audited IHPL's accounts, there was a risk of having to pay additional tax and a penalty.

88. Dr. Bernath learned that Rahul had traded a bike for a year's supply of wine in an e-mail exchange on 23 August 2019. In the same exchange Ms. Singh instructed Rahul to give the wine away to clients. This was on the premise that Rahul still had virtually all the wine to give away as he had told her. It was on the same day, however, that Rahul had e-mailed his contact with the wine supplier to say:

> "*... I am dangerously close to finishing your wonderous wine. Do you remember when I should expect the next batch (I believe we agreed 1/qrtr). I have to say, the Austrian wine generally has been very palatable*."

89. It was also in late August that the Founders and Rahul began to discuss the possibility of trading a bike for some time at a Six Senses Spa in Portugal. Ms. Singh's evidence in both her witness statement and in cross-examination was that the trade was for marketing purposes. In this regard, I note that on 23 August 2019, Ms. Singh in an e-mail to Dr. Bernath and others suggested *"Six Senses spa. Had a great chat with them and they will big [buy] but I think we should trade :). I would be up for 6 1 week visits – 2 each.* I understand the reference to '2 each' to refer to each of the Founders having two of the weeks. Subsequently on 26 August 2019, Ms. Singh also commented: *"But I want a full week's stay. Let's see what the cost of that is. I am totally desperate for something like this. I need it and I deserve it."* . This message shows that Ms. Singh's principal motivation in doing the trade with the Six Senses Spa was her desire for a holiday.

90. On 29 August 2019, there was a lengthy WhatsApp exchange between Ms. Singh and Mr. Bensoussan regarding the current relationship between Ms. Singh and other members of the Board. In light of the issues I have to decide, it is worth setting out this exchange in full:

- RB: "As an investor, I am like the others, frustrated. As a friend, I think I gave all the advice I could, starting by don't alienate your current investors." […] "Who brought the money you have until now?"

- D1: "How do I alienate people?? You are all on holiday!" "You did – but I need help NOW. All I get is flagellation." "I try not to disturb anyone and no one has responded to my emails because they have switched off" […]

- RB: "They have switched off because they think you don't want to take them into consideration. And want to do your own thing, Ratna."

- D1: "That's just bollocks, Robert – they don't give me any practical help just berate us all the time. Give me 1 example of a practical help or advice. One." […] "Please give me one thing that has been offered as practical advice on moving forward. No one bothers to even read documents before the Board. It's a forum for beating us up only." […]

- D1: "[…] all EG [Eldad Gal] can say is nonsense. Sorry I am standing up to the Board." […]

- RB: "*They was unanimous consent on management style and structure for them to continue investing. You took that personnally [sic] and made it an ego trip.*"

- D1: "*They want to fire me and do a downround. Yeah. I should really have said thank you.*"

- RB: "*Since then, you've been at war.*" […] "*Read the Peloton deck – one of the strengths was "founder management team*" "*You're full of s….. And you don't listen.* […]"

- D1: "*Robert you are always angry. I always get berated. No matter what it's a one way conversation that is telling me off. It's not just me who thinks it it is an observation from all. As a Friend you are amazing and I have always adored you and*

do adore you but I do feel always criticised. Always told I am doing everything wrong. Everything I do is wrong. You may not be aware of how you come across but that is how you do. It's very demoralizing" "*I just have to open my mouth and I get slammed*"

- D1: "*RD is disengaged and negative. EG is just disruptive and EK is well EK. I always do what you tell me down to verbatim emails. I just don't know what I am accused of – what do I do that is so wrong that I can't have a single civil conversation. It's extremely demoralising. I work all hours I sacrifice everything and all I get is beration. I don't deserve that.*" "*But anyway I do t want anything g personal [sic]. I adore you and always have but as you say maybe it's time for a change. You are not enjoying it and haven't for a while. So let's move on. RD will also step down. That leaves E and E and the Russians.*" "*Ask Oliver ask Ulrich their perception is also that you are always angry*" […] "*And it's not just you – it's the board. It does not work. We don't understand what we keep doing wrong or what we don't listen to. But anyway. It's late I am sure you are tired. Let's just move on. For my part. I have no fight left. I am emotionally and physically spent.*"

91. The same day, Ms. Singh e-mailed Dr. Bernath and Mr. Dempfle to say:

"(Subject: "*Gosh I am in tears*"): "*Let's get a new Board. Let's get rid of* [*Robert Bensoussan*] *and* [*Robert Darwent*] *and hopefully one of the* [*Eldad Gal*] *or* [*Evan Kalimtzis*]. *Ideally all resign*."

92. This exchange highlights that while the level of overt conflict between Ms. Singh and the Founders on the one hand and the other board members on the other may have diminished, the tensions which were in play in 2018 were still there. The other board members still put conditions on any further investment and it is clear that Ms. Singh was not prepared to accept Mr. Bensoussan's criticisms that she took matters too personally.

93. In early September 2019, Mr. Luke completed the Investment Memorandum. Rahul was also negotiating with the Six Senses Spa for the trade of a bike in return for a stay for 2 families at their resort in Portugal.

94. On 10 September 2019, there is an exchange of e-mails between Ms. Singh and Mr. Bell about the role of his due diligence team. In this exchange, Mr. Bell reminded Ms. Singh that questions being asked by his due diligence team were being asked on his behalf. As he put it: *"I am asking. They work for me"*. It is however clear from correspondence at this time that Ms. Singh and Dr. Bernath both had a low opinion of individuals such as Mr. Luke who were reviewing the bike and IHPL for Mr. Bell.

95. On 16 September 2019, there was an exchange of e-mails between the Defendants, Mr. Dempfle and Rahul regarding who was to pay for flights to Portugal for the holiday at Six Senses Spa. Rahul wanted to know if his flights from New York would be paid by IHPL. Initially Dr. Bernath said that the flight from New York to London would be paid by IHPL but the flight from London to Portugal would not. He was overruled by Ms. Singh who stated *"Expense it. CEO said so."*. Again, this exchange highlights the extent to which Ms. Singh was prepared to charge expenditure that was properly personal expenditure to IHPL.

96. On 23 September 2019, Ms. Singh stated to Mr. Bell over WhatsApp:

"My current investors will invest – even asked me yesterday – but as I told you, we don't want them to have too much power."

97. I have not been taken to any evidence to suggest that there was a request from current investors on 22 September 2019. Further what is clear from the correspondence in August 2019 and later on in October is that if existing members were to invest further they would still require a change of CEO or a down round. Ms. Singh sought in cross-examination to suggest that her message on 23 September 2019 was not misleading because Mr. Bell could not care less about the board and the question of whether the existing investors would invest was irrelevant to Mr. Bell. This evidence begs the question then why Ms. Singh felt it necessary to tell Mr. Bell that her current investors would invest. But, in any event, I find that this message was misleading because it failed to explain the true position namely that those existing investors who had expressed a willingness to invest further were only prepared to do so on conditions.

98. Mr. Bell e-mailed Mr. Zubarev on 25 September 2019 attaching the investment memorandum and setting out his reasons for being willing to invest. He describes the team as being *"not perfect in fund raising"*. Subsequently on 03 October 2019, he informed his due diligence team that he intended to invest. It is clear from correspondence the following day between him and Ms. Singh that he was aware at this time that she could be aggressive and rude but in the same message, he also says *"Always stay polite and patient with investors. And open -w/o money you go out of business – so there is no point being closed, nothing to hide […]"*. Once again, Mr. Bell emphasises that Ms. Singh has a responsibility to present information in a way that his due diligence team understand saying that *"If they don't, it is your fault"*. It is implicit in this message that Mr. Bell wanted to know what his due diligence team discovered about IHPL and the bike.

99. On 05 October 2019, in a WhatsApp message to the Defendants, Mr. Dempfle summarised his understanding of IHPL's position and the need for investment in the following terms:

"I think the discussion at the board may be a bit uncomfortable but relatively easy: we need money, we need it soon, we want a decent valuation. SB would simply be the best offer on the table in any of those dimensions. EG would offer for sure only a lower valuation, but he doesn't want to say what it would be. It would take much longer as he would tie it to really difficult condition (hiring some rockstar US Pres before any money …) and hence it would be much more risky. Going with SB is self-evidently the better option and while they might complain, I don't think they could make a different choice."

100. Ms. Singh replied to this message saying that she would like the Claimants' money.

101. On 11 October 2019, Ms. Singh expensed £1,501.65 in respect of flights for those attending the trip to the Six Senses Spa in Portugal in exchange for a CAR.O.L. bike provided by IHPL. Dr. Bernath authorised the reimbursement of these expenses.

102. The Defendants together with Mr. Dempfle and a number of family members attended the Six Senses Spa in Portugal from 22 October 2019 in exchange for a CAR.O.L. bike provided by IHPL. Immediately prior to the trip, Ms. Singh was e-mailing the spa to say how much she was looking forward to down time at the spa and spa treatments. She also suggested that it would take a couple of hours of training to induct the spa's instructors on how to use the bike. In a similar vein Rahul e-mailed a member of IHPL's staff saying *"We are all going on holiday tomorrow (a team retreat) so I am sure we will talk soon"*.

103. During the Defendants' visit to the spa, the spa blocked out two hours on 22 October 2019 for training instructors on the use of the bike. The Defendants say, however, that during the visit they and Rahul spent more time showing guests how to use the bike and generally marketing it. During the visit, Ms. Singh booked a number of spa treatments as did Dr. Bernath and other members of the party. It appears Ms. Singh left the resort early having fallen out with a waitress and then members of her family.

104. The Defendants completed the Founders' Questionnaires on 25 November 2019. In subsequent correspondence on 28 November 2019, Ms. Singh and Dr. Bernath discussed the possibility of existing investors wanting to come in on the third round. Dr. Bernath estimated the prospects as zero based on the conditions they had previously sought to impose. This message evidences the fact that both Defendants knew at the time of signing the Founders' Questionnaires that the existing investors would only come into the third round on the basis of conditions, which included Ms. Singh resigning.

105. Subsequently on 01 December 2019, Ms. Singh submitted an expenses claim in respect of the Six Senses Spa trip looking to recover £2,400.61 in expenses incurred during the trip to Portugal including the cost of food and drinks, a kayak trip and various spa treatments. Dr. Bernath approved the expenses and they were paid by IHPL.

106. On 05 December 2019, IHPL and Rahul signed an employment contract covering his employment from 17 December 2018. Rahul said in cross-examination that he believed there was an earlier written contract of employment. However, no such contract has been disclosed in this litigation and I am unable to accept that there was in fact an earlier written contract. It seems more likely to me that the Defendants offered Rahul his employment with IHPL without formally recording the terms of that employment in a written contract. Otherwise, there would have been no need for the contract of 05 December 2019 to be put in place for the purposes of the round 3 investment.

107. On 17 December 2019, the IHPL board approved documentation and board changes pursuant to the Series A fundraising round subject to shareholder approval. On 08 December 2019, Mr. Bell and Ms. Singh discussed whether Mr. Zubarev had decided not to invest. Mr. Bell said that he had not made a decision and later that day asked Mr. Luke to get a full set of materials over to Mr. Zubarev that day. Mr. Bell sent Mr. Zubarev a WhatsApp on 20 December 2019 encouraging him to sign.

108. Mr. Bell signed the Subscription Agreement on 30 December 2019 and invested $1 million by subscribing for 822,492 A preferred shares at a price of approximately

$1.25 per share. The Shareholders' Agreement and other associated documentation were executed and IHPL received the $1 million that day.

109. Mr. Zubarev was sent the draft Subscription Agreement and Deed of Adherence to the Subscription Agreement on 15 January 2020 along with the Shareholder Agreement and new company Articles. Mr. Gordon Caplan acted as Mr. Zubarev's agent in the discussions with Mr. Bell's due diligence team and the Founders. Mr. Zubarev was given full access to the data room documents.

110. Mr. Bell became a director of IHPL on 17 January 2020 and Mr. Gal resigned from the board the same day.

111. The second closing for the round 3 investment took place in February and March 2020 leading to further A preferred shares being issued to new investors including Mr. Zubarev and to existing investors including Mr. Gal, who decided to invest to maintain his level of investment in the company. Revised Articles were adopted for IHPL. Sometime before 03 March 2020, Mr. Zubarev signed the Deed of Adherence and Subscription Deed investing US$ 1.5 million and subscribing for 1,234,412 A preferred shares.

112. On 20 February 2020, Rahul contacted a wellness retreat in Thailand looking to trade a bike in return for a stay. On 28 February 2020, Dr. Bernath had an exchange of WhatsApps with one of IHPL's employees about how to treat certain credit card expenses including ones made by Ms. Singh such as a purchase for her mother. Dr. Bernath's answer was that the expenses should be put under *"International Travel and Central Overhead"*. Dr. Bernath did not question why expenses for Ms. Singh's mother were being included within IHPL's accounts.

113. It is clear from the correspondence that by March 2020, Mr. Bell and Ms. Singh had fallen out with Mr. Bell threatening to resign from the board and suggesting that he would like his money back. Although this dispute occurred after the Claimants had invested in IHPL, there is a remarkable exchange involving Ms. Singh, Mr. Bell and a Ms. Tanya von Varchmin concerning IHPL's marketing in which Ms. Singh becomes very aggressive and rude in response to an e-mail from Ms. Von Varchmin questioning the role of one of IHPL's employees.

"Tanya – thanks but I have worked for far bigger brands and agencies than you have EVER. I have also and all my analysts worked at McKinsey – I and Ulrich at senior levels – have you tried getting in? …

So we are not stupid and do not do BS.

You are one of those people who don't listen and interrupt potential clients. You are what we call in England an upstart for whom a little knowledge is a dangerous thing. An empty tin that rattles. I don't give a flying fuck about what an upstart like you thinks. I care about what SB thinks. I care about what intelligent people think.

…"

114. Ms. Singh was continuing to pass invoices from Lifeline Technique UK to IHPL for payment and on 20 April 2020 passed an invoice to Dr. Bernath for payment with the suggestion that it should be categorised as *"r & d"*.

115. Mr. Robert Bensoussan resigned from the Board on 20 April 2020 and was replaced by Mr. JP Crametz although this led to complaints from Mr. Gal that the Defendants had not complied with IHPL's articles of association when appointing Mr. Crametz. Mr. Gordon Caplan joined the board on 03 May 2020.

116. PwC asked Dr. Bernath on 11 May 2020 whether any employees required P11Ds for 2019 and 2020 in relation to any benefits they received. Dr. Bernath's response was that no cars, no medical insurance and no benefits had been provided. Once again, the Defendants have now accepted that this answer was false.

117. It is clear from later correspondence that the disputes within the board as to the direction of the company were still continuing in September 2020. The disputes included whether Ms. Singh should remain as CEO and what steps should be taken to improve sales. Again, Mr. Bensoussan usefully summarised the position in an e-mail of 02 October 2020:

> *"... I heard with a certain consternation yesterday ... that you have decided not to proceed with our discussions, play hard ball and prepare to go to war with your investors. [...] Ratna, with all my love and respect, it is my opinion now that that you need to pass on the reigns of the company, to a professional CEO who is hopefully going to take this company to a new level and help us raise money. [...] We have defended you endlessly, vis a vis other more aggressive investors, but we can't any more. We have missed numbers four years in a row, and this year even more. [...] With results like these, you will be out of cash soon, and will most likely not be able to raise money from outside investors that would do a minimum of due diligence. [...] So please, let's not let egos get in the way and be realistic. The current setup is not working and hasn't for quite some time. [...] So we urge you to sit at the table to discuss the next steps with your investors."*

118. In October 2020, IHPL paid $4,500 which Rahul had to pay to New York City as tax. Later in December 2020, a review of IHPL's credit card transactions showed that earlier in 2020 a Valentino handbag for Ms. Singh, a PSiO headset and computer equipment had also been paid for by IHPL. Twelve Lifeline Technique UK sessions expensed to IHPL in December 2020 were recorded with the description *"Exec Coaching"* and under the account *"staff training"*. Again, this calls into question the suggestion that Ms. Singh's sessions with Lifeline Technique UK were properly to be regarded as therapy sessions, the cost for which IHPL was liable under its health and safety policy.

119. Ms. Singh's employment as CEO was terminated on 05 November 2020 and Dr. Bernath resigned from the board on 02 December 2020.

120. IHPL raised a further $2.5 million through the issue of 10,825,809 A ordinary shares in March 2021. The board initially authorised a rights issue at a $8million valuation. However, there was only c.$100,000 of interest at that valuation. The board therefore issued a second rights issue at a $4 million valuation. Each of Mr. Bell and Mr. Zubarev invested $1,089,424.

121. On 06 January 2022, iHorizon Accounts Limited wrote to HMRC on behalf of IHPL to make a voluntary disclosure in respect of benefits provided to the Defendants and Rahul Bernath. Later that month, on 28 January, Blick Rothenberg wrote to HMRC responding to the letter from iHorizon on behalf of the Defendants. In that letter, the Defendants accepted that they had received taxable benefits in relation to the Six Senses Spa trip, the purchase of a mobile phone and SIM card and the Valentino handbag (which Ms. Singh purchased immediately after IHPL had received Mr. Bell's initial investment of $1 million). They also accepted that Rahul had received benefits in respect of the spa trip and his UK citizenship application.

The Four Fundamental Facts

122. Having set out the relevant chronology of events above, I now turn to set out my findings of fact on the Four Fundamental Facts.

Had the relationship between the existing investors on the board on the one hand and the founders on the other broken down and become acrimonious?

123. The Defendants say that disagreements did manifest themselves at board level in late 2018 but this was essentially a disagreement over strategy and the company's prospects in different scenarios, of a kind which is not at all uncommon in small private companies. In broad terms, the Founders thought it appropriate to adopt a more cautious approach pursuant to which IHPL would grow organically, initially on the basis of its existing executive team and relatively modest fundraising, until such time as IHPL, through Ms Singh's efforts, was able to raise substantial funds from new investors in a Series A round of fund-raising at an appropriate valuation. Some of the existing investor board members wanted to take a more aggressive approach pursuant to which IHPL would immediately hire external professional management and Ms Singh's role would be significantly reduced. The latter approach would have resulted in IHPL having a more pressing need for funds, which the dissenting existing investor board members had offered to supply, albeit at a valuation of IHPL regarded by the Founders as unduly depressed. The Founders considered that proposal to be unacceptable and not in the best interests of IHPL or its shareholders as a whole. Although non-executive investor directors constituted a board majority, the dissenting investor board members were unable or unwilling to assemble the majority required to enforce their will, and they did not stand in the way of the Founders pursuing their preferred course. A division of views remained, but the board continued to meet and discharge its functions throughout 2019. The Defendants say that there is nothing unusual about the situation which existed between the board members and the Founders from late 2018 to early 2020 which would have made their answers to questions 22, 30 and 31 of the Founders' Questionnaires false.

124. If the evidence before the Court only went as far as the situation described in the previous paragraph, I would agree that there was nothing unusual about the situation which existed between the board members and the Founders. However, I find that the evidence goes further.

125. It is clear that by November 2018 the disagreements between the existing board members and the Founders had deteriorated to a point that went beyond simply a disagreement over strategy. The evidence before me also establishes that the situation

was such that the relationship between the Founders and the other board members had collapsed or almost collapsed. It further establishes that the cause of that collapse was in part a disagreement over strategy but it was also caused by:

i) The failure of Ms. Singh and IHPL to generate the sales revenue that she had promised the existing investors such that they began to have concerns over her abilities as CEO.

ii) The failure of Ms. Singh to engage with and seek assistance from the other board members and existing investors so as to generate further sales for the company and to identify what changes to IHPL's strategy needed to be made to improve sales and market the product effectively.

iii) A situation developing, which was correctly described by the Claimants in paragraph 15(2)(b) of the Re-Re-Amended Particulars of Claim as an "us versus them" mentality. As the evidence considered above establishes, there was an attitude on the part of the Founders but particularly Ms. Singh that the company was theirs and that the other board members, Mr. Gal, Mr. Kalimtzis and Mr. Darwent, were seeking to take control of it from them.

iv) Behaviour on the part of Ms. Singh in her dealings with the other board members, which was rude and aggressive in a way which went beyond what might fairly be described as a product of heated discussion to being unprofessional. It is fair to say that the most extreme examples of this behaviour are to be found in the correspondence in late 2018 but that behaviour continued through 2019 and into 2020 as well. I accept that the worst examples of Ms. Singh's attitude to the other board members are to be found in correspondence between herself and the other Founders. In other words, in correspondence which was not seen at the time by those other board members. Nevertheless, I consider that the correspondence still illustrates Ms. Singh's general attitude to those board members and her approach to the running of IHPL.

v) Ms. Singh and, to a lesser extent, Dr. Bernath wanting to run IHPL as a family business and refusing to engage properly with the proposals from the other board members for the re-organisation of IHPL and the hiring of more experienced and professional individuals to run or assist with the running of the company.

126. I accept that Mr. Gal and Mr. Kalimtzis may have been forthright in their criticisms of Ms. Singh and the strategy she adopted for IHPL but I find that she bears principal responsibility for the breakdown of relationships within the board.

127. As a consequence of the breakdown in the relationship between the Founders and other board members, the situation in November 2018 was that the existing investors were not willing to inject more money into IHPL unless (i) as part of a down round (in other words at a lower price per share than the price at which they had originally invested) or (ii) a professional CEO was hired to run the company or (iii) that Ms. Singh's role was changed materially so that she retained the title of CEO in name only.

128. The position did not improve during 2019. By late 2019, neither Mr. Darwent nor Mr. Bensoussan were prepared to invest further in IHPL. Mr. Bensoussan had sought to resign as Chair of the board. Mr. Gal and Mr. Kalimtzis was not prepared to invest further unless it was at a price of US$ 0.50 per share or if Ms. Singh was replaced as CEO or her role was changed materially.

129. In short, I find that at the time when the Defendants completed the Founders' Questionnaires and at the time when the Claimants came to invest in IHPL, the relationship between the existing investors on the board on the one hand and the Founders on the other had broken down and become acrimonious. That breakdown was such that IHPL was unable to attract further investment from its existing investors except on terms which were unacceptable to Ms. Singh. I further find:

    i) That at the time of the Claimants' investment, the company could not survive without further funding.

    ii) A major cause of breakdown in the relationship between other board members and the Founders was the sales strategy adopted by Ms. Singh and her aggressive behaviour in her dealings with other board members.

Were existing investors unwilling to invest further in IHPL unless it was at a lower share price than the price at which they had bought their original shares and, or possibly alternatively, that Ms. Singh was replaced as CEO?

130. It follows from my findings in the previous section of this judgment that from November 2018 and continuing until the time when the Defendants completed the Founders' Questionnaires and the Claimants came to invest in IHPL existing investors, specifically Mr. Gal and Mr. Kalimtzis were not prepared to invest further in IHPL unless it was at a lower share price than the price at which they brought their original shares, or possibly alternatively, that Ms. Singh was replaced as CEO. I accept that Mr. Gal did participate in round 3 but this was only after it became clear that Mr. Bell was going to participate in round 3 and Mr. Gal invested a further US$100,000 to maintain his level of equity.

Were IHPL funds were being serially misused to finance personal expenses of gifts and gratuities for friends and family?

131. This issue was addressed by reference to different categories, each of which I will deal with below. However, for the purposes of the issues I have to decide, it seems to me that it is also appropriate to step back and look at the evidence concerning how the Defendants dealt with expenditure in question more generally for what it reveals about their approach to the treatment of expenditure which was ultimately for the benefit of themselves and their family but where there was a question as to whether it is personal expenditure or properly a business expense.

132. I say this because the evidence before me is that decisions as to what was properly a business expense and what was a personal expense were made by Dr. Bernath, who was responsible for oversight of expenditure, either on his own or with input from Ms. Singh, who would occasionally overrule Dr. Bernath when he initially refused to put expenses through the company. Those decisions are generally to be understood from the correspondence between Ms. Singh, Dr. Bernath and Rahul rather than from any

internal reporting whether to the board or otherwise. Overall, that correspondence has the tone and feel of a family discussion rather than a discussion between corporate officers as to the treatment of expenditure. Ms. Singh did seek to suggest that she had authority from the board for any expenditure up to $100,000 without having to seek board approval. However Mr. Drake clarified in closing that Ms. Singh had made a mistake and there was no such authority.

133. Likewise, Dr. Bernath sought in oral evidence to suggest that where there was any uncertainty about expenditure, he would rely on PwC for advice. I cannot accept that evidence in light of the letter sent on behalf of the Defendants by Mr. Michael Duggan Q.C. dated 23 December 2021 expressly confirming at the request of PwC that PwC's only role was administrative and that it was not for PwC to check the legitimacy of an expense or advise on expenses. The same confirmation was then repeated by the Defendants in their Further Clarificatory Information provided by the Defendants in relation to Paragraph 9.4 of the Amended Defence.

134. There is also no evidence of any decisions as to personal expenditure or expenditure where the Defendants might have a conflict of interest being reported to the board as individual items. In particular, it was not reported to the Board that bikes were being traded for wine or for holidays nor was the fact that IHPL had rented a flat for Rahul reported to the Board. When Dr. Bernath was giving evidence, I asked him what reports were made to the board and he confirmed that the board was provided with management accounts with different categories of expenditure shown as line items drawn from the Xero accounting system used by the company.

135. So far as expenditure made on behalf of Rahul is concerned, I was provided with a copy of a contract of employment dated 05 December 2019, which is said to cover the full period of his employment. I treat this document with some caution because it is clear that this contract was only signed as part of the process of preparing for Round 3 investment. There is no good evidence to confirm that the terms of that contract actually reflect what was agreed with Rahul in September 2018.

136. I was also provided with a copy of a health and safety policy for IHPL dated June 2020. I treat that document with a similar degree of caution given that it obviously post-dates the Claimants' investment. Ms. Singh said in evidence that there was a previous health and safety policy in place for IHPL but no copy of that policy has been disclosed. Turning then to the individual categories of expenditure.

137. Use of IHPL funds to pay for 6 bottles of Louis Roederer Cristal: The Claimants now accept that Rahul was joking when he suggested to his parents that he had spent US$9,000 on champagne. However, there is still uncertainty as to what items were in fact purchased. Dr. Bernath suggested in his oral evidence that it may have been payments for advertising campaigns for IHPL which Rahul paid using his personal credit card. I am not in a position on the evidence to know whether that is correct or not. What is clear is that Dr. Bernath did apparently reimburse the expenditure without verifying whether the expenditure was properly to be reimbursed by IHPL.

138. Reimbursement of Rahul's unidentified and unauthorised expenditure: The evidence does establish and I find that Dr. Bernath regularly reimbursed expenditure incurred by Rahul without verifying what that expenditure was for. I am persuaded on the

evidence that Dr. Bernath was using the reimbursement of expenses through IHPL to augment Rahul's salary.

139. Use of IHPL funds to pay for rent on two apartments occupied by Rahul in New York: Although the Claimants' case was pleaded on the basis that IHPL had paid rent on Rahul's apartment in New York between May 2019 and November 2020, the Claimants accepted that the only apartment which was relevant to their case was apartment 261 N on 9th Street ("the apartment"). So far as this apartment is concerned, the Defendants pleaded that it was appropriate for IHPL to pay the rent because it was cheaper than paying for a hotel for Rahul and that it was a legitimate business expense given that Rahul was going to be working in the United States for them.

140. In the end, the Claimants did not put to either Dr. Bernath or Ms. Singh that the expenses incurred paid by IHPL in respect of the rent for Rahul's apartment was not a legitimate business expense. Nor did they advance any case to this effect in closing. It follows that this element of the Claimants' case on personal expenditure falls away.

141. Use of IHPL funds to pay for Rahul's bed and bedding: So far as this expenditure is concerned, the Claimants did maintain a case that the bedding was not a legitimate expense in their cross-examination of Dr Bernath and Rahul. The evidence in cross-examination on this expense focussed on the Defendants' belief that the cost of the bedding was reasonable. But this does not answer the question as to whether it was legitimate for IHPL to have to bear the cost in the first place. I find that it was not. The terms of Rahul's employment even under the contract of 05 December 2019 do not justify IHPL bearing the cost of Rahul's bedding. The Defendants' decision that IHPL should bear the cost of the bedding was a consequence of their family relationship with Rahul without any proper consideration having been given as to whether or not it was properly a business expense.

142. Use of IHPL funds to make *per diem* payments to Rahul: Rahul was paid *per diem* payments at a rate of US$102.50 at a total cost of £10,828.61. There is some uncertainty in the evidence as to whether or not Rahul was entitled as a matter of UK tax law to *per diem* payments given the period of time that he was resident in New York. I do not, however, have to decide that question. Again what is clear from the correspondence is that Dr. Bernath originally agreed to pay Rahul *per diem* payments as a solution to the fact that Rahul failed to keep receipts to justify expenditure that he was claiming from IHPL. Secondly, Dr. Bernath considered that making *per diem* payments or expenses payments to Rahul was a way to supplement Rahul's salary. Again, therefore, I find that Dr. Bernath's decisions as to the payment of *per diem*s to Rahul was influenced by his role as Rahul's father rather than by any proper consideration of whether the sums paid to Rahul were properly a business expense to be incurred by IHPL.

143. Lifeline Technique UK payments: In her oral evidence, Ms. Singh sought to justify these payments on the basis that the sessions were a medical expense incurred by her to manage stress caused by her work for IHPL and by her dealings with the other board members. Ms. Singh also said that this was an expense properly incurred in accordance with IHPL's health and safety policy. I do not accept that this was Ms. Singh's reasoning at the time she decided to have the sessions or continued to have them. First, there is no contemporaneous evidence before me to support the suggestion that Ms. Singh went to Ms. Kia on the basis that she was suffering stress at

work. On the contrary, the initial invoices rendered by Lifeline Technique UK describe the sessions as being *"business enhancement sessions"* and Ms. Singh asked Dr. Bernath to record the expense as a consulting services. Second, Ms. Singh's evidence as to the purposes of the sessions varied from therapy to business coaching to product development (the idea being that the services offered by Lifeline Technique UK would be of interest to potential purchasers of the bike). Third, Dr. Bernath charged the cost of the sessions to different categories within the Xero system including 'consulting', 'staff training', 'travel and subsistence' and 'general expenses'. The board was not informed that Ms. Singh and other members of her family were having sessions with Lifeline Technique UK or that the costs of those sessions were being charged to IHPL. I am satisfied that the expenditure incurred by Ms. Singh with Lifeline Technique UK was personal expenditure and was charged by her and Dr. Bernath to IHPL knowing that it was such.

144. Disposal of a bike for bottles of wine: This was the first occasion on which Rahul traded a bike for 48 bottles of wine from the founders of Dry Farm Wines. It appears that Rahul first made the trade on his own initiative but later informed his parents who approved the trade. It is also clear from the correspondence and his answers in cross-examination that Rahul initially did the trade on the basis that the wine was to be for his personal consumption, albeit the evidence is unclear as to how much of it he drank. In the end, Ms. Singh told him to give the wine to *"valued clients"*. The Defendants say that the trade was a good one because Dry Farm Wines represented a good marketing opportunity for IHPL and that this justified the exchange. They also say that among start-ups, the exchange of goods and services by way of barter is common. Even if this is the case, it is clearly not appropriate that Rahul should be trading a bike belonging to IHPL for wine for his own consumption yet there was no objection to the trade from the Defendants nor was the trade reported to the board.

145. Six Senses Spa holiday: The Defendants traded a CAR.OL bike in exchange for a two-week holiday at Six Senses' resort in Portugal. The holiday was for the Defendants, Rahul, Aria Bernath and a friend of Aria's as well as for Mr. Dempfle and his family. The Defendants have justified the trade on the basis that it was a marketing exercise intended both to show off the bike to guests at the resort and to encourage the resort to purchase more bikes. They say that the justification for the holiday was that it was both a team retreat and an opportunity to train the resort's staff on how to use the bike. The difficulty I have with both of these justifications is that it is apparent from the correspondence surrounding the holiday that the Defendants, and in particular Ms. Singh, regarded the visit to the resort as a holiday for them and their family. The only organised training which the Defendants were obliged to deliver while they were at the resort was a two-hour session for one of the resort's instructors. So far as the suggestion that the holiday was intended to be a team retreat is concerned, the evidence supports the conclusion that it was only the Founders and their families who were invited on the holiday. Again the trade was not reported to the board notwithstanding the obvious conflict of interest arising given that the Defendants were trading a bike for a holiday for themselves and their family.

146. In addition to the visit to the resort, the Defendants also incurred expenses of £2,689.64 while at the resort. Those expenses included, inter alia, the cost of food, drinks, a kayaking trip, a private alchemy session, a limousine trip, various spa and beauty treatments and massages. These expenses were entered into IHPL's records as

"Advertising and Marketing". The Defendants sought to justify this expenditure on the basis that it is normal for the costs associated with a team retreat or marketing holiday to be met by the company. Both Defendants sought to rely on their experiences at previous employers in support of their argument that the costs were a business expense. I am unable to accept that explanation. I find that the expenses were personal expenses and that they were expenses which the Defendants knew should not properly have been recorded under 'Advertising & Marketing'.

147. Flights to Portugal for the family holiday: The Defendants put all their flights to Portugal, including Rahul's flight from New York to London, through IHPL as business expenditure. In line with my conclusions in relation to the holiday itself, I am satisfied that these costs were more properly personal expenses and should noy have been treated as business expenses by the Defendants.

148. My overall impression in relation to the expenditure discussed above and the Defendants' treatment of business expenditure more generally is that the Defendants saw expenses as a way of compensating them for the fact that Ms. Singh was not drawing her full salary while working for IHPL and Rahul was being paid less than he was in his previous job.

149. The costs of Rahul's UK Citizenship application

150. Again, I accept in principle that a company can legitimately pay as a business expense the costs associated with ensuring that an employee is entitled to work in the United Kingdom. However, no adequate explanation was provided for why it was necessary for IHPL to bear the costs of Rahul's application in circumstances where (i) Rahul was already previously employed in the United Kingdom by another firm and (ii) he was being recruited to work in the United States (even if it was intended to be only a temporary basis). I further note that the contract of employment dated 05 December 2019, which is supposed to contain the terms of Rahul's employment required him to be entitled to work in the United Kingdom. I find that the cost of Rahul's application was a personal expense which it was not appropriate for the Defendants to reimburse using IHPL funds. I further find that Dr. Bernath authorised the expenditure without proper consideration of the whether the costs were a legitimate business expense for IHPL.

That the Defendant's son was the occupant of the apartment that the company was renting in New York.

151. It is common ground that the Defendants' son was the occupant of the apartment that the company was renting in New York.

The Law of Deceit/Fraudulent Misrepresentation

152. The elements of the tort of fraudulent misrepresentation are well-known and have been recently set out by Andrew Baker J in Pisante v. Logothetis [2022] EWHC 161 (Comm) at §6.

    i) There must be a false representation of fact, made with the intention that it be relied on, that was in fact relied on;

ii) A statement of opinion, therefore, is not actionable save in so far as it incorporates or implies a representation of fact;

iii) A representation as to the future is not actionable save insofar as it incorporates or implies a representation as to present intention or presently held opinion; made either expressly or impliedly from words or conduct;

iv) A representation may be made expressly or may be implied from words or conduct. However, clear words or conduct are required for the implication of a representation, reflecting the principle that there is no duty to disclose;

v) A representation is not to be implied, therefore, from conduct the tenor of which is vague, uncertain imprecise or elastic;

vi) In consequence, where a representation is said to be implied, particular care is needed to identify with precision the content of the representation and how it is said to have been made;

vii) A representation cannot be inferred from mere silence;

viii) What (if any) representation has been made is ascertained objectively and construing the representation fairly in its context, but

a) Where a representation is ambiguous, the claimant must prove that the representor intended their statement to be understood by representee in the sense in which it was false and that the representee did understand the statement in that sense; Cassa di Risparmio della Republica di San Marino Spa. V. Barclays Bank Ltd [2011] EWHC 484 (Comm) at [221].

b) For a claimant to establish reliance he will have to show that he understood the representation in the sense alleged; and

c) In order to establish deceit, the claimant must show that the defendant understood they were making the allegation representation, i.e. that they were conveying to the defendant that which was in fact untrue.

ix) The test for deceit, then, is whether the representor knew the representation to be false, did not believe it to be true, or was reckless as to whether it was true or false; and

x) The representation is intended to be relied on and was in fact relied on; and

xi) While the standard of proof remains the balance of probabilities, more convincing evidence is required to establish fraud than is true of other types of allegation because the law considers there to be a strong inherent improbability that a party would dissemble to persuade a counterparty to enter into a contract.

153. The fraudulent representation must also cause loss.

154. For the purposes of the test for knowledge or recklessness, the representor must either know their representation to be untrue or be careless as to whether it is true or false; Derry v. Peek (1889) 14 App. Cas 337, 374. It is not necessary that the representor was 'dishonest' as that word is used in the criminal law. Nor is the representor's motive in making the representation relevant. If fraud is established, it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made. What is required is dishonest knowledge, in the sense of an absence of belief in truth; Vald Nielsen v. Baldorino [2019] EWHC 1926 (Comm) at [147].

155. As to recklessness, even if the representor has no knowledge of the falsity of their statement, they will still be responsible if they had no belief in its truth and made it not caring whether it was true or false; Vald Nield at [146]. If a representor asserts that they believed the representation to be true, the Court is still entitled to infer fraud if the grounds for that belief are objectively unreasonable; see Derry v. Peek at 376 and Ivy Technology at [360].

156. Once a fraudulent misrepresentation is made out, it is well-established that there is a rebuttable presumption as to the representor's intention; Quantum Care Ltd. v. Modi [2022] EWHC 721 (Ch), [35] and Goose v. Wilson Sanford & Co. [2001] Ll. Rep. PN 189. Likewise where the claimant has made out the other elements of the tort of fraudulent misrepresentation, the representee has to establish that they was materially influenced by the representations in the sense that they were actively present in their mind but there is a rebuttable evidential presumption as to inducement, a presumption which is very difficult to rebut; see Pan Atlantic Insurance Co. Ltd v. Pine Top Insurance Ltd [1995] 1 AC 501 at 542A, BV Nederlandse Industrie Van Eiproducten v. Rembrandt Enterprises Inc [2018] EWHC 1857 at [34] & [45] and Zurich Insurance Co. plc v. Hayward [2016] UKSC 48 at [36].

157. In addition to the principles already discussed above, the following further principles are also relevant for the purposes of the questions I have to decide on liability:

    i) Representations in a contract can also be warranties (and vice versa) if that is what the parties intended; *Civil Fraud*, §1-065A (Supplement), §1-066. However, a warranty contained in a contract is not without more, something on which a claim for misrepresentation can be based; it is merely a promise that something is the case, intended to give rise to a claim for breach of contract if it turns out that it is not the case rather than a means by which information is imparted; Idemitsu Kosan Co. v. Sumitomo Corp [2016] EWHC 1909 (Comm) at [16] to [22].

    ii) Falsity is determined on the date that the representation was acted on, *ibid*, §1-036).

    iii) To establish a misrepresentation, it is necessary to show that what was said was materially false. A representation that is substantially correct, even if not entirely correct, is not a misrepresentation. The question is whether the difference between what was represented and the truth would have been likely to induce a reasonable person in the position of the claimant to act in the way that had given rise to the claim; Avon Insurance v. Swire Fraser [2000] 1 All E.R. (Comm) 573 at [17] and Raiffeisen Zentralbank v. RBS [2011] Lloyd's Rep. 123, §149.

iv) Representees are under no obligation to exercise reasonable care or skill to test the truth (or falsity) of a representation; Ivy Technology Ltd. v Martin [2022] EWHC 1218 (Comm) at [369].

v) There are three categories of person who can sue on a misrepresentation: (1) those to whom the representation is made directly; (2) those to whom the representor intends or expects the representation to be passed on and (3) members of a class to which the representation was directed; see Swift v. Winterbotham (1873) L.R. 8 Q.B. 244 at 253. The representee does not in fact have to be known to the representor.

vi) A representation to an agent, which the maker intends to be passed on to the principal or relied upon by an agent in acting for the principal can found a claim even if the agent is not an employee. A principal can sue if his agent has relied on the representation by acting on behalf of the principal in a particular way, which causes the principal loss, the representation does not need to have been passed on to the principal, *Civil Fraud,* §1-124.

158. In relation to causation of loss, the relevant principles are set out by Lord Browne-Wilkinson in Smith New Court Securities Ltd v. Scrimgeour Vickers (Asset Management) Ltd. [1997] AC 254 at 267A-D and more recently in Glossop Carton & Print Ltd v. Contact (Print & Packaging) Ltd [2021] EWCA Civ 639 at [1]:

i) The defendant is bound to make reparation for all the damage directly flowing from the transaction;

ii) Although such damage need not have been foreseeable, it must have been directly caused by the transaction;

iii) In assessing such damage, the claimant is entitled to recover by way of damages the full price paid by him but he must give credit for any benefits he has received as a result of the transaction;

iv) As a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him from obtaining full compensation for the wrong suffered;

v) Although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will not normally apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the claimant to retain the asset or (b) the circumstances of the case are such that the claimant is, by reason of the fraud, locked into the property.

vi) In addition, the claimant is entitled to recover consequential losses caused by the transaction.

vii) The claimant must take all reasonable steps to mitigate their loss once they have discovered the fraud.

Falsity of the additional misrepresentations

159. The Claimants' pleaded case and the parties' submissions addressed the issues relating to the answers to the Founders' Questionnaires first and then the additional representations. However, chronologically, the additional misrepresentations were first in time and I find it helpful to address the question of whether the additional misrepresentations were made and whether they were false first because the evidence on these issues is also helpful in assessing the Defendants' state of mind when answering the Founders' Questionnaires. I will deal with the issues of fraud and inducement separately below.

The e-mail exchange of 04 April and 05 April 2019

160. So far as this exchange is concerned, I am satisfied that Dr. Bernath's answer to Ms. Russkova's e-mail of 04 April 2019 was false. Ms. Russkova's question was whether any current investors were interested in following Round 3. Dr. Bernath's answer in his e-mail of 05 April 2019, which was sent on behalf of all the Founders said that existing investors had not expressed an interest to increase their investment at this stage was therefore false. Mr. Gal, Mr. Kalimtzis and Mr. Darwent had expressed an interest in increasing their investment but only at a share price of US$0.50 and only if Ms. Singh was replaced as CEO or her role as CEO was changed materially. Dr. Bernath explained his answer in cross-examination in the following terms:

> *"So at that time it was premature to ask the question since the term had not been negotiated and at that time since the existing investors would not know what to consider since there was no term sheet, so they had not yet expressed an interest whether they would come in at that or not. ...*
>
> *...*
>
> *So this was a very specific reference for me that at the moment I don't know, or at the moment the existing shareholders had not expressed to come in at that round simply because the term sheet was not defined yet.*

161. It is correct that Dr. Bernath's statement that the existing investors have not expressed an interest to increase their investment at this point follows his explanation of their right to take shares in Round 3 at the same valuation and terms as the new investors up to a percentage which would allow them to maintain their current equity holding. However, I still consider that his answer was misleading. I do not accept that his answer to Ms. Russkova was the specific reference he suggested in evidence. The answer is a general statement as to whether there has been an expression of interest by the existing shareholders to increase their investments, which was false given the indications from Mr. Gal, Mr. Kalimtzis and Mr. Darwent that they were prepared to invest but only under certain conditions.

162. Ms. Russkova relied on Dr. Bernath's message for the purposes of completing the Investment Memorandum she sent to Mr. Bell on 05 April 2019 as is evident from the fact that she incorporated Dr. Bernath's answer in the memorandum.

Ms. Singh's WhatsApp message to Mr. Bell of 10 April 2019 at (04:31)

163. The statement by Ms. Singh in this message that her current investors do want to invest and they want the same terms as last time was false given the terms on which Mr. Gal, Mr. Kalimtzis and Mr. Darwent were prepared to invest and given that the other investors had not at this stage said whether or not they were prepared to invest. It was also false in so far as Ms. Singh gives the impression that the only reason for not accepting further investment from existing shareholders was that Ms. Singh was not prepared to take further investment from existing investors because she did not want to give all her company away or increase their power.

Ms. Singh's WhatsApp message to Mr. Luke of 25 April 2019

164. In this message Ms. Singh said that her current investors did want to invest but on the same terms as last time. She repeated her statement that she wanted to keep control of the balance of power and also said that she was certain her current investors would follow. I find that this message was false because Ms. Singh failed to mention that there were existing investors who had already indicated that they were not prepared to invest on the same terms as last time but only on a conditional basis which included her relinquishing her role as CEO or stepping aside.

Ms. Singh's e-mail to Mr. Like of 25 April 2019

165. I find that Ms. Singh's statement that she could easily get her current round of investors to get a band of high net worth individuals together was false as was the statement that if she needed followers plenty abound in so far as it was intended to suggest that those followers would be provided by existing investors. The true position in relation to at least some of the existing shareholders, Mr. Gal, Mr. Kalimtzis and Mr. Darwent, is that they were not prepared to invest in IHPL further unless on the conditions already outlined.

Ms. Singh's WhatsApp message to Mr. Bell of 23 September 2019

166. In this message, Ms. Singh refers back to her earlier message of 10 April 2019, saying that as she had previously told Mr. Bell, she did not want her current investors to have too much power. She goes on to say that they were still willing to invest and had even asked her yesterday. Ms. Singh does not, however, identify in her evidence which investor she says asked her on 22 September 2019 if they could invest. I find that implicit in the reference back to the message of 10 April 2019 is the statement that the existing investors were prepared to invest but only on the same terms as last time. It follows that the representation in this message that the existing investors would invest but that Ms. Singh didn't want them to have too much power was false in so far as it failed to identify that there were conditions to any further investment by some of the existing investors.

The Founders' Questionnaires – misrepresentation and breach of warranty

The proper construction of the questions in the Founders' Questionnaires

167. Part of the Defendants' response to the Claimants' case on the answers to the Founder's Questionnaires was that the questions, in particular question 30, were

vague and ambiguous and that the matters complained of by the Claimants were too open-ended to fit within the questions. Accordingly, it is necessary to consider first the proper construction of the questions in the Founders' questionnaires and to do so by looking at the ordinary and natural meaning of the words used and the relevant commercial context.

168. The questionnaire is personal to the Founder completing it and requires specific information about the individual and, for certain questions, their spouse or civil partner. The questions ask for both personal information and information about their professional history. The matters covered include any previous bankruptcies (question 5) or deeds of arrangement (question 6), any unsatisfied judgments (question 7), criminal offences (question 8), financial resources (questions 9 and 10), illness and physical incapacity (questions 11 and 12), employment history (question 14), previous dismissals or requests to leave employment (question 15), disqualifications (question 17); involvement with previous insolvencies (question 18), future and past litigation involving businesses in which the Founder had a material interest (questions 19 and 20), past or future litigation involving the Founder, their spouse or civil partner (questions 21 and 22), adverse press comment (question 23), DTI inspections or other investigations by statutory authorities (question 24), membership of trade or professional bodies (questions 25 to 27), HMRC or police investigations and unpaid taxes (questions 28 and 29).

169. So far as that commercial context is concerned, the Claimants submitted that for the purpose of determining what matters should properly be disclosed in answer to the questions in the Founders' Questionnaires, one can look to the list of directors' duties found in sections 171 to 177 of the Companies Act 2006, (which largely codifies the common law). I agree. Of the duties listed in sections 171 – 177, the following are relevant to the facts of this case:

    i) The duty to promote the success of the company for the benefit of its members as a whole and to act fairly as between members of the company (s.172);

    ii) The duty to exercise reasonable care, skill and diligence (s.174);

    iii) The duty to avoid conflicts of interest (s.175);

    iv) The duty to declare any interest in a proposed transaction or arrangement (s.177).

170. It is also material to the construction of the Founders' Questionnaires that the purpose of the questionnaires is to enable potential venture capital investors to know more about the individuals who founded or established the business in which they are investing and who are likely to be critical to the future success of that business. In his evidence, Mr. Zubarev expressed the position in this way:

    "No, for me we are giving money not to the ideas or to the products, we are primarily giving money to the people and this is our sweet spot. Not 100 per cent but probably 90 per cent of case we are giving money to the people and for us personally for me I would say people are more important than idea or product in current state. …"

171. Turning then to the questions, which are the subject of the Claimants' case, question 22 provides:

Are there any circumstances known to either you or your spouse or civil partner, which are likely to lead to either you or your spouse or your civil partner becoming a party to any litigation or court proceedings?

172. The principal issue of construction which arises for this question is what is meant by 'likely'? As to this, it was common ground that 'likely' in this context means objectively likely. In other words, a reasonable person in the position of the representor would have thought that it was at least 50% likely that litigation or court proceedings would arise in which they or their spouse would be a party. This construction of clause 22 also accords with the guidance from cases in the insurance sector as to the meaning of 'likely' in 'claims cooperation' provisions; see, for example, Maccaferri Ltd v. Zurich Insurance Plc [2017] Lloyd's Rep. IR 200 at [16] and [34].

173. The further issue of construction is whether the court proceedings referred to in question 22 would include proceedings, such as the present, brought by an investor for breach of warranty or misrepresentation on discovering that answers to the questionnaire were false. The Claimants say that it does on the basis that the question is directed at circumstances which could give rise to such proceedings. The Defendants say that it does not on the basis that such a construction would be circular. In my judgment, the Defendants are correct as to the construction of clause 22. The question is directed at circumstances which the Founders know at the time of completing the questionnaire are likely to lead to proceedings brought by third parties. The question is not directed at requiring the disclosure of facts and circumstances which might at some time in the future give rise to a claim by the investor for breach of warranty or misrepresentation. Nor is it necessary to read clause 22 in the way the Claimants propose given that an investor would necessarily have a separate claim for breach of warranty or misrepresentation in order for the proceedings to be likely.

174. Question 30 provides:

"Are there any other facts or circumstances relating to your spouse or your civil partner or yourself and your respective business careers which could in your reasonable opinion be relevant to a prospective purchaser of, or subscriber for shares in a business, company, or firm in whose management you or your spouse or your civil partner are involved when deciding whether or not to make such purchase or subscription? If so, please provide particulars."

175. Question 30 is a 'wrap-up' question and as set out above follows a series of questions which are specifically concerned with the personal and professional history of the Founder completing the questionnaire. Question 30 asks about both the Founders as individuals and also about their respective business careers. It is intended to identify whether there any relevant facts or circumstances about that Founder, their spouse or civil partner or their business career (including their time at IHPL), which an investor would want to know but which might not be revealed by the answers to the previous questions in the questionnaire. In this regard, the question is broad in its ambit but I find that question 30 is not vague and ambiguous. The question is broad and deliberately so but it is clear as to which types of facts and circumstances are to be

disclosed, namely those which relate to or provide information about the individuals mentioned in the question or their business careers. It is not asking about matters such as the state of the company more generally.

176. The check to what information a Founder is required to disclose is provided by the requirement that their opinion as to whether a matter should be disclosed be reasonable. In other words, if they reasonably decide that a matter is not relevant to a prospective purchaser or subscriber, then they have no obligation to disclose that matter in answer to question 30. Likewise, if they decide that a matter is not relevant which objectively they should have disclosed, then their answer to question 30 is false even if their decision was honestly made.

177. To the extent that it is necessary to refer to authority for the proposition that the requirement of reasonableness in question 30 imposes an objective standard, I refer to Pacific Basin IHX Limited v. Bulkhandling Handymax AS [2011] EWHC 2862 (Comm) at [55] and Barclays Bank Plc v. Unicredit Bank AG [2012] EWHC (Comm) at [62] – [64].

178. Question 31 provides:

Are there any other facts or circumstances which could reasonably be expected to impair your suitability to be a director of a publicly quoted company. If so, please provide particulars?

179. Again, it seems to me that this another wrap-up question intended to identify facts and circumstances which might not be revealed in answer to the previous questions, but which viewed objectively could be expected to impair a Founder's suitability to be a director of a publicly quoted company if IHPL were subsequently to go public. It is clear that the information which question 30 requires a Founder to disclose is information that relates to the Founder. It is not asking about matters such as the state of the company more generally. In terms of which types of facts and circumstances might impair a person's suitability to be a director of a publicly quoted company, that is a test which can be answered by reference to the duties which have been codified in ss. 171 to 177 of the Companies Act although I accept that matters such as a criminal conviction or insolvency could also be matters which require disclosure in answer to question 31.

Were the answers to the questions false?

180. Question 22: As already stated above, I do not consider that question 22 required the Defendants to disclose circumstances which might lead the Claimants to commence legal proceedings following their investment.

181. So far as proceedings by HMRC are concerned, the Defendants acknowledge in the letter from Blick Rothenberg dated 28 January 2022 that there were matters which IHPL should have reported to HMRC on the Defendants' and Rahul's forms PDF11D as being taxable benefits. I do not consider, however, that it can be said proceedings by HMRC would have been likely at the date of completion of the Founders' questionnaires given the previous non-disclosure of the benefits conferred by those expenses. It seems to me it is more likely that as a consequence of the non-disclosures, the Defendants would be required to pay any outstanding tax owed and

potentially a penalty before HMRC moved to the stage of commencing proceedings. In her ninth witness statement, Ms. Singh says that she and Dr. Bernath are willing to pay any outstanding sums owed by them to HMRC. I accept that evidence.

182. The more difficult question is whether the Defendants knew of circumstances which made proceedings against them by the board for breach of directors' duties likely. This possibility was not specifically pleaded by the Claimants but was canvassed both in evidence and in submissions. On the evidence, I am not satisfied that at the date of completion of the Founders' Questionnaires, it can be said that circumstances were such that such litigation was likely. This is because there is no sufficient evidence before me to conclude that it is likely that the other board members would have sought to commence litigation even had they known that IHPL funds were being used to pay personal expenses. It is true that in June 2018, Mr. Gal was apparently consulting lawyers and that he and other board members may have been talking about consulting lawyers in May 2019. It is also true that in January 2019, the Founders were considering litigation against the other Board members. However, although Mr. Bensoussan has commented in his witness statement on the use of IHPL funds by the Defendants to pay personal expenses, he does not say that if he had known of that use, he would have recommended to the board bringing proceedings against the Defendants. Similarly, Mr. Gal gave no evidence to suggest that he would have been likely to commence proceedings or to seek to have the board commence proceedings if he had known of the expenditure.

183. Accordingly, I find that 'no' was a true answer to question 22 in the Founders' Questionnaire.

184. Question 30: Ms. Singh accepted in her oral evidence that an incoming investor would want to know about a breakdown in relations between the board of a company and the existing investors. She was right to do so and I find that this would be all the more so, if the existing investors considered that the sales strategy and behaviour of the CEO were reasons for that breakdown. She also accepted that incoming investors would want to know that existing investors had lost confidence in the CEO of the company. Again, she was right to do so.

185. In my judgment, an incoming investor would also want to know if the existing board wanted the CEO to resign and if the existing investors were only willing to invest further if there was a down round, at least where the reason for that decision was a consequence of the actions of the CEO. Further, incoming investors would want to know if the CEO or a director of the company was authorising the use of company funds for the payment of personal expenses. All of these matters fall within the scope of the wording of question 30 and are properly and reasonably to be considered as matters which are about Ms. Singh and about her business career. In relation to the use of company funds to pay personal expenses that is also a matter which is about Dr. Bernath as director of the company and his business career and accordingly within the scope of question 30. Of course, since Ms. Singh and Dr. Bernath are married, they would each be required to make disclosure about the other as their spouse.

186. It follows in light of my findings of fact above in relation to the first three of the Four Fundamental Facts, that I find both Ms. Singh's and Dr. Bernath's answers to question 30 were false because they failed to reveal:

i) That there had been a breakdown in relations between the Founders and the other existing investors; a breakdown which was principally a consequence of the sales strategy and behaviour of Ms. Singh;

ii) That the existing investors wanted Ms. Singh to resign and were otherwise only prepared to invest if there was a down round;

iii) That the Defendants had been authorising the use of company funds for the payment of personal expenses.

187. Question 31: For question 31, there is a distinction to be drawn between what Ms. Singh was required to disclose and what Dr. Bernath was required to disclose given that the question only refers to matters about the individual signing the Founder's Questionnaire.

188. So far as Ms. Singh is concerned, I find that she was required in answer to question 31 to disclose each of the matters referred to in paragraph 186 above. So far as Dr. Bernath is concerned, I find that he was required to disclose that he had been authorising the use of company funds for the payment of expenses which were more properly to be considered personal expenses. It was put to Dr. Bernath that he was also required under this question to disclose the fact that he had failed to disclose the breakdown of relations between the Founders and the Board also put him in breach of question 31 because the failure to disclose the breakdown and a willingness to mislead the incoming investors about a breakdown showed a lack of suitability to be the director of a publicly quoted company. I am not persuaded, however, that these matters which relate to Dr. Bernath's relationship with incoming investors rather than the company itself are obviously matters which Dr. Bernath should have disclosed in answer to question 31.

189. I find that the wording of the question required Ms. Singh to disclose the first three of the Four Fundamental Facts; each of which goes to her suitability to be a director of a public company. This is because these Fundamental Facts went to her suitability to be a director of a publicly quoted company in circumstances where she owed a fiduciary duty to IHPL as a director and where she owed duties to that company as a director:

i) To promote the success of the company for the benefit of its members as a whole;

ii) To exercise reasonable care, skill and diligence; and

iii) To avoid conflicts of interest.

190. So far as Dr. Bernath is concerned, I consider that he was required to disclose the fact that he had been using IHPL funds to pay personal expenses on behalf of the Defendants and Rahul. This fact goes to his suitability to be a director of a public company because it also goes to his duty to comply with the obligations set out in the sub-paragraphs (i) to (iii) of the previous paragraph.

191. It follows that I consider that both Ms. Singh's and Dr. Bernath's answers of 'no' to question 31 were false.

Breach of Warranty

192. It follows from my conclusions in relation to the Defendants' answers to questions 30 and 31 that the Defendants' were in breach of the warranty at paragraph 2.3 of Schedule 5 of the Subscription Agreement. The answers to those questions were not true, accurate and complete in all material respects. The falsity of the Defendants' answers to questions 30 and 31 did not change between the date on which the Defendants signed the Founders' Questionnaires and 30 December 2019, the date of the Subscription Agreement.

193. This leaves over the separate question of whether or not the Defendants were in breach of the warranty at clause 11.2 of Schedule 5. As to this, it is common ground that the Defendants are in breach of this warranty because there was an existing contract or arrangement to which IHPL was a party and in which a person connected to them, namely Rahul, was interested, namely the rental contract for the New York apartment. The Defendants say that they are entitled to rely on clause 6.2 of the Subscription Agreement to exclude their liability for their breach because they had disclosed the fact that IHPL was a party to a rental and lease arrangement in respect of the New York apartment and had included Rahul's employment contract in the due diligence bundle. I find, however, that this disclosure was not sufficient to comply with obligation of fair disclosure set out in clause 1 of the Subscription Agreement. Fair disclosure required disclosure to the incoming investors of the fact that Rahul, their son, was occupying the apartment.

Fraud

194. I keep in mind that although the burden of proof remains the civil standard of balance of probabilities, the seriousness of the allegations made by the Claimants requires cogent evidence in support of their allegations of fraud.

The additional representations

195. Given that both Defendants knew in the period between April and September 2019 that Mr. Gal, Mr. Kalimtzis and Mr. Darwent were not prepared to invest in IHPL on the same terms, but only on the basis of a down round or on the basis that either Ms. Singh resigned or her role was changed, I find that Dr. Bernath's answers to Ms. Russkova and Ms. Singh's exchanges with Mr. Bell and Mr. Luke deliberately omitted any reference to the conditions on which certain existing investors were prepared to invest further in IHPL. In particular, I find that the Defendants were concerned to ensure that the Claimants did not discover that other board members wanted Ms. Singh to resign or at least significantly change her role and allow the recruitment of a professional CEO. As set out in more detail above, I do not accept the Defendants' evidence that they believed that the Claimants knew the position of the existing investors nor do I accept their evidence as to why they say that the messages did not correctly refer to the position of the existing investors.

196. The position in relation to Dr. Bernath's exchange with Ms. Russkova is more uncertain than with Ms. Singh's messages. Ms. Singh's messages to the effect that existing investors did want to invest but it was Ms. Singh who did not want to allow them further investment because she was concerned with the balance of power

misstate the reality of the relationship between Ms. Singh and some of the existing investors in a way which can only have been deliberate.

197. The reasons why Ms. Singh would want to avoid telling Mr. Bell about the conditions on which existing investors were prepared to invest are also clear.

i) It was apparent to Ms. Singh given the breakdown of her relationship with the other Board members that she would need to find new investors, such as Mr. Bell, if she was to raise the funds which IHPL needed and also keep control of IHPL.

ii) If Mr. Bell were to discover the true position of the other board members, it would provide him (and Mr. Zubarev) with commercial leverage in the negotiations of the Round 3 investment.

iii) Ms. Singh wanted to ensure that her reputation as CEO was not damaged.

198. So far as Dr. Bernath's exchange with Ms. Russkova is concerned, the failure to mention that existing investors were prepared to invest but only on conditions could be regarded as simply a mistake if taken on its own. However, three factors persuade me that the omission of the position of the existing investors was deliberate:

i) If the intent of Dr. Bernath was simply to inform Ms. Russkova that existing investors had not been asked whether they wished to invest in Round 3, he could have said that.

ii) The message was sent by Dr. Bernath following discussions with Ms. Singh and Mr. Dempfle.

iii) The message was sent only shortly before Ms. Singh's exchanges in April with Mr. Bell and Mr. Luke, in which she was careful not to mention the true position of the existing investors.

199. It follows from my conclusions above that I consider that the additional representations were made by the Defendants when they knew them to be false.

Were the Defendants' answers to questions 30 and 31 knowingly false or made recklessly as to whether they were true or false?

200. Both of the Defendants are individuals experienced in business and in particular experienced in relation to the start-up of a business and the acquisition of investment. In this regard, both Ms. Singh and Dr. Bernath repeatedly referred to that experience and to their employment with companies such McKinsey and PwC. Their experience is such that I am satisfied that both were aware of their duties as directors to IHPL and would have been aware of the duties of a publicly quoted company, including the duties that would have been imposed on them as directors were IHPL to go public. They may not have been aware of those duties as they were defined in s.171 to 177 of the Companies Act 2006 but they were aware that:

i) They owed a duty of loyalty to the company;

ii) They were required to work for the success of the company for the benefit of all its members;

iii) They were required to exercise reasonable skill and care in the performance of their duties.

iv) They had a duty to avoid conflicts of interest and, otherwise, to disclose any conflict, including their interest in any proposed transaction.

201. The Defendants' awareness of their responsibilities as directors is illustrated by:

i) Ms. Singh's repeated references in her evidence to her duty to grow the company;

ii) Dr. Bernath's evidence as to his responsibilities as a director of the company in relation to signing off expenses;

iii) Ms. Singh's WhatsApp and e-mail to Mr. Bensoussan of 27 November 2018 in which she refers to Mr. Gal's fiduciary duties and does so in terms which make it clear that the messages are sent on behalf of the Defendants;

iv) Her message to James Klein of Shoosmiths of 03 January 2019 in which she again refers to the fiduciary duties of Mr. Gal. Although this message and the ones of 27 November 2019 refer to Mr. Gal's fiduciary duties rather than hers, they show that the Defendants were aware of the concept of directors owing fiduciary duties to a company. It also clear from these messages that both Defendants were seeking legal advice at this time about the possibility of removing other board members.

v) The repeated e-mails from Mr. Bensoussan in which he reminded Ms. Singh of her responsibilities as CEO and all the Founders of the need to consider the interests of the other investors.

202. Both Defendants also knew that the answers to the questions in the Founders' Questionnaires were or were likely to be important to the decision of incoming investors as to whether to invest. If there was any doubt about this, the position was made clear by the declaration above the signature box at the end of the questionnaire by which of them declared and warranted that their answers were true, complete and not misleading. Mr. Bell also made clear early on in the due diligence process that he expected the Defendants to work with his team in completing the necessary investment documents and later chastised Ms. Singh when she was complaining about the demands of his due diligence team..

203. Ms. Singh accepted that she knew an incoming investor would want to know about a breakdown in the relationship between the board and incoming investors. She also accepted that she knew that incoming investors would want to know if the board had lost confidence in the CEO. Mr. Drake submitted in closing that the questions put to Ms. Singh about her knowledge addressed only her state of knowledge at the time of giving evidence but not her state of mind at the time of completing the Founders' Questionnaire or signing the Subscription Agreement. However, I am satisfied, that the questions put to Ms. Singh did address her knowledge at the time of signing the

Founders' Questionnaire and the Subscription Agreement. In any event, I have no reason to doubt that her knowledge at that time was any different to her knowledge at the time of giving evidence. I am accordingly satisfied that Ms. Singh knew that the Claimants would want to know about the breakdown of her relationship with the other members and its cause as well as about their desire for her to resign or at least step aside.

204. I am also satisfied that Ms. Singh knew that the Claimants would want to know if the Defendants were using IHPL's funds to reimburse personal expenses. Not only would this be a circumstance going to their character and business careers, it would also be a matter going to their suitability to be directors of a public company. It shows a willingness to use company funds for their own purposes and a failure to appreciate their responsibilities in relation to conflicts of interest.

205. So far as Dr. Bernath is concerned, I find that he would also have known that an incoming investor would want to know about a breakdown in the relationship between the board and incoming investors and would also have known that an incoming investor would want to know that the board had lost confidence in the CEO. These are matters which are obviously important to an incoming investor and ones of which someone with Dr. Bernath's experience would be aware.

206. Similarly, he would know that the Claimants would want to know if the Defendants were using IHPL's funds to reimburse personal expenses for the same reasons as this was known to Ms. Singh.

207. Dr. Bernath did seek to suggest in cross-examination that he understood that the only reason someone would be unsuitable to be a director of a publicly quoted company would be if they had been convicted of a crime or if they been struck off the Companies House register. I do not accept that the list of reasons why someone may be unsuitable to be a director of a publicly quoted company is so limited nor do I accept that Dr. Bernath's answer as to his understanding of the position represented his true understanding of the position. Circumstances which could reasonably be expected to make someone unsuitable to be a director of a publicly quoted company will include the mis-use of company funds and investors' loss of confidence in a CEO, certainly in circumstances where it can fairly be said that it is the CEO who is responsible for that loss of confidence. These are matters which it is reasonable to infer that he did know from his business experience.

208. Neither Ms. Singh nor Dr. Bernath give evidence in their witness statements as to the circumstances in which they signed the Founders' Questionnaires or as to their understanding of questions 22, 30 and 31 and why they signed the Questionnaires as they did.

209. Nevertheless, I am satisfied on the evidence that at the time Ms. Singh and Dr. Bernath signed the Founders' Questionnaires, they needed the investment from Mr. Bell and any other investors he could persuade to join the round in order to keep IHPL going and avoid seeking further funds from existing investors, something they were very keen to do. I am also satisfied that in these circumstances they were concerned not to raise matters which might diminish the prospects of Mr. Bell investing and were concerned to answer the Questionnaires in a way which would avoid or minimise the risk of Mr. Bell and other investors refusing to invest.

210. It follows that given my findings as to (i) why their answers to questions 30 and 31 were false, (ii) my findings as to what they knew incoming investors would want to know and (iii) my findings as to their understanding of their duties as directors that I must conclude that Ms. Singh and Dr. Bernath answered questions 30 and 31 in the Founders' Questionnaires knowing their answers to be false or at the very least being reckless as to whether their answers were true or not.

The warranties

211. In light of my conclusion that the Defendants' knowingly or recklessly answered questions 30 and 31 of the Founders' Questionnaire wrongly, it follows that the Defendants' breach of the warranty at clause 2.3 of Schedule 5 is also fraudulent.

212. So far as the warranty at clause 11.2 of Schedule 5 is concerned, I am prepared to accept that while the Defendants are in breach of this warranty, their failure to qualify the warranty to disclose that it was Rahul who was the tenant of the New York apartment was not fraudulent. I accept in relation to this breach of warranty that it was more likely to be an inadvertent or careless breach rather than a deliberate breach. It might be said that the Defendants gave the unqualified warranty at clause 11.2 in order to avoid an investigation into Rahul's occupation of the apartment. However, given that the Defendants disclosed the lease during the due diligence process as well as the fact that Rahul was employed by IHPL, it seems to me that the reasons for the Defendants giving false answers to questions 30 and 31 do not apply with the same degree of force in relation to the warranty at clause 11.2.

Inducement

213. Mr. Robinson is correct that there is a rebuttable presumption of inducement which is difficult to displace once it has been established that a defendant has made fraudulent misrepresentations. However, I also agree with him that he does not need the presumption in this case.

214. Mr. Bell was a representee to whom representations were made in the Founders' Questionnaires and in his exchanges with Ms. Singh on which it was intended he would act. Mr. Zubarev was a representee to whom representations where made in the Founders' Questionnaires on which it was intended he would act. Representations were also made to their agents, Ms. Russkova and Mr. Luke as well as to the lawyers reviewing the contractual documentation and in Mr. Zubarev's case, Mr. Bell himself.

215. Both Mr. Zubarev and Mr. Bell made clear in their evidence that they were professional investors and not lawyers so it was not feasible or efficient for them to read all of the documentation relating to a proposed deal – they relied on their partners and associates and lawyers to write, read and interpret documents. I accept that evidence.

216. Mr. Zubarev expressly confirmed in his oral evidence that he would read the Founders' Questionnaires and would rely on his lawyers, paralegals and business consultants to confirm to him the terms of a deal. The Defendants correctly conceded in closing that if fraudulent misrepresentations were made out in relation to the Founders' Questionnaires, Mr. Zubarev was entitled to rely on the presumption of reliance. I find that Mr. Bell is also entitled to rely on the presumption of reliance and

did in fact do so. Mr. Bell confirmed that he would rely on his lawyers for good legal advice and would then sign the documents. In his witness statement, Mr. Bell further confirmed that he relied on the representations and warranties in the legal documentation, which was reviewed in detail by his associate, Ms. Fischer.

217. Mr. Drake questioned why if it was Ms. Fischer who reviewed the documentation, she was not made available to give evidence. While there is some force in this question, I do not consider that the absence of Ms. Fischer's evidence is a reason not to accept Mr. Bell's evidence in his witness statement. Further, it is not realistic to suggest that if the Defendants had answered Questions 30 and 31 correctly, this is information which would not have been given to Mr. Bell.

218. So far as the additional representations are concerned, the Defendants accepted in closing that if I found that the representations made in response to Ms. Russkova's message and in Ms. Singh's WhatsApps were fraudulent, then Mr. Bell relied on those misrepresentations. This concession was a realistic one because I find on the evidence that Mr. Bell did rely on the messages in making his decision to invest in IHPL. The Defendants make no concession as to whether Mr. Zubarev relied on the representations made to Mr. Bell in deciding to invest. However, I find that he did so rely because his decision to invest was based at least in part on the encouragement and information provided to him by Mr. Bell, who for the purposes of Mr. Zubarev's decision to invest was acting as his agent and was passing on information.

219. The Defendants' principal challenge on the issue of reliance was as to whether any reliance was placed on the representations made to Mr. Luke. Mr. Luke's evidence in this regard was that if he had any doubts as to whether Ms Singh was an active CEO or founder with a high level of integrity, then that was a showstopper for 100%. His evidence in his witness statement was that if he had been aware that the existing investors wanted to replace Ms. Singh as CEO and had made it a pre-condition to further investment, this would have been a huge red flag.

220. Notwithstanding the criticisms made of Mr. Luke's evidence in the Defendants' closing, I accept his evidence. In light of the representations made to Mr. Luke, there was no reason for him to go behind those representations and make further inquiries as to their truth. I am also satisfied that if he been given the correct information as to the relationship between Ms. Singh and other board members, then that is information which he would have passed on to the Claimants, in particular in the Investment Memorandum.

The limitation clause at clause 6.1

221. The Defendants accept that as a matter of public policy, they cannot exclude their liability for fraud even if under the wording of clause 6.1 of the Subscription Agreement they might otherwise be entitled to do so.

222. It is not therefore necessary for me to decide whether or not the Defendants are entitled to rely on the limitation of liability found in clauses 6.1 and 6.4(b) of the Subscription Agreement in relation to the additional misrepresentations, the answers to questions 30 and 31 in the Founders' Questionnaires and the breach of the warranty at Clause 2.3 of Schedule 5 of the Subscription Agreement.

223. Given my conclusion that the Defendants' breach of the warranty at clause 11.2 of Schedule 5 was not fraudulent, the Defendants are entitled to rely on the limitation of liability found in clause 6.1 and 6.4(b) in respect of that breach. However, that breach does not give rise to any separate head of damages on the part of the Claimants. Accordingly, I do not need to consider the effect of the limitation provisions any further.

Damages recoverable by the Claimants

The measure of damage for direct loss

224. It was common ground that the measure of damages is the same with respect to the Claimants' claims for both breach of warranty and misrepresentation, namely the difference between the As Warranted Value of the shares, which the Claimants purchased and their Actual Value.

225. This is essentially a valuation exercise requiring the input of experts in valuation.

The expert evidence generally

226. Both parties relied on expert evidence in support of their case as to the measure of damages recoverable by the Claimants in the event that their claims succeeded (as they largely have).

227. The Claimants relied on the evidence of Mr. Andrew Caldwell. He is an expert in company valuation and a Senior Managing Director in the London office of Ankura Consulting (Europe) Limited, a company specialising in providing expert witness and dispute resolution services. Mr. Caldwell works within the Disputes and Economics practice and has over 30 years of experience in the valuation of businesses, shares, intellectual property and other assets across a broad range of industries. He has prepared two reports for this hearing and, taking the two together, has provided a full explanation for his methodology of working. I am satisfied that Mr. Caldwell was doing his best to assist the Court notwithstanding the criticisms of his evidence made by the Defendants.

228. The Defendants relied on the evidence of Mr. Mark Berenblut, an affiliated consultant with Nera Economic Consulting. Mr. Berenblut is a qualified chartered accountant, again with over 30 years of experience in securities and business valuation, financial and accounting investigations and the analysis of complex claims including the quantification of damages. Mr. Berenblut's C.V. provides some detail of work he has done in international arbitrations but no details of his experience of giving evidence before the English courts. Mr. Berenblut's evidence was unsatisfactory. He failed to understand or comply with his duties an expert. In essence, his report addressed the question of whether or not he considered that the Claimants had made good their complaints of misrepresentation and breach of warranty against the Defendants. He did not seek to explain what the effect on the value of the Claimants' investment in IHPL would be if the Claimants did make good their complaints. In other words, although I had some limited evidence from Mr. Berenblut criticising Mr. Caldwell's methodology of valuation, I had no evidence from him of alternative valuations with which to test the valuations put forward by Mr. Caldwell.

229. Mr. Robinson submitted on behalf of the Claimants that Mr. Berenblut:

i) Had misunderstood the role of an expert witness in English litigation;

ii) Had strayed beyond his role as an expert by purporting to make factual findings.

iii) Had produced a report on the premise that his factual findings were correct and failed to express an opinion on the premise that the Claimants' case was correct.

230. I accept each of these criticisms of Mr. Berenblut's evidence.

231. Despite the absence of an alternative valuation against which to test Mr. Caldwell's evidence, the Defendants still submitted that Mr. Caldwell's methodology was flawed and I should not accept his valuation. Instead I should find that the breaches of warranty and misrepresentations had no effect on the actual value of the shares.

232. Against the background of this submission, the following principles drawn from the authorities assist in determining the scope of my discretion when considering Mr. Caldwell's evidence.

i) The Court is not bound to accept unchallenged evidence of an expert rather their evidence falls to be evaluated in the ordinary way. It is open to a party who has not challenged an expert report in cross-examination to still seek to impugn the report in closing submissions. The Court may reject an expert's evidence if there is good reason to do so; see Griffiths v. Tui (UK) Ltd [2022] 1 WLR 973 at [57].

ii) Expert evidence must contain supporting reasoning for a conclusion, even if it is short. A report cannot be mere assertion with zero reasoning; see Kennedy v (Cordia Services) LLP [2016] 1 WLR 597 at [50].

iii) Share valuation is an art not a science; Ahuja Investments Limited v. Victorygame Limited [2021] EWHC 2382 (Ch) at [147].

iv) The Court retains a wide freedom to disregard the views of an expert if they do not, in the Court's view, produce a fair and sensible result in all the circumstances; Re Icamera Ltd [2021] EWHC 1762 at [32].

Discussion

233. Mr. Caldwell helpfully set out his views on the difference between the As Warranted or As Paid value of the Claimants' shares and the actual value of those shares in his first report. He concluded that the As Warranted or As Paid value of IHPL's equity was US$17 million based on the pre-money valuation that the Claimants' investments were made at. In other words, there was a price per share of US$1.2152 per share. In determining the As Warranted or As Paid value of the shares, Mr. Caldwell relied on the definition of market value provided by the International Valuation Standards Council in IVS 104:

"Market Value is 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".

234. In determining that the price paid for the Claimants' shares represented their market value, Mr. Caldwell proceeded on the basis that the sale of IHPL shares to the Claimants was conducted on an arms' length basis between a willing vendor and a willing purchaser and on the assumption that all relevant information available to the purchaser was correct. Mr. Caldwell then went on to opine that the effect of the matters which the Defendants failed to disclose resulted in a total discount of between 55.0% and 65% of the As Warranted (or As Paid) value. He reached this conclusion using both a market approach and an income approach to the valuation of IHPL.

235. In brief, a market approach values a company's equity on the basis that a prudent buyer will pay no more for an asset than it would cost to acquire a substitute asset with the same utility. In contrast an income approach values a business on the basis that its value is equal to the present value of the future cash flows of the business. There is a further alternative basis of assessment namely, a costs approach, but this is apparently only used when the market or income approaches cannot be reliably implemented. Mr. Caldwell considered the costs approach in this case but decided that the market and income approaches provided more reliable bases of assessment.

236. Mr. Caldwell broke down his assessment of the losses suffered by the Claimants between the different aspects of the Claimants' claim. It was his view that:

    i) The breakdown in relationships between existing management and existing investors justified a discount of between 55 to 65%;

    ii) The use of IHPL funds for personal expenditure justified a discount of 5%; and

    iii) The failure to disclose that Rahul occupied the New York apartment justified a discount of up to 1%.

237. Mr. Caldwell confirmed in evidence that if I found for the Claimants in relation to all three aspects of the Claimants' loss, the overall level of discount remained 55 to 65%.

238. In his supplementary report, Mr. Caldwell addressed the first report of Mr. Berenblut and explained his reasons for disagreeing with Mr. Berenblut's analysis and also provided further explanation for the percentage discounts put forward in his first report. There were four principal areas of disagreement between Mr. Caldwell and Mr. Berenblut:

    i) Whether or not one should use the notional definition of market value found in IVS 104 as the basis for determining the market value of IHPL's shares or a different value based on the price paid and the knowledge of the parties at the date of the transaction.

    ii) Whether or not the Claimants had available to them on 31 December 2019 all the information about the matters which form the basis of their claims.

iii) Whether the series A preference shares provided additional rights which made them economically more favourable than the Ordinary A shares held by the existing investors.

iv) Whether or not Mr. Caldwell had provided sufficient support for his assessment of the discounts to be applied to the shares.

239. As to the first of these matters, it seemed to me that the distinction Mr. Berenblut was seeking to draw in relation to the difference between the price paid for the shares on an open market and the notional market value was not helpful to me in seeking to decide the issues in this case not least because Mr. Berenblut did not offer an alternative market value. In reality, both experts seemed to be agreed that for the purposes of determining the As Warranted or As Paid value of the Claimants' shares, one should use the price actually paid by the Claimants.

240. As to the second matter, as already set out above, the question Mr. Berenblut sought to answer was one on which it was for the Court to make findings not him.

241. The third issue, namely whether series A preference shares are more valuable than series A ordinary shares, is more difficult. The experts agree that there are different rights attached to the different series of shares, the key differences being liquidation preferences, voting, rights to convert, anti-dilution clauses, dividends, automatic conversion and veto rights. However, Mr. Caldwell does not perceive these differences as affecting his valuation whereas Mr. Berenblut does. Unfortunately, Mr. Berenblut does not go on to quantify these differences in monetary terms or explain which of the rights make the preference shares more valuable than the ordinary shares and why.

242. Mr. Caldwell explained that he did not consider the differences between the two share classes justified the conclusion that the series A preference shares are more valuable than the ordinary shares for the following reasons:

i) The liquidation preferences attached to the preferred shares are only applicable on liquidation of the company;

ii) The voting rights of the two share classes are equal;

iii) The rights of the series A preferred shares to cumulative dividends of 9% per annum are only payable on liquidation.

iv) The veto rights attached to the preference shares require consent from at least 50% of the holders of this share class, which none of the Claimants had individually.

v) Ultimately in a public offering, the series A preferred shares would automatically convert to ordinary shares.

243. In cross-examination, both Mr. Luke and Mr. Zubarev accepted that there were rights attached to preference shares which could make them more valuable than A ordinary shares in certain circumstances. Mr. Caldwell also accepted in cross-examination that in certain exit scenarios, there were circumstances where the preference shares would

result in a greater return to their holders than would be the case for ordinary shareholders.

244. Nevertheless, having considered both Mr. Caldwell's views and those of Dr. Berenblut, I prefer the views of Mr. Caldwell, whose reasons for why there is no difference in value are the more convincing. In addition, I accept that, as Mr. Bell put it in evidence, nobody invests in a company for the liquidation preference and the preferred dividend. That is not the intention where investment is made.

245. As to the level of discount applied, Mr. Caldwell initially concluded that based on his experience and understanding of the facts of the case a discount of 55 – 65% was appropriate. In his supplementary report, he sought to support the assessments in his original report by reference to a series of reported instances in which public companies had seen their share price fall as a consequence of issues relating to the CEO and senior management, albeit a wide-ranging series of issues including sudden departure of a CEO, fraud investigations, and lack of confidence in the leadership.

246. Mr. Drake criticised Mr. Caldwell's views as being bare assertion (*ipse dixit*) or alternatively as being so obviously illogical and wrong they should be rejected in their entirety. More specifically, Mr. Drake submitted in closing that Mr. Caldwell had accepted in cross-examination that:

i) Mr. Caldwell did not carry out the exercise of comparing his view as to the level of discount with other reported instances of share prices falling prior to arriving at his assessment of the level of discount.

ii) He did not carry out any sort of calculation of the adverse effect of management problems on future cash flows in his first report.

iii) He did not carry out any calculations of how IHPL's (alleged) lack of inability to raise future funds might numerically impact on its value.

iv) Although he claimed to have previous experience of breach of warranty cases where the multiples that might be applied to an acquisition will have an impact as well, he did not set out any of the details of this experience in either his first or his second reports.

v) When choosing comparators for the purposes of the exercise set out in his supplementary report, Mr. Caldwell instructed his junior staff specifically to look for examples of companies where the share price had fallen. In other words, his company selection criteria were deliberately chosen to exclude the possibility that he might find a company which had issues with its CEO or senior management but whose share price nonetheless went up or stayed the same.

247. There is force to Mr. Drake's criticisms of Mr. Caldwell's analysis. The difficulty for me is that unless I accept the Defendants' submission that I should reject Mr. Caldwell's evidence as bare assertion, I do not have any evidence from the Defendants as to how I should take account of those criticisms in assessing what discount, if any, should be made to the As Warranted or As Paid value of the Claimants' shares to arrive at the actual value.

248. I do not consider that I should reject Mr. Caldwell's opinions as being merely bare assertion. As I pointed out during the hearing, it would be a rather surprising conclusion that the Claimants had suffered no loss if the Defendants were liable for breach of warranty or fraudulent misrepresentation.

249. In any event, I am satisfied that the Defendants' criticisms of Mr. Caldwell's report do not justify rejecting his evidence entirely or concluding that the Claimants have failed to meet the standard and burden of proof in establishing their loss.

    i) Mr. Caldwell is an experienced and well-qualified valuation expert who has complied with his duties to the Court.

    ii) There is obviously a measure of uncertainty as to the appropriate level of discount and inevitably a need for Mr. Caldwell to rely on his past experience and understanding of the relevant principles of valuation in reaching his opinion.

    iii) While there may be factors which Mr. Caldwell should have given greater prominence when forming his opinion, his failure to do so does not justify rejecting his methodology or calculations entirely.

    iv) Likewise, while it may be that Mr. Caldwell's comparative valuation exercise can be challenged for not taking into account positive examples (if there are any) and for not allowing for the impact of wider market factors on the fall in share price, it does not seem to me that these criticisms justify discounting his evidence entirely. The exercise is still a useful one in terms of providing evidence against which to test Mr. Caldwell's figures.

    v) Finally, given that I accept Mr. Caldwell's opinion that for the purposes of valuing the Claimants' shares no account needs to be taken of the additional rights conferred by the preference shares, it follows that I do not regard his failure to make any allowance for those differences as a reason to reject his evidence entirely. Even if some allowance should be made for the differences between the two types of share, it would be a matter affecting the level of discount not a reason to justify rejecting it entirely.

250. Mr. Caldwell's assessment of a discount of 55 – 65% as the basis for calculating the actual value of the Claimants' shares allowed for what he considered was the premium paid by the Claimants for their shares compared to what he considered was the indicative value range for IHPL shares using the market approach. Absent such a premium, Mr. Caldwell considered that the appropriate level of discount would be between 40% to 60% from a valuation of IHPL based on first principles.

251. In this respect, Mr. Caldwell's evidence only serves to emphasise just how much valuation is an art rather than a precise science. With this in mind and taking into account the wide discretion given to the Court in assessing the expert evidence, I have considered whether I should substitute a different percentage for Mr. Caldwell's range of 55 to 65% in assessing the Claimants' direct losses.

252. While it might be within my discretion to reduce Mr. Caldwell's range to take account of the Defendants' criticisms of his analysis, I have in the end concluded that the

appropriate course is to assess the Claimants' losses based on 55%, the lowest end of Mr. Caldwell's range based on a valuation at a premium and within his range based on his valuation of the shares using an indicative market value. I have decided not to reduce the percentage any further because to do so would be to make an arbitrary reduction without any satisfactory evidence to justify the level of that reduction. Although I accept that the detail of Mr. Caldwell's analysis only appeared in his supplementary report, his assessment of the appropriate range of percentage discount was pleaded by the Claimants in their Re-Re-Amended Particulars of Claim. The Defendants had the opportunity to put in evidence offering an alternative range of discount but did not do so.

253. Accordingly, Mr. Bell is entitled to recover a sum of US$ 550,001 in respect of his direct losses while Mr. Zubarev is entitled to recover a sum of US$825,000 in respect of his direct losses.

Consequential Loss

254. The Defendants accepted in Opening that in an appropriate case a subsequent decline in share value between the date of purchase and the date of trial might be recoverable as consequential loss. However, the Defendants submit that there is no good evidence to support the valuation of IHPL on which the claim for consequential loss is based. They further allege, albeit without pleading particulars of their case, that the decline in value of IHPL was a consequence of poor management following Ms. Singh's resignation as CEO and that in any event the Claimants have deliberately sought to drive down the value of IHPL to be able to take control of the company.

255. There are presently unfair prejudice proceedings on foot between the parties. The Defendants ask that I should not make any findings as to the propriety of the March 2021 share issue going beyond those necessary for the resolution of the present claims. However, to determine the Claimants' case that they are entitled to recover consequential losses, it is necessary for me to decide whether there was a need for the Claimants to put further funds into IHPL in March 2021 and if so, whether their investment in March 2021 (in mitigation of their loss) resulted in a reduction in value of their original shares, which they were entitled to claim as a consequential loss. The Defendants plead that any need for further investment was a consequence of poor management decisions made after Ms. Singh was removed as CEO and that the purchase of shares was done at an under-value as part of a strategy to enable the Claimants to take control of IHPL. Accordingly, these are matters which I have to decide and in relation to which it was incumbent on the Defendants to put evidence before the Court.

256. So far as the law is concerned, the starting point in assessing whether the Claimants are entitled to recover anything in respect of consequential loss is the underlying policy that damages are intended to put the relevant claimant in the position they would have occupied if they had not sustained the wrong for which they are being compensated; see Smith New Court Securities Ltd. v Citibank NA [1997] AC 254 at 262. Such a claim may be made in respect of consequential losses even if they are not reasonably foreseeable: Doyle v. Olby (Ironmongers) Ltd [1969] 2 QB 158. But the damages must be consequential and in so far as they are looking to recover costs incurred in mitigation of their loss, the Claimants must establish that it was necessary

and reasonable for them to spend the money in order to mitigate their loss and preserve their asset; Butler-Creagh v. Hersham [2011] EWHC 2525 at [111].

257. The Defendants criticised the use of March 2021 as an arbitrary date for the assessment of the Claimants' consequential loss. But I accept Mr. Robinson's submission that it is the date at which the Claimants' loss crystalised. The Defendants also submitted that the Claimants were attempting to recover a paper loss rather than actual loss. I accept that the exercise undertaken by Mr. Caldwell to calculate the quantum of the Claimants' loss is an exercise which is a calculation of the loss in value of the Claimants' shares based on the difference between what he describes as the Actual Full Knowledge of the Breaches Value of the shares at the time of entering into the Subscription Agreement and the value of those shares after the valuation of IHPL at US$4 million. Nevertheless, this calculation is still a calculation of an actual loss, namely the reduction in value of the Claimants' shareholding following the US$ 4 million rights issue at a time when IHPL was running out of money.

258. The Claimants say that in March 2021, the company was close to running out of cash. This was accepted by Ms. Singh in her witness statement where she acknowledged that the company was in a cash crisis in which it was two weeks away from running out of money. There was an unsuccessful rights offering at a valuation of IHPL at US$ 8 million. On 05 March 2021, as evidenced by minutes of the board meeting, the board approved a rights issue at US$ 4 million. The Claimants then each invested US$1,089,424 to keep the company afloat.

259. It is at first sight surprising that a company valued at US$17 million in December 2019 should have declined in such a way that by March 2021, it was valued at US$4 million. However, I have no evidence before me to support the Defendants' case that this decline in value was a consequence of poor management decisions other than an assertion to that effect in Ms. Singh's witness statement (and I keep in mind that Ms. Singh was CEO until November 2020). Similarly, I have no evidence from the Defendants offering an alternative valuation in March 2021 or providing support for the plea that the valuation of US$4 million was deliberately engineered to enable the Claimants to take control of the company and to do so at a reduced share price.

260. Considering the lack of any particularised case by the Defendants as to the failures in management which are said to have caused the decline in value of the company and the lack of evidence going to the plea in any event, I find that the Defendants have not established a break in the chain of causation such as would prevent the Claimants recovering their consequential losses.

261. I also reject the Defendant's case that the fundraising round in March 2021 was at a deliberate undervalue. I have no evidence from the Defendants to support their plea in this regard. The evidence before me does, however, include the board minutes at which the decision was made to approve the fundraising round at a value of US$4 million. That decision was approved by a majority of the directors; Dr. Bernath, who was there as an alternate for Ms. Singh abstained. I find that I have no evidence justifying me rejecting the use of the share price at which the Claimants purchased their shares in March 2021 as the basis for calculation of their consequential losses. Accordingly, using the figures provided in Mr. Caldwell's report, I find that:

i) Mr. Bell is entitled to recover US$82,000 in respect of his consequential losses; and

ii) Mr. Zubarev is entitled to recover US$123,000 in respect of his consequential losses.

Conclusion

262. For the reasons set out above, I find that Mr. Bell's and Mr. Zubarev's claims against the Defendants succeed in the following sums:

i) Mr. Bell: US$632,001.00

ii) Mr. Zubarev: US$948,000.00.

263. I would be grateful for the assistance of counsel in drawing up an appropriate order to reflect this judgment.

264. Finally, I would like to acknowledge the high standard of the oral and written advocacy of both teams of counsel and to thank them and their instructing solicitors for the work done to assist the Court in hearing this dispute as well as for the courteous way in which each party advanced their case.