Neutral Citation Number: [2020] EWHC 3465 (Ch)

Case No: CR-2017-006788

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMPANIES COURT (CHANCERY DIVISION)

IN THE MATTER OF SPRINTROOM LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 December 2020

Before:

RICHARD SPEARMAN Q.C.
(sitting as a Judge of the Chancery Division)

Between:

ARISTIDES GEORGE POTAMIANOS
Petitioner

- and –

(1) EDWIN JOHN PRESCOTT
(2) SPRINTROOM LIMITED
Respondents

- -

Anthony Pavlovich (instructed by Blake Morgan LLP) for the Petitioner
Rebecca Page (instructed by Moore Barlow LLP) for the First Respondent

Hearing dates: 21-25 September and 6 October 2020

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INTRODUCTION

1. This is the trial of a number of issues of quantum following my judgment on liability in two sets of proceedings (see *Sprint Electric Ltd v Buyer's Dream Ltd & Anor* [2018] EWHC 1924 (Ch), [2018] WLR(D) 585) ("the Liability Judgment"). The background to the dispute is set out in detail in the Liability Judgment and need not be repeated.

2. The first of those claims ("the Source Code claim") concerned source code and other materials used by Sprint Electric Limited ("SEL"), and was brought by SEL against (a) a former director of SEL and the author of the source code ("Dr Potamianos") and (b) Dr Potamianos' service company, Buyer's Dream Limited ("BDL").

3. SEL is a wholly owned subsidiary of Sprintroom Limited ("SRL"), and 40% of the shares in SRL are held by Dr Potamianos. The second of those claims ("the Unfair Prejudice claim") involved a petition presented by Dr Potamianos against (a) SRL and (b) the holder of the remaining 60% of the shares in SRL ("Mr Prescott") under sections 994-996 of the Companies Act 2006, in which Dr Potamianos contended that the affairs of SRL and SEL had been conducted in a manner unfairly prejudicial to his interests, and sought an order requiring Mr Prescott or SRL to purchase his shares in SRL.

4. In the Liability Judgment, I decided the Source Code claim substantially in favour of SEL, and no appeal was made against that decision. The Source Code claim proceeded to a trial on quantum, in which SEL claimed damages in the total sum of £5,331,413. The trial on quantum was heard by His Honour Judge Hacon, who held that SEL was entitled to recover the cost of two weeks of the charging rate of Dr Fells under one head of claim, the cost of five months of the charging rate of Dr Fells under a second head, £2,000 for the time of Mr Lock and Mr Kelly under a third head, and £3,250 under some further heads (see *Sprint Electric Ltd v Buyer's Dream Ltd & Anor* [2020] EWHC 2004 (Ch) at [285]) ("the Source Code Quantum Judgment"). The precise amount of liability was left to be determined at a later hearing to deal with consequential matters.

5. Following the Liability Judgment, I ordered (1) that Dr Potamianos' 40% shareholding should be bought out at a price to be determined by the Court, (2) that any purchase of Dr Potamianos' shares should be at full *pro rata* value, without discount for the fact that his is a minority holding, and (3) that a payment should be made by SEL to BDL to reflect payments received by Mr Prescott's service company, Sameaim Limited ("Sameaim"), after the exclusion of Dr Potamianos from management, which had not been matched by similar payments to BDL - such that £4 should be paid to BDL for every £6 paid to Sameaim in the relevant period ("the Balancing Payment"). However, the first of those orders was subject to future determination of whether various offers made by Mr Prescott to buy Dr Potamianos' shares meant that there had, in fact, been no unfairly prejudicial conduct in the affairs of SRL, with the result that the petition

should be dismissed. That question was left over to a further trial of matters relating to the quantification of such of Dr Potamianos' claims as might require expert evidence.

6. Both Mr Prescott and Dr Potamianos appealed those orders on a number of grounds. The Court of Appeal (McCombe, Leggatt and Rose LJJ) (i) allowed Dr Potamianos' appeal relating to the requirement to assess the offers made by Mr Prescott, but (ii) dismissed Mr Prescott's appeal in its entirety and (iii) dismissed Dr Potamianos' appeal on all other grounds (see *Prescott v Potamianos & Anor* [2019] EWCA Civ 932, [2019] 2 BCLC 617) ("the Appeal Judgment"). The Court of Appeal said at [144]-[145]:

> "An evaluation of all the circumstances surrounding the offers shows that none of them rendered Dr Potamianos' exclusion from the Company fair. They could not be relied on to defeat Dr Potamianos' petition and it would make no difference to that conclusion that an expert might now value the shares as at the time the offers were made at less than the £1.34 million or £1 million offered …We do not think that the expert evidence of valuation, whatever its result, will be capable of producing a result that would deny Dr Potamianos any relief upon his petition. That is not to say that the offers made may not have some bearing upon costs questions, depending upon the outcome."

7. Accordingly, the Court of Appeal ordered that the issues for the trial of quantum should be recast to exclude consideration of the offers that had been made by Mr Prescott.

8. At [393] of the Liability Judgment, I said "I do not consider that the fault in this case lies by any means all on one side". At [67] of the Appeal Judgment, the Court of Appeal said:

> "We would add that in each party's skeleton argument for this appeal he 'puts his best foot forward' in identifying the features of the case upon which he relies to put the other in the worst possible light: see e.g. paragraph 11 of the argument for Mr Prescott and paragraph 5(5) of Dr Potamianos's argument. In our judgment, such paragraphs only serve to support the judge's overall conclusion that fault lay on both sides."

9. The issues which I now have to decide comprise, in essence: (1) the amount of the Balancing Payment; (2) the price to be paid to Dr Potamianos for his 40% shareholding in SRL; and (3) whether Dr Potamianos is entitled to interest or quasi-interest, and if so for what period(s) and at what rate(s).

10. I am most grateful to Mr Pavlovich (for Dr Potamianos) and Ms Page (for Mr Prescott) for their full, clear and very helpful written and oral submissions on those issues.

THE APPLICABLE LEGAL PRINCIPLES

11. Section 994(1)(a) Companies Act 2006 allows a member of a company to petition the Court on the ground that "the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of… some part of its members (including at least himself)". In accordance with section 996(1), the Court "may make such order as it thinks fit for giving relief in respect of the matters complained of". In particular, by section 996(2)(e) it may order the other members or the company to purchase the petitioner's shares (a "buy-out order"). That has happened in this case.

12. In *Re Bird Precision Bellows Ltd* [1986] Ch 658, Nourse J said (in relation to the predecessors to s.994):

> "Although both sections 210 and 75 are silent on the point, it is axiomatic that a price fixed by the court must be fair. While that which is fair may often be generally predicated in regard to matters of common occurrence, it can never be conclusively judged in regard to a particular case until the facts are known."

13. In the same case, Oliver LJ said at p669:

> "The whole framework of the section, and of such of the authorities as we have seen, which seem to me to support this, is to confer on the court a very wide discretion to do what is considered fair and equitable in all the circumstances of the case, in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company; and I find myself quite unable to accept that that discretion in some way stops short when it comes to the terms of the order for purchase in the manner in which the price is to be assessed".

14. Similarly, in the Liability Judgment, I stated at [373] that "when considering unfair prejudice, the central concern of the court is to determine what is fair, just and equitable".

15. Among other things, the Court "retains a wide freedom to disregard the views of experts and apply the court's view of what is fair and sensible in all the circumstances" (*Hollington on Shareholders' Rights*, 9th ed, §8-45).

16. Mr Pavlovich submitted that, beyond the above general approach, the question of the share price will depend on the evidence, so care must be taken in deriving any points of general principle from decided cases (see *Hollington* at §8-45). In particular, when dealing with the hypothesis of a sale by a willing seller to a willing buyer, as in the present case, "any departure from reality must either be compelled by the hypothesis, or at least based on solid evidence rather than assumption or speculation" (*Chilukuri v RP Explorer Master Fund* [2013] EWCA Civ 1307, Lewison LJ at [57]). This is the "principle of reality" upon which Mr Prescott also relies. However, care is needed in deriving any other principle from *Chilukuri*, which concerned the assessment of damages for breach of contract, rather than relief for unfair prejudice. The crucial

difference is that in the present case the Court is concerned with a notional sale of the *entire* share capital, whereas there the sale was limited to a 26% minority holding.

17. Mr Pavlovich further submitted that in valuing a contingent liability (or a contingent asset), the court is permitted to take into account events subsequent to the valuation date that shed light on its value. In *Re Annacott Holdings Ltd* [2013] EWCA Civ 119, [2013] 2 BCLC 46, for example, the actual corporation tax paid, as opposed to an estimate at the valuation date, was a suitable deduction for the purpose of achieving fair value. The conclusion may be different if an external, unforeseen factor arose after the valuation date, such as a change in the rate of corporation tax (see *Shah v Shah* [2011] EWHC 1902 (Ch) at [54]; *Joffe, Minority Shareholders*, 6th ed, §7.127). Similarly, the court is entitled to have regard to matters subsequent to the valuation date in order to confirm or cross-check its assessment of circumstances at that date (see *Re Southern Counties Fresh Foods Ltd* [2010] EWHC 3334 (Ch) at [126.a]; *Joffe* at §7.126(c)-(d)). These last two points are exceptions to the "general starting point" or "basic rule" that the court will look at the evidence available to a purchaser at the valuation date (see *Joffe* at §7.126 and *Hollington* at §8-62). This is far from an absolute rule and the court is obliged to depart from it in considering contingent liabilities (and contingent assets): "With the light before him, why should [the tribunal] shut his eyes and grope in the dark?" (*Re Annacott* at [19], quoting *Bwllfa Merthyr Dare Steam Collieries* (*1981*) *Ltd v Pontypridd Waterworks Company* [1903] AC 426).

18. Mr Pavlovich also made submissions concerning the power of the Court to award "the equivalent of interest" (or "quasi-interest") on the buy-out price if that is the best way to a fair result (see *Re Annacott* at [27]-[36]). I consider that issue separately below.

19. Ms Page submitted that share valuation is not an exact science. Although it ultimately involves a finding of fact, elements leading up to such finding might well involve points on which different minds, approaching the matter judicially, could quite properly take different views "in other words, points to which there cannot be said to be exclusively one correct answer" (*Joiner & Anor v George* [2003] BCC 298, [101]). In an appropriate case the Court may consider what the outcome of negotiations in an arm's length sale would have been (see *Wann v Birkinshaw* [2017] EWCH Civ 84 at [40]-[45], where the Court of Appeal concluded that the price on an earnings basis would have been reduced in the course of negotiations - in that case the issue was whether the price should be reduced by the net borrowings).

20. Ms Page placed extensive reliance on *Chilukuri v RP Explorer Master Fund* [2013] EWCA 1307, in which an appeal to the Court of Appeal was allowed and nominal damages were substituted for the sum found by the judge.

21. In *Chilukuri*, Lewison LJ said at [59]:

> "the first and fundamental principle of valuation; namely that things are to be taken as they are in reality on the valuation date, except to the extent that the exercise requires a departure from reality. In the old cases this is summarised in the Latin phrase rebus sic stantibus. In the more modern cases it has been described as the principle of reality."

22. With regard to the principle of reality, Ms Page submitted that in any valuation, it is critical that that the valuer "steps back and checks its provisional valuation against commercial reality and business common sense" (*Hollington* at §8.45). In *Chilukuri,* Briggs LJ said:

> "It is axiomatic that in any complicated process of valuation, the valuer must take the relevant aspects of the world as he finds them (unless constrained by his instructions), and that he must, after looking at each element of the process, stand back and ask himself whether his provisional valuation makes commercial or business sense, viewed in the round".

23. Briggs LJ considered the reality pertaining to the company in that case:

> "Standing back therefore, the putative market for this shareholding in July 2009 would have been offered a 26% minority holding in an apparently incompetently managed Indian company, the majority shareholders of which were close-knit private individuals with no reason to take any notice of the purchaser's views about the conduct of the company's affairs, with a track record of mismanagement, or non-management, of its principal asset which they had allowed to become dormant, in a deteriorating political and economic environment in the DRC, and who had allowed a winding up petition to be presented and served, with the immediate consequence of prohibiting the completion of any share sale transaction in any event. The interested purchaser would have discovered, upon due diligence, that the supposedly valuable rights in the JVA were still inchoate as the result of the outstanding presidential decree, that attempts to fund the project had come to nothing, and apparently ceased a year previously, that the company lacked its own resources with which either to fund the project or to deal with its creditors, and that the commercial substratum upon which the JVA had been constructed, namely an immediate local demand in the DRC for bitumen needed in a large government roadbuilding programme, had in all probability evaporated due to the deterioration in the political and economic state of that country."

24. Briggs LJ concluded:

> "In all the circumstances, I find myself quite unable to imagine any reasonably prudent and well-advised prospective purchaser paying anything for this 26% shareholding. In my judgment the only conclusion on the largely undisputed facts is that no such person would have touched these shares with a barge pole".

25. With regard to hindsight, Ms Page submitted that the basic rule in valuing shares in a company is to reject evidence of events which occurred after the valuation date (*Holt v*

Inland Revenue Commissioners [1953] 1 WLR 1488; *Joiner v George* [2003] BCC 298 at [68] (Court of Appeal)). However, regard may be had to events subsequent to the valuation date (see *Joffe* at §7.126): (a) for the purpose of checking what forecasts for the future could reasonably have been made and what a proper estimate was at the valuation date (*Buckingham v Francis* [1986] BCLC 353, at 355, 358); (b) for the purpose of a cross-check or as a form of comfort (*Re Southern Counties Fresh Foods Ltd* [2010] EWHC 3334 at [126], where the expert accepted this in evidence); (c) to demonstrate circumstances as at the valuation date: for example where it is known that the value of an asset at the valuation date is speculative and precarious and this is borne out by later events (*Stanley v TMK Finance Ltd* [2011] BPIR 876 at [8]-[16]): that involves using the evidence of the subsequent event to put a value on the asset at the valuation date; and (d) to value a contingent liability (in *Annacott Holdings Ltd* [2013] 2 BCLC 46 at [19] the Court of Appeal took account of events subsequent to the valuation date which shed light on its value).

26. In *Edgar v Munro* [2017] EWHC 1814 (Ch) the court adopted an "opentextured" approach (see *Joffe* at §7.126). Mr Robin Hollington QC sitting as a Deputy Judge of the Chancery Division said at [14]:

> "it would be a blinkered court which was not prepared to take into account, with caution and mindful of the overriding objective to arrive at a valuation at a given date, the direct evidence on those issues for at least a relatively short period after the valuation date. I would note that in the real world a purchaser and seller might well have agreed upon a formula which took into account the performance of the business for a similar period, and I do not see why in this case the court should adopt a completely different. My ultimate task is to arrive at a "fair" or "proper" sum of money which Mr Munro should pay Mr Edgar for this 50% shareholding: *Re Bird Precision Bellows* [1986] Ch 658, at 668-669".

27. Ms Page made a number of submissions as to how the above general principles should be applied to the facts of the present case:

    (1) First, Ms Page submitted that the Court has acknowledged that the Balancing Payment comprised "rough justice", and that in this large and significant respect, Dr Potamianos has already been given the benefit of the Court's discretion. It does not become Dr Potamianos that he now persists with over-technical and misconceived arguments on numerous financially small points (many of which were articulated for the first time in his Skeleton Argument for, and during, the current trial), in order to eke out every last point in his favour. In so doing he has forced the parties and the court to incur significant time and costs on the same.

    (2) Second, Ms Page drew attention to the conduct of Dr Potamianos, and submitted that he is not deserving of the "benefit of the doubt" on the issues which are now

before the Court. Unlike Mr Prescott (who the Court had "no doubt" was "acting in which he believed to be the best interests of SEL (and SRL) throughout" and who was acquitted of allegations of breach of fiduciary duty), Dr Potamianos' conduct was found to be seriously wanting in the Liability Judgment:

(a) He was found to have acted in breach of his fiduciary duties to SEL, to have been "evasive", "misleading", and "dissembling" about his position regarding the source code (at [261]) and to have abused the trust SEL placed in him with regard to his knowledge of the source code by using it "for his own ends, seeking to gain an advantage for himself in his wrangling with Mr Prescott and other SEL personnel". The Court found that "All this was contrary to the duties that he owed to SEL, and was detrimental to SEL" (at [262(10)]).

(b) Prior to the formation of the Sub-Committee, he "downed tools, stopped providing work produce to SEL and became difficult and evasive about the source code". The Court found it was "impossible to say that it was not reasonable and necessary to take steps to address these issues, for example by the formation of an appropriate Sub-Committee", albeit the Court ultimately found its remit was too wide (at [392]).

(c) He procured that BDL acted in breach of contract with SEL (at [352(7)]).

28. With regard to the principle of reality, Ms Page submitted that the Court's task is to value SRL, and assess the fair price to be paid for the shares on the Valuation Date, and that the following factors are significant. There is a wealth of evidence which amply demonstrates that SEL was experiencing significant problems with the source code to which it had access at the Valuation Date alongside multiple other business difficulties. The expert evidence is that there would have been a commercial negotiation of the purchase price. It is manifestly unreal, having regard to SEL's documentation and knowledge of the difficulties, to hypothesise that a notional buyer would not have sought and obtained a downward adjustment to the purchase price. Fairness to Mr Prescott requires that this is taken into account. To ignore the reality would, in effect, result in Mr Prescott being compelled to pay a price greater than the market value. Not only would this not be fair and equitable, but it would go beyond what is necessary in order to put right for the future the unfair prejudice established in this case.

THE WITNESSES

29. Mr Pavlovich submitted that the evidence of Dr Potamianos was straightforward and to the point. Further: (a) he had considerable experience in running SRL and SEL and was able to give a realistic assessment of the requirements of doing so; and (b) his evidence about the technical aspects of SEL's business was not open to serious challenge.

30. As to the evidence of Mr Prescott, Mr Pavlovich placed particular reliance on the findings of HH Judge Hacon in the Source Code Quantum Judgment at [123], which he submitted were equally, and regrettably, pertinent in the present context:

> "I think that Mr Prescott did his best to give honest answers to all the questions put to him. However, he was highly invested in the outcome of this inquiry and I cannot exclude the possibility that his recollection of some of the events covered may have adapted over time to be consistent with SEL's claim to damages. I think that the assumptions Mr Prescott made in support of his quantification of the loss suffered by SEL were astonishingly over-optimistic. I have little confidence in them as I will explain below. I have the impression that Mr Prescott was given free rein to devise those assumptions as he saw fit without much if any critical scrutiny being applied to them before the trial."

31. Mr Pavlovich submitted that this phenomenon is particularly important because Mr Prescott has full access to information concerning SEL, whereas Dr Potamianos' knowledge is limited to (a) what Mr Prescott has disclosed and (b) historical information predating Dr Potamianos' exclusion from SEL. Accordingly, when Mr Prescott complains of problems at SEL as at the Valuation Date, Mr Pavlovich submitted that his evidence is self-serving and is generally limited to assertion. Overall, while Mr Prescott presumably again did his best to give honest answers, one again cannot exclude the possibility that his recollection has adapted to be consistent with his case. That adaptation is illustrated by Mr Prescott disputing HHJ Hacon's findings about Dr Fells' work, and, further, by his attempt to re-run his failed case from the liability trial that the dispute about BDL's invoices arose before July 2016.

32. Ms Page's submissions were to the opposite effect. She submitted that Mr Prescott was an honest and credible witness. He was able to assist the Court with first-hand evidence of the position of SRL and SEL at the Valuation Date. His evidence was clear, consistent and reliable, and no criticism should be made of it. Ms Page emphasised that the Liability Judgment at [390] records that I was "entirely unpersuaded" by Dr Potamianos' allegations that Mr Prescott had acted in breach of duty and that:

> "… On the contrary, having heard and seen Mr Prescott give evidence, I have no doubt that he acted in what he believed to be the best interests of SEL (and SRL) throughout, and that he went to great lengths to try and maintain a working relationship with Dr Potamianos and to keep him on board, even though the two men had very different personalities and even though they had difficulties working together. In my judgment, these findings are also supported by the documents considered above."

33. Ms Page submitted that, in contrast, Dr Potamianos was, at times, an evasive witness. For example:

(1) He denied that BDL and Sameaim deferred invoicing during the 2008-9 banking crisis ("that is absolutely incorrect") although his own evidence in the Source Code claim was "some invoices for services rendered by BDL and Sameaim were deferred during the financial crisis of 2008 and 2009 for the sake of prudence".

(2) He refused to accept in oral examination that Mr Levine came from an engineering background "He alluded to that, but I cannot confirm that" although in his email to Mr Prescott of 24 February 2015 he described Mr Levine as "coming from an engineering background and he has been a CEO in engineering companies before". When challenged, Dr Potamianos suggested that what he meant was qualified by the preceding words in brackets, that "they all say that blah blah blah", however it is quite clear that, objectively read, the words in brackets qualify his earlier statement that Mr Levine seems to know the sector.

(3) He confirmed his witness statement in which he said there was "no known source code problems other than a bug by which the field did not, on rare occasions, go into standby mode", when he knew this was not the only bug, having admitted the existence of the "alter password" bug in the course of the Source Code claim.

34. These submissions echo the submissions which were made to me about the reliability of Dr Potamianos and Mr Prescott during the trial of the Source Code claim. They also echo the points made in the Liability Judgment and in the Court of Appeal Judgment which are referred to in paragraph 8 above. I propose to adopt the same course as I took in the trial on liability, as recorded at [14] and [15] of the Liability Judgment:

> "In cases, like the present, which relate to events which happened over many years, in which feelings run high, and in which individuals have taken up entrenched positions in their written evidence by the time the case comes to trial, there are significant risks that witnesses may be honest but mistaken about what took place, and may give evidence about what they would like to think happened rather than what they can truly recollect. These factors make the appraisal of their evidence more difficult. At the end of the day, the best guide to the truth is often to be found not so much in the demeanour of the protagonists, or even concessions made in cross-examination, but in the contemporary documents and in an objective appraisal of the probabilities overall. These matters were discussed more fully in *Gestmin SGPS SA v Credit Suisse (UK) Limited, Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm) …
>
> For these reasons, I have thought it right to focus on the documentary materials, which are extensive in the present case, and to place less weight on the differing accounts and recollections of the witnesses, save where they appear uncontroversial, or objectively probable, or are supported by the contemporary documents. That does not mean that the reliability of the witnesses is of no consequence. Where it is significant, however, I consider that it is often safer to make findings with regard to specific instances, rather than to form a view as to overall reliability and then apply

that finding to what may be disparate circumstances. I have made such findings as I consider appropriate below."

35. With regard to the expert share-valuation evidence, Mr Pavlovich submitted that (a) Moira Hindson for Dr Potamianos: gave clear and independent evidence on matters of company valuation; set out which matters were points of principle and which were assumptions derived from her instructions; and readily conceded points where it was proper to do so; whereas (b) David Stern for Mr Prescott: was less clear, particularly in his explanation as to why he considered the accounting value (or "net asset value") of SEL to be irrelevant; broadly agreed with Ms Hindson, and accepted that the essential difference between them was in their instructions as to matters of fact; but appeared to have pre-prepared answers to some questions, which were not always on point.

36. Ms Page submitted that both Mr Stern and Ms Hindson (a) are highly qualified independent professional accountants, (b) provided clear and credible explanations for their joint opinions, and (c) entirely properly, accepted the limits of their expertise. Like Mr Stern, Ms Hindson is not a corporate financier, and (i) she could offer no expert evidence on costs of employing engineers, (ii) she rightly accepted that she had no first-hand experience of SEL and that her conclusions in respect of the replacement costs of the engineers and a salesperson ("Z") were based on the factual instructions provided by Dr Potamianos, and (iii) she also rightly accepted that if those facts were not accurate, her conclusions did not necessarily stand: "They depend on the evidence".

THE AMOUNT OF THE BALANCING PAYMENT

37. I explained my decision to order the Balancing Payment in [398] of the Liability Judgment as follows:

> "… Dr Potamianos complains that Sameaim has continued to invoice SEL and to be paid by SEL while he and … BDL, have been shut out from doing so since disputes arose and, more particularly, he was excluded from management. Dr Potamianos asserts that this was in breach of a promise made by Mr Prescott on 15 July 2016 that Sameaim would stop invoicing SEL, and, in any event, that it has allowed Mr Prescott to extract monies from SEL in a way that is prejudicial to Dr Potamianos. In my judgment, the answer to this complaint is that Mr Prescott and SEL should be held to the bargain that was made with Dr Potamianos in or about 2007, to the effect that they would each invoice SEL and be paid by SEL in a manner that was proportional to their respective shareholdings. Accordingly, for every £6 that [Sameaim] has been paid which is not matched by a payment of £4 to BDL since relations broke down, I consider that BDL is entitled to be paid a balancing payment (save that (a) in so far as the payments that were made to [Sameaim] were used to pay Dr Fells, that element of those payments should be left out of account, and (b) I will hear submissions as to whether BDL is entitled to charge VAT in light of the fact that, in the events which have happened, BDL has not performed any services for SEL). That may seem like rough justice in light of the fact that BDL and Dr

> Potamianos have made no contribution to SEL since that time, but, as against that, it is relevant to have regard to my finding that Dr Potamianos was unfairly excluded from management, and to set this decision in the context of my determination of wider issues as to the valuation date and other terms of buy-out discussed below."

38. At [105] of the Appeal Judgment, the Court of Appeal held that I was "entitled to find that (in the face of the exclusion) the appropriate relief includes an order that Dr Potamianos be paid Balancing Payments calculated in the manner agreed", having earlier said at [104]:

> "We accept that the judge, although rightly describing the mechanism adopted by the parties for extracting money from SEL as involving "an element of artifice", did not go so far as to find that the arrangements were a sham. He recognised that BDL's contractual right to receive payments was conditional on the provision of (or upon Dr Potamianos being ready and willing to provide) services to SEL. That was why the judge observed that his order requiring the Balancing Payments to be made might "seem like rough justice". Nevertheless, the judge was entitled to have regard to the underlying rationale and objective of the payments and to take the view that, in all the circumstances, it was fair that, for as long as Dr Potamianos was participating in the management of SEL or was ready and willing to do so, he should continue to receive his agreed share of the profits of SEL. The judge took account of the fact that Dr Potamianos stopped providing programming services to SEL by excluding from the calculation of the Balancing Payments the sums which Sameaim invoiced to SEL for the cost of employing Dr Fells to provide such services. The judge also properly had regard to his finding that the reason why Dr Potamianos ceased to participate in the management of SEL was that he was unfairly excluded from doing so."

39. There was no dispute between the parties as to the amounts paid during the relevant periods. They also agreed that the appropriate end date for the purposes of calculating the amount of the Balancing Payment is 28 September 2018, which is the date of the Order that I made following the determination of consequential matters arising from the Liability Judgment ("the Valuation Date"). However, the parties disagreed as to whether certain sums should be included in the calculation of the Balancing Payment.

40. The main difference between the parties related to the appropriate starting date for the period to be used for the purposes of the calculation. Mr Pavlovich, on behalf of Dr Potamianos, argued for 15 July 2016, on the basis that it was only on this date that SEL stopped paying BDL, and, it was submitted, that Mr Prescott breached the bargain to split payments in the ratio of 60:40. Ms Page, for Mr Prescott, argued for 19 February 2016, on the basis that it was on this date that relations between Dr Potamianos and Mr Prescott broke down, and that to take 15 July 2016 as the relevant date would leave out of account a period in 2016 during which BDL invoiced and received more than Sameaim (because, it was submitted, Sameaim was refraining from issuing invoices).

41. A further difference between the parties related to an invoice from Dr Fells to Sameaim numbered 00032 and in the sum of £3,744. This invoice was dated 28 September 2018 (i.e. the Valuation Date), but it was not paid until 2 October 2018. Mr Pavlovich contended that this invoice should be left out of account. Ms Page argued the contrary.

42. Accordingly, at the beginning of the present hearing, Dr Potamianos was contending for a Balancing Payment of £406,370.67, and Mr Prescott for one of £372,981.13.

43. During the course of the hearing, I indicated that in ordering the Balancing Payment I was more concerned with restoring the parties to the distribution of monies in the ratio of 60:40, rather than with requiring there to be carried out an accounting exercise which depended on the ascertainment of the precise date when (whether by reference to the contents of emails or the payment of one invoice or another) it could be said that there was a breakdown in relations such as to signify a decision by Mr Prescott no longer to abide by the bargain that he and Dr Potamianos had made in or about 2007.

44. In light of that indication, Mr Pavlovich very sensibly recast his client's case to run from the date when, as he submitted, there was first a mismatch between the invoices raised by BDL and those raised by Sameaim. On this basis, he argued that the appropriate starting date for the purposes of calculating the Balancing Payment was May 2016, and not any earlier date as submitted by Ms Page. He also argued that Dr Fells' invoice 00032 should continue to be left out of account (i) because the Order relating to the Balancing Payment suggested that it should be calculated on a cash basis (i.e. having regard to the date when payments were made, rather than when they were earned), (ii) because that invoice was not paid until after the Valuation Date, and (iii) because that invoice matched an invoice from Sameaim which is not included in the calculation. In the result, Dr Potamianos sought a Balancing Payment of £361,810.67.

45. As this sum was less than the sum of £372,981.13 which Mr Prescott had contended was due to Dr Potamianos as a Balancing Payment, it is perhaps unsurprising that in her closing submissions Ms Page was willing to accept that basis of calculation.

46. Nevertheless, Ms Page adhered to the argument that invoice 00032 should not be left out of account. She submitted that, for the purposes of the Balancing Payment calculation, this sum should be deducted from the payments made to Sameaim as (i) it is not disputed that Sameaim paid Dr Fells £3,744 in respect of this invoice out of monies received by Sameaim from SEL (and, moreover, in accordance with the evidence of Mr Prescott, received by Sameaim prior to the Valuation Date), (ii) it is irrelevant that Sameaim paid Dr Fells a few days later on 2 October 2018, and (iii) it is also irrelevant whether the schedules and invoices of Dr Fells and Sameaim tally by reference to the Valuation Date. According to my calculations, the effect is that the Balancing Payment would become: £361,810.67 – (4/6 x £3,744) = £359,314.67.

47. Mr Pavlovich submitted in reply that it was "somewhat bizarre" that Mr Prescott should adopt Dr Potamianos' calculations in place of Mr Prescott's own calculations, reducing Mr Prescott's final figure from £372,981.13 to £359,314.67.

48. The effect, as Mr Pavlovich submits, is that Mr Prescott (a) accepts Dr Potamianos' position in closing save only as regards Dr Fells' last invoice, and (b) in particular, accepts that Sameaim invoiced a total of £686,000 after April 2016 without matching invoices from BDL, and that BDL invoiced a total of £30,000 after April 2016 without matching invoices from Sameaim. On that basis, Mr Pavlovich submitted as follows: (i) the approach of matching invoices (which leads to the above figures for the invoices of Sameaim and BDL) means that Dr Fells' invoice 00032 should be matched with Sameaim's invoice of about the same date, (ii) Dr Fells' invoice was dated 28 September 2018 and Sameaim had an invoice dated 30 September 2018 in the amount of £27,000 (which is not in the trial bundles, but is said to be reflected in the general ledger which is at bundle B2, divider 3, at row 41973), (iii) if Dr Fells' last invoice is included, then this invoice of Sameaim should be included as well, at least to reflect the work done by the Valuation Date, (iv) however, the fairer approach is to omit both, (v) it is arbitrary to look at which Sameaim invoice Dr Fells' invoice was paid from, and (vi) a more rigorous approach is appropriate, even in a broad-brush exercise.

49. I prefer the submissions of Ms Page on this issue. I consider that they better accord with my decision that "in so far as the payments that were made to Sameaim were used to pay Dr Fells, that element of those payments should be left out of account". I accept that this has the effect that Dr Fells' invoice dated 28 September 2018 and paid out of monies received by Sameaim before the Valuation Date is included in the calculation, while an invoice from Sameaim which is dated after the Valuation Date is not included. In my view, however, that is not in contradiction with the agreement of the parties that the appropriate end date for the purposes of the calculation is the Valuation Date.

50. Before leaving it, I note that the value of this point is not great. This is because if Dr Potamianos had succeeded on it he would have received £3,744 more as part of the Balancing Payment, but he would receive 4/10 x £3,744 = £1,497.40 less for his 40% shareholding in SRL, because that £3,744 would fall be deducted from the net assets of SEL. Conversely, although in the result Mr Prescott has succeeded in paying £3,744 less to Dr Potamianos as part of the Balancing Payment, that will increase by 40% of that sum (i.e. £1,497.40) the price that Mr Prescott will have to pay Dr Potamianos for his shareholding in SEL. That does not mean that the point was not properly arguable, although it may say something about the unwillingness of these parties to compromise.

QUASI-INTEREST ON THE BALANCING PAYMENT

51. Turning to interest, Mr Pavlovich submitted that it would be fair to add quasi-interest to reflect the fact that BDL has been kept waiting for the Balancing Payment, whereas

Sameaim received its corresponding payments between 2016 and 2018. He argued that the same reasoning applies as in the cases which deal with quasi-interest on a buy-out price, namely that it is required to provide fair compensation for the delay in payment.

52. As to the rate which should be awarded, Mr Pavlovich submitted:

(1) A normal commercial rate of 3% above base rate would be fair. See *Re Annacott Holdings Ltd, Attwood & Ors v Maidment* [2013] EWCA Civ 119, Arden LJ at [3(v)] and [33]-[34], including the observation at [34] that:

> "It is tolerably clear that [the judge] was working on the basis of the practice of the court under section 35A of the Senior Courts Act 1981. The rate that he directed [i.e. 2% over Bank of England base rate ("BBR") from 1 October 2005 to 31 October 2008 and 3% over BBR for the period from 31 October 2008 to 16 July 2012] was not an unusual rate (see *Jaura v Ahmed* [2002] EWCA Civ 210, but note now the observations of Tomlinson LJ in *F& C Alternative Investments Holding Ltd v Bartholemy* [2012] EWCA Civ 843, with which I there agreed). On the contrary it was one that would be properly capable of being awarded under section 35A".

(2) Alternatively, the same rate should be used as was awarded to SEL in the Source Code claim, namely 2% above base rate (see the Source Code Quantum judgment at [286]), and which is also the same rate as was awarded to BDL in relation to its counterclaim for payment of invoice 253 in the Source Code claim.

53. Ms Page submitted with regard to the claims for quasi-interest generally that the jurisdictional basis for the interest claimed is unclear. The Petition does not plead interest under section 35A Senior Courts Act, and such interest would not be available on the share purchase order as no date for payment has yet been ordered, so there is nothing on which interest can run (*Elliott v Planet Organic* [2000] BCC 610, 616c). It is also well established that there is no jurisdiction under section 35A or the equitable jurisdiction to award interest on the purchase price in respect of any period prior to the making of the purchase order (*Re Bird Precision Bellows Ltd* [1984] Ch 419, 437c).

54. Further, the power to order quasi-interest under section 996 is to be exercised with great caution based on evidence (including of the rate) of which there is none (*Profinance Trust SA v Gladstone* [2002] 1 BCLC 141 [31]-[32]). In *Re BC&G Care Homes* [2016] BCC 615, the need to exercise "great caution" was emphasised. Whilst the court made an order for quasi-interest in that case, it is distinguishable from the present case, as the respondent had not made any open offers at all for the petitioner's shares.

55. Ms Page submitted that it would be unfair for the Balancing Payment to be augmented by an award equivalent to interest for the following principal reasons:

(1) The Balancing Payment itself is already "rough justice" given that BDL did not provide any services to SEL. It was no part of the bargain between them that either Mr Prescott or Dr Potamianos should draw money from SEL for doing nothing. SEL already has to pay Dr Potamianos for services it has not received.

(2) The reason why BDL was not permitted to provide any services to SEL after September 2016 (and thus receive any payment), was because: (i) it was in breach of its obligations under the 1997, 2000 and 2015 Contracts in failing to deliver up the source code and documents; (ii) BDL was not ready and willing to perform its obligations under the 2015 Contract as it was disputing that it was obliged to provide the deliverables; and (iii) BDL was in breach of contract for failing to provide services under Schedule 200815, and Dr Potamianos had informed Mr Prescott in June 2016 that he was "too busy to do any work on software R&D" (see the Liability Judgment at [100]).

(3) The Balancing Payment goes well beyond compensating BDL and Dr Potamianos for any loss. BDL may, or could, have found alternative work since 2016. BDL has not been required to show whether it has mitigated its loss. BDL is being paid in full only by reference to the net benefit received by Sameaim from its invoices. In contrast, Sameaim provided services to SEL throughout the relevant period.

(4) The Balancing Payment is not a commercial debt. It has not yet been ordered to be paid, and BDL has not been kept out of any money.

(5) It would not be fair to augment the relief to Dr Potamianos for the like reasons as apply in respect of the share price, namely, in summary: (i) the Valuation Date is very favourable to him in light, in particular, of the current global pandemic and financial crisis, (ii) his conduct, as found in the Liability Judgment, was seriously wanting, and (iii) the Balancing Payment and the share purchase order already provide him with full compensation for the material unfairly prejudicial conduct.

(6) BDL has not been unfairly kept out of any money in respect of the Balancing Payment since the Valuation Date because SEL refrained from seeking an immediate costs order against BDL/Dr Potamianos in respect of the Source Code liability trial, or an interim payment regarding its costs, on the basis that there would be no immediate order for the Balancing Payment. In other words, the two sums were, or should be treated as, "netted off". SEL's approach was recognised to be "a very restrained approach on costs". Indeed, the Court gave SEL liberty to apply in the Source Code claim for an interim payment on account of its costs, in the event that an order was made in the Unfair Prejudice claim which required SEL to be procured to pay, or pay, any sums to BDL. Thus BDL has had the financial benefit of the costs of the Source Code claim trial on liability being reserved for 2 years and has not had to fund payment, or interim payments on

account, in respect of the same. SEL having taken such a restrained and reasonable approach from which BDL has benefitted financially, it would be unfair to augment the Balancing Payment by the equivalent of interest for that period.

56. Although those points were attractively put by Ms Page, they have not persuaded me that this aspect of the claim should be treated otherwise than as an ordinary commercial debt. I consider that the first three points fail to acknowledge the basis on which the Balancing Payment was ordered. In short, it was ordered to restore the 60:40 payment split agreed by the parties, in spite of the fact that BDL/Dr Potamianos were making no contribution to SEL, having regard to the consideration that Dr Potamianos had been unfairly excluded from management. As to the fifth point: (i) there is no evidence that the Valuation Date is very favourable to Dr Potamianos (in fact, in ordering that date I rejected his case that an earlier date should be ordered, which I imagine he considered would have been more favourable to him), (ii) I do not consider that his conduct, as found in the Liability Judgment, should operate as a bar to ordering interest on the Balancing Payment any more that it operated as a bar to ordering the Balancing Payment itself, and (iii) the argument that the Balancing Payment and the share purchase order already provide Dr Potamianos with full fair and equitable compensation for the material unfairly prejudicial conduct seems to me to contain an element of circularity, and I am unpersuaded by it in any event. As to the sixth point, the costs issues relating to the Source Code claim are not before me, and it seems to me that they now form or are likely to form part of a wider series of issues relating to costs, including those arising from the Source Code quantum trial and the quantum trial that is now before me. I consider it more appropriate to deal with quasi-interest on the claims that are in front of me, and leave questions of interest on costs claims to be dealt with as and when those claims are before the Court, than to speculate what will happen with regard to those questions, and make orders on the claims before me on that basis.

57. If I was against her on those points, Ms Page submitted with regard to the appropriate rate that I should award quasi-interest on the Balancing Payment at a commercial rate of no more than 1% above base. The Balancing Payment is payable to BDL, which should be assumed to be able to borrow at commercial rates, and this supports a rate of no more than 1% above base. Ms Page placed reliance on *Baker v Black Sea and Baltic General Insurance Company Ltd* [1996] LRLR 353, in which Staughton LJ said that rate "is somewhat less than almost all plaintiffs would have to pay if they were borrowers, but significantly more than they could earn as lenders" and Otton LJ said:

> "The practice whereby interest is normally awarded at 1% over Base Rate amounts to a presumption which can be displaced if its application would be substantially unfair to either party. That rate represents something of a compromise (albeit weighted in favour of the plaintiff) between what a plaintiff kept out of his money might have earned on it and what he might have had to pay by way of interest: see

per Staughton J in *La Pintada Compania Navegacion SA v President of India* [1983] 1 Lloyds Rep 37, 43".

58. In this regard, a number of earlier cases concerning awards of statutory interest under s.35A of the Senior Courts Act 1981 were considered by the Court of Appeal in *Carrasco v Johnson* [2018] EWCA Civ 87. Hamblen LJ (as he then was) said at [17] that the guidance to be derived from these cases includes the following:

> "(1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.
> (2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been.
> (3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.
> (4) In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate.
> (5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates."

59. The cases considered by Hamblen LJ included *Fiona Trust & Holding Corporation v Privalov* [2011] EWHC 664 (Comm), in which Andrew Smith J stated at [16]:

> "A 'broad brush' is taken to determine what rate of interest is just and appropriate: it would be neither practical nor proportionate (even in a case involving as large sums as these) to attempt a minute assessment of what will precisely compensate the recipient. In particular, the courts do not have regard to the rate at which a particular recipient of compensation might have borrowed funds. This policy is adopted in order to control the extent of the inquiry to ascertain an appropriate rate: see the *Banque Keyser Ullman* case (cit sup). The court will, however, consider the general characteristics of the recipient in order to decide whether to assess interest at a rate that is higher or lower than is conventional. So, for example, in *Jaura v Ahmed* [2002] EWCA Civ 210, Rix LJ awarded interest at base rate plus 3% to reflect that 'small businessmen' had been kept out of their money and in recognition of the 'real cost of borrowing incurred by such a class of businessman'. Thus, the court will examine what has been called 'a question of categorisation of the plaintiff in an objective sense' (see the *Banque Keyser Ullman* case, cit sup), recognise relevant characteristics of the party who is awarded interest and reflect them when determining the fair and appropriate rate."

60. I consider that it is appropriate to award quasi-interest on the Balancing Payment for the reasons submitted by Mr Pavlovich. I also consider that *Re Annacott Holdings Ltd*

provides a more reliable guide to the appropriate rate than the *Baker v Black Sea and Baltic* case to which Ms Page referred, which predates *Re Annacott Holdings Ltd* by 17 years. I consider that I am entitled to assume that BDL (the entity entitled to be paid the Balancing Payment) was a borrower rather than a lender, such that I should "have regard to the rate at which persons with the general attributes of [BDL] could have borrowed". Further, BDL would appear to be a "small business". However, although I have rejected Ms Page's submissions as a basis for refusing to award quasi-interest altogether, I consider that she makes a valid point that there is a risk of over-compensating Dr Potamianos. In addition, I am concerned that any order which leaves room for argument, whether as to base rates from time to time or as to when elements of the Balancing Payment fell due, will generate disputes. In the exercise of my discretion, I will therefore award interest at 3% and from the Valuation Date *simplicter*.

THE VALUE OF DR POTAMIANOS' SHARES

Overview of the issues

61. In accordance with the Order which I made consequential upon the Liability Judgment, and which was upheld by the Court of Appeal, Dr Potamianos' shares in SRL are to be valued as at the Valuation Date on the basis of "a sale between a willing buyer and a willing seller, acting at arm's length, of the entire share capital of [SRL]".

62. SRL has two principal assets, namely (1) the equity in Peregrine House and (2) the shares in SEL. So far as concerns Peregrine House, I was informed on the last day of the present trial that an up to date valuation had been produced in draft, which placed a value of £1.6m on the property. Somewhat surprisingly, the valuation report was not produced until 28 October 2020, and it was only provided to the parties on 3 November 2020. It was then provided to the Court on 6 November 2020 under cover of an email from Counsel which confirmed that both parties accepted the valuation of £1.6m and that accordingly neither party was seeking to adduce further evidence or make further submissions about the value of Peregrine House. There fall to be deducted from that figure (a) a mortgage in the sum of £460,352, and (b) in accordance with the agreement of the experts, 15% of a latent capital gains tax liability which would arise in the event that Peregrine House is sold. By the same email dated 6 November 2020, the Court was informed that both parties calculate the adjustment to the value of SRL resulting from the prospective capital gains tax liability on Peregrine House as £6,370. In the result, the net value is approximately £1,600,000 – (£460,352 + £6,370) = £1,133,278.00.

63. So far as concerns the value of the shares in SEL, as set out above the parties instructed experts: Ms Hindson for Dr Potamianos, and Mr Stern for Mr Prescott. They are both very experienced and well qualified Chartered Accountants, and experienced expert witnesses. Their reports on share valuation were exchanged on 30 June 2020, and they

subsequently produced a Joint Statement. Appendix 1 to their Joint Statement contains a helpful comparison of their respective calculations relating to the value of SEL.

64. Ms Hindson and Mr Stern were in agreement on a significant number of matters.

65. First, they agreed the appropriate valuation methodology, as follows:

(1) SEL should be valued on the basis of a multiple of earnings. The preferred measure of earnings is "EBITDA" (i.e. "earnings before interest, tax, depreciation and amortisation"). The effect is to strip out financing costs (interest) and some non-cash items (depreciation and amortisation) and arrive at a figure for the pre-tax earnings generated by the assets of the business.

(2) The relevant valuations measure is "EV", which stands for "enterprise value". This may be understood as the market value of the assets required to operate the business. It excludes any assets or liabilities that are not used to operate the business. Those assets or liabilities are valued separately.

(3) Before applying the earnings multiple, the EBITDA of SEL should be adjusted to reflect the way that the business would be restructured by a notional buyer.

(4) The adjusted EBITDA figures for three financial years (ending in October 2016, 2017 and 2018) are combined to produce SEL's "maintainable earnings". The calculation uses a weighted average in the ratio of 1:2:3 across the three financial years. The effect is to give the most recent earnings the most weight.

(5) The earnings multiple is applied to the maintainable earnings to produce the EV of SEL. The experts agreed a figure of 4.5 for the multiple.

(6) Various adjustments are made to the EV to produce the value of SEL, including, for example, the addition of the value of SEL's surplus cash (which the experts agreed to amount to £450,000 – a figure which was supported by Ms Page but which was contested by Mr Pavlovich), and the addition of the following matters upon each of which the experts were unable to place a value: (i) the value of SEL's claim which formed the subject of the Source Code quantum trial, (ii) the cost of remedial work to the Source Code (an issue raised by Mr Prescott), and (iii) the impact of further "significant issues" raised by Mr Prescott and listed at paragraphs 16(i)-16(xvi) of his 5th witness statement dated 21 April 2020.

(7) The values of SRL's other assets and liabilities (besides SEL) are then added.

(8) Dr Potamianos is entitled to 40% of the final figure, reflecting his shareholding in SRL.

66. Second, in addition to agreeing that SEL had surplus cash of £450,000, the experts agreed:

(1) That payments made to Sameaim, Mr Prescott and BDL should be added back to the EBITDA figures for SEL for each of the 2016, 2017 and 2018 financial years.

(2) That the cost of employing a CEO should be deducted from those figures. Ms Hindson considered that the sum of £100,000 should be deducted in this respect for each of those years. Mr Stern considered that the sums to be deducted should be as follows: £101,417 for 2016, £103,547 for 2017, and £99,068 for 2018.

(3) That extraordinary legal costs (attributable, in essence, to the current batch of ongoing legal disputes between the parties), in excess of an allowance for ordinary legal costs of £10,000 per annum, should be added back.

(4) That SEL's marketing costs for 2017 were out of line with its marketing costs for 2016 and 2018, and that accordingly an adjustment of £78,635 should be made to the 2017 maintainable EBITDA calculation. The principle that the marketing costs should be adjusted to a "proper" level was accepted by both parties at the trial. However, Mr Pavlovich argued that the experts had erred in the way that they had gone about making the calculation, and that consistency required that an adjustment should be made to the 2016 year in the sum of £10,833, or alternatively in the sum of £8,335, and to the 2018 year in the sum of £6,744. Ms Page disputed that the experts had made any error. This argument developed into a dispute as to what the experts had been doing when they made the adjustment that they both considered right for the 2018 year. In short: had they been looking at the actual expenditure in 2016 and 2018 as broadly right, and then adjusting the 2017 figure so that it was in line with what on that basis they took to be broadly the appropriate amount of expenditure; or had they in truth been adding back in 2017 anything in excess of what was "properly" paid in 2016 and 2018, such that if some of the expenditure incurred by SEL on marketing in 2016 and 2018 was "excess" it followed that sums ought to be added back in those years as well?

(5) That the sum of £40,886 which Sameaim was ordered to pay to SEL in the Source Code claim should be included in the value of SEL at the Valuation Date.

67. The experts had also agreed that a sum (£220,000 according to Ms Hindson, and £176,000 according to Mr Stern) should be included in the assets of SEL to reflect the costs of the trial on liability in the Source Code claim, in which SEL was substantially successful. It seemed to me that there were a number of problems with that approach.

Those costs were reserved. Accordingly, they are not yet payable. Indeed, they have not yet been quantified. Further, they are now tied up, or may be tied up, with the costs outcome following the Source Code Quantum Judgment, the result of which may be to increase or decrease SEL's costs entitlement as against Dr Potamianos. In these circumstances, I suggested that the better and fairer course would be to deal with these costs and the value of the Source Code claim (which is another asset of SEL) (i) together and (ii) after the outcome of the Source Code claim is known. (Mr Pavlovich suggested in opening that this would be the appropriate approach towards valuation of the Source Code claim. Ms Page, on the other hand, submitted that the Court should value the Source Code claim now, and, in essence, attribute no or little value to it.)

68. By the conclusion of the trial, the parties were both content to follow this course. Therefore, the issues of whether and to what extent the value of Dr Potamianos' shares in SRL should be adjusted to take account of the (i) costs of the trial on liability in the Source Code claim and (ii) the value of the Source Code claim will be deferred until a later date. It was agreed that the details of the argument as to how those matters should be valued would have to await the final determination of consequential issues following the trial of quantum in the Source Code claim, including the orders for costs then made. In this regard, although I have yet to hear argument on these matters, it is right to record that on 12 November 2020 HH Judge Hacon made an Order in the Source Code quantum proceedings which includes the following provisions (among others):

"Damages and interest payable to the claimant pursuant to this inquiry

1. The claimant's damages are assessed in the sum of £23,730.

2. Interest shall be paid by the defendants on such sum at 2% above base rate from 13 June 2016. The amount payable in respect of such interest is £2,578.44.

Sums payable to the defendant pursuant to the September 2018 Order

3. Pursuant to the September 2018 Order the claimant shall pay the first defendant the sum of £18,000 (namely £15,000 + VAT) together with interest at a rate of 2% above base rate from 30 July 2016.

4. The amount payable in respect of such interest is £1,898.70.

Balance to be paid

5. The defendants shall pay to the claimant the amount due pursuant to paragraphs 1 and 2 of this order, less the amount due to the first defendant pursuant to paragraphs 3 and 4 of this order.

6. Payment of such amount is stayed pending final order in respect of quantum and costs in case CR-2017-006788 (the "UPP case"). The defendants must pay the claimant interest on the difference between the sum payable under paragraph 1 of this

order, less the sum payable under paragraph 3 of this order at 2% above base rate from the date of this order until such final order in the UPP case and thereafter at the judgment rate.

Costs

7. The costs of the trial as to liability for this claim and the defendants' counterclaim and the issue of whether interest should be paid on such costs and if so at what rate and for such period are reserved to the designated 3 judge in the UPP case (Mr Richard Spearman QC) to be determined by him when he considers the appropriate form of order following his judgment in the UPP case (or at such other time as he may direct).

8. The defendants shall pay the claimant the following costs (and shall not be entitled to their costs in respect of the following):

(1) the claimant's costs of and occasioned by and consequential to the defendants' application to amend their points of defence made by application notice dated 25 February 2020;

(2) the claimant's costs of and occasioned by the defendants' application to extend time for service of their schedule of costs following judgment on this inquiry as to damages made by application notice dated 11 June 2020.

9. There shall be no order as to costs in respect of the defendants' application made by application notice dated 20 December 2019 to extend time for service of witness statements.

10. Otherwise, the claimant shall pay the defendants' costs of the inquiry to the date of this order on the standard basis.

11. The costs referred to in paragraphs 8 and 10 are summarily assessed as follows:

(1) Under paragraph 8: £6,871

(2) Under paragraph 10: £248,000

12. Accordingly, the claimant shall pay the defendants the sum of £241,129. Payment of such sum is stayed pending final order in respect of quantum and costs in the UPP case.

13. The claimant shall pay the defendants interest on their costs (up to a maximum of £241,129) at 2% above base rate from the date the defendants paid those costs to the date of payment.

…

Permission to appeal

18. The claimant is refused permission to appeal in respect of the court's determination that the costs of this inquiry should not be reserved to Mr Richard Spearman QC for determination after he has handed down judgment on issues of quantum in the UPP case.

19. The claimant is refused permission to appeal in respect of issues of quantum in this inquiry as to damages."

69. The main matters upon which the experts were unable to reach agreement concerned (a) the cost of staff to replace Mr Prescott and Dr Potamianos and (b) whether a notional buyer would consider that Z should be retained. In outline:

(1) The experts agreed that at least one replacement engineer would be required. Ms Hindson considered that the cost of Dr Fells, the engineer directly or indirectly engaged by SEL, in the sum of £37,000, should be adopted under this head. Mr Stern considered that two engineers, at a cost of £60,000 each, would be required, on the basis that this is what Justin Levine proposed in March 2016 when Mr Levine was in discussion with Mr Prescott and Dr Potamianos about buying SEL and "Mr Levine provides a reasonable proxy for the behaviour of a willing arm's length buyer". This is a significant item, because one engineer at a flat cost of £60,000 makes a difference of £270,000 to the final valuation of SEL (because £60,000 x 6 = £360,000; £360,000 ÷ 6 = £60,000; and £60,000 x 4.5 = £270,000).

(2) Ms Hindson considered that in circumstances where a new CEO is recruited, one of the Joint Managing Directors of SEL, Mr Keen, would have more time to devote to sales, such that Z would not be required. Ms Hindson "therefore added back to EBITDA [Z's] salary of £50,000", albeit only (according to Appendix 1 to the experts' Joint Statement) for the 2017 and 2018 years. Mr Stern disagreed that this is appropriate. This is also a significant item, because it makes a difference of £187,500 to the final valuation of SEL (because £50,000 x 5 = £250,000; £250,000 ÷ 6 = £41,666; and £41,666 x 4.5 = £187,500).

70. Accordingly, the following issues arise for determination now:

(1) Whether the correct figure for the cost of employing a CEO is, as Ms Hindson contends, £100,000 for each of the years 2016, 2017 and 2018, or is instead, as Mr Stern contends, £101,417 for 2016, £103,547 for 2017, and £99,068 for 2018.

(2) Whether the cost of staff to replace Mr Prescott and Dr Potamianos which should be inserted into the calculation is (a) £37,000 for each of the years 2016, 2017 and 2018, as suggested by Ms Hindson, or (b) £120,000 for 2016, increased to £122,520 for 2017 and further to £126,564 for 2018, as suggested by Mr Stern.

(3) Whether or not the saving of the cost of Z at £50,000 per annum should be added back in to the years 2017 and 2018, as suggested by Ms Hindson.

(4) Whether the correct value of SEL's surplus cash is £450,000, as agreed by the experts, or £755,000 as argued by Mr Pavlovich. This is a major item of dispute, as any difference feeds directly into the calculation of the total value of SEL.

(5) Whether or not the experts' agreed approach towards marketing costs is correct.

(6) Whether and to what extent the value of SEL should be adjusted to take account of the cost of remedial work to the Source Code. This is another major item, because SEL's case as set out in a letter of claim from its solicitors, Moore Barlow LLP ("MB"), dated 8 January 2019 to the solicitors for BDL and Dr Potamianos, Blake Morgan LLP ("BM"), sent pursuant to the Professional Negligence Pre-Action Protocol, is that this work is estimated to cost "in the region of £468,000".

(7) Whether and to what extent the value of SEL should be adjusted to take account of the further "significant issues" raised by Mr Prescott and listed at paragraphs 16(i)-16(xvi) of his 5th witness statement dated 21 April 2020. No figure was placed on these items, whether separately or cumulatively, either by Mr Prescott or Ms Page, but, on the face of it, they could have a marked effect on that value.

Replacement CEO

71. Mr Stern put forward the cost of a replacement CEO at £101,417 for 2016, £103,547 for 2017, and £99,068 for 2018 on the basis that these are the figures yielded by using "the median cost associated with a full time CEO in the South-East of England as inflated by 20% (to allow for National Insurance, pension contributions etc) as per the ONS' Annual Survey of Hours and Earnings in each of 2017 and 2018" and that as the ONS did not publish the corresponding information for 2016, Mr Stern "simply adopted the 2017 figure and deflated for the effects of UK wage inflation in the following year".

72. Ms Hindson's evidence was to the effect that there was no warrant for this degree of fine tuning, and that the results of the exercise were unreal in that it seemed unlikely that a notional buyer would approach matters on the basis that the CEO would take a pay cut between 2017 and 2018.

73. Further, I consider that Mr Stern's approach in this regard may be contrasted with an answer that he gave to Mr Pavlovich when asked about another aspect of the figures: "… if we were going to embark on a detailed, forensic, in depth analysis, then we would need to look at all of the costs that were incurred in the business. As Ms Hindson said yesterday, it is an art not a science".

74. I agree with Ms Hindson's approach in this instance. It should be noted that the consequence of adopting Mr Stern's approach would be minimal: (£101,417 + 2×£103,547 + 3×£99,068) ÷ 6 = £100,952.50; accordingly, £100,952.50 rather than £100,000 (because £100,000 x 6 ÷ 6 = £100,000) would feed in to the final valuation figure for SEL; and the sum which Mr Prescott would have to pay Dr Potamianos for his shares would be reduced to the following extent: £952.50 x 4.5 x 40% = £1,714.50. It is unfortunate that Mr Prescott considered it worthwhile to take time over this issue.

Replacement engineers

75. As set out above, Ms Hindson's approach is based on the costs actually incurred by SEL following the effective cessation of work by Dr Potamianos, whereas Mr Stern's approach is based on treating Mr Levine as a proxy for a willing arm's length buyer.

76. Ms Hindson stated at §5.2.16 of her report:

> "Given that Mr Keen, Dr Gardiner and Dr Fells together undertake the managerial and technical work formerly carried out by Dr Potamianos and Mr Prescott, Mr Levine's assumptions that an additional CEO and two engineers would also need to be recruited seems to me to result in excessive remuneration costs being deducted from SEL's EBITDA".

77. Mr Stern explained his approach in §§3.14 and §3.15 of his report as follows:

> "3.14 For the purposes of identifying the notional replacement costs that would be taken into account by a willing buyer, I have relied upon the contemporaneous email exchanges between Mr Justin Levine and Mr Prescott and Dr Potamianos in March 2016, being the point in time at which Mr Levine was exploring the possibility of purchasing SEL.
>
> 3.15 It is my understanding that both the Petitioner and the First Respondent accept that Mr Levine, whom they had in engaged in 2015 to act as their corporate finance advisor to try and sell the Company, has a detailed knowledge of the industry in which SEL operates. As such, I consider that, notwithstanding an element of self-interest (which would apply in the case of any willing buyer), Mr Levine provides a reasonable proxy for the behaviour of a willing arm's length buyer, including in relation to:
>
> i The evaluation of future EBITDA; and
>
> ii The replacement costs (including the requisite staff) that it would be considered appropriate to reflect in lieu of the management charges paid to Mr Prescott and Dr Potamianos in order to properly reflect the ongoing costs of generating the future EBITDA of SEL."

78. Mr Pavlovich submitted that it is much more realistic to use the actual costs, as Ms Hindson does. Moreover, there are reasons to doubt the reliability of Mr Stern's approach. In summary:

(1) Mr Levine was an outsider to the business of SEL, and had an obvious incentive to give a low estimate of earnings to support his bid for SEL.

(2) Mr Levine's bid never progressed beyond an opening bid for want of financing (see his email to Mr Prescott dated 11 April 2016). It cannot be said that it had settled on an appropriate value, as it might have done if it had progressed further.

(3) Dr Potamianos and Mr Prescott did not accept the need for replacement engineers as suggested by Mr Levine. Their "evaluation of the financials [Mr Levine] produced" contained in an email and attachment from Dr Potamianos to Mr Levine, which was copied to Mr Prescott, dated 18 March 2016 showed (a) the cost of a new hardware designer tapering to £30,000, then £15,000, then £0 in the 3 years 2013, 2014 and 2015, and (b) the cost of a new software/digital designer tapering from £60,000 in each of the years 2013 and 2014 to £10,000 in 2015.

(4) Dr Potamianos' evidence in cross-examination was that £60,000 for either type of designer "would be the top range" and "As SEL has done since, it has employed people well below that".

(5) Mr Prescott accepted in cross-examination that £45,000 would be a fair figure for a more junior hardware engineer. However, I would add that Mr Prescott also said "If you wanted a senior hardware engineer, you would pay more for them".

(6) Mr Pavlovich also submitted that Mr Prescott had accepted in cross-examination that if a new CEO had been appointed that would have enabled Dr Gardiner to spend more time dealing with hardware. However, I consider that Mr Prescott's evidence was more equivocal than that. In one passage, the latter part of which, in my judgment, echoed parts of Dr Potamianos' oral evidence (and see, further, in this regard the statement in the letter from BM dated 26 January 2017 that, at least up to around 2012, Dr Potamianos "… alone continued the software development of the PL/X flagship product on two fronts … This would normally have been a task carried out by 3 or 4 (or sometimes more) engineers in a typical competitor's R&D environment"), Mr Prescott said:

> "I would say that an incoming buyer would be fairly keen to have a replacement for me on the technical front as well as the CEO front because I was multi-tasking.
>
> As we know, Sprint Electric did lots of jobs across various aspects of the business. When you are a shareholder, you have a different work motivation. You do all these things. If you are an employee, then you tend to be a bit more specialised and you do not have the motivation to work as hard as the shareholder might do."

(7) Mr Pavlovich further submitted that a new CEO would be able to undertake more work than Mr Prescott, who had been planning "to be more supportive and spend less time and move into retirement" but who "was not able to do that" and "had to

resort to working intensively to solve the problems" which were "mainly caused by the fallout from the dispute". This supports the suggestion that Mr Prescott's workload was not due to any ordinary ongoing responsibilities. Again, however, it is right to note that Mr Prescott also gave evidence that (among other things) he "became very busy" with involvement in a long-term R&D project which SEL would be "reliant upon" for "the future … going forward many years".

(8) Mr Pavlovich submitted that, in any event, and in addition to Dr Gardiner, Mr Prescott had rightly accepted that as at the Valuation Date there were other individuals within SEL (Jim Lock, Richard Blows and Paul Janicki) who could assist with hardware issues; and that Mr Prescott's "unique position" concerned "analogue legacy products". The cross-examination continued as follows:

"Q. Is it fair to say that on the valuation date, Dr Gardiner had little role beyond his technical functions and his function as joint managing director?

A. Well, those two titles encompass a great deal of things.

Q. You accept that statement?

A. Yes. If, you have to qualify what was required under those headings to get the context, the full picture.

Q. So, looking at a hypothetical sale of the business in 2018, the appointment of a CEO would give him more time to focus on hardware, would it not?

A. Well, he was already heavily engaged in hardware with the new R&D project.

Q. That is the one that you ----

A. The CEO work he was doing was less of a load than it had been earlier on, when he first became joint MD.

Q. I stress to you again that if there were a new person appointed, a CEO, then he would need to spend less time on his role as joint managing director and consequently more time to spend dealing with hardware; that must be right, must it not?

A. Yes, but he was heavily involved in the new R&D project, so that would employ a great deal of his time, which was a new task within the company, because we had embarked on this new R&D project, which had been stimulated by the fact we were worried we would not own the IP or the copyright. So, we had embarked on that project to mitigate against that possibility.

Q. If you had been replaced by a CEO, it follows, does it not, that SEL would not need a new hardware engineer because the existing team could do whatever was required?

A. Well, you would need someone to replace with the knowledge or be trained by me to do the things that I was uniquely able to do on the hardware. Even with the PL/X, as I had done all the thermal designs and all the PCB designs, there was a lot of experience and knowledge I had about those …"

(9) The SEL Business Plan from 2016 and Mr Prescott's offer for Dr Potamianos' shares in 2015 also supported the conclusion that the sum of £220,000 (or more) used by Mr Stern in respect of the costs of a CEO and two engineers is too high. In particular, as Mr Prescott confirmed in cross-examination, the assumption underlying that offer was that he would be the "supporting chairman" and that the people actually running the business would be the two joint managing directors ("JMDs"). It was in that context that Mr Prescott added back £60,000 in respect of each of himself and Dr Potamianos. It is said to follow that if a CEO were carrying out a more extensive role, that would relieve the JMDs of some of their responsibilities, and would result in there being no need for two new engineers.

(10) Mr Levine was not called as a witness on behalf of Mr Prescott, and neither were Dr Gardiner or Mr Keen called to support his case concerning their workloads.

79. Mr Pavlovich also relied on a number of findings of HH Judge Hacon in the Source Code Quantum Judgment. Those findings included the following:

"160 I find that in January and February 2016 Dr Potamianos was doing what he could to avoid SEL having access to the PL/X source code.

161 But I think it makes no difference… On 27 May 2016 Dr Gardiner found what is now agreed to be v.6.11 of the source code. On 2 June 2016 Dr Fells started work on v.6.11.

162 There seems to me to have been no good reason for the delay in finding v.6.11. In cross-examination Dr Gardiner did not provide a convincing answer to the suggestion that permission from the IT administrator to access Dr Potamianos' partition could have been sought in January 2016. My impression is that there was no sense of urgency at SEL during the first part of 2016 in seeking to find v.6.11.

163 There was a meeting between Dr Gardiner and Dr Fells on 10 June 2016, in which they discussed the way forward for SEL now that they had what they (correctly) believed to be v.6.11 of the PL/X source code. Their discussion is evidenced by an exchange of emails between 11 and 13 June 2016 …

164 Despite the tone of the exchanges between Dr Gardiner and Dr Fells, Dr Fells answered to Dr Gardiner who, as between them, took the decisions on priorities and direction.

165 Three significant points emerge from their discussions. First, Dr Fells would not try to re-create the source code for v.6.13. Secondly, he would re-write the v.6.11 source code using C code, a high-level programming code. Thirdly, he would make improvements to v.6.11 along the way.

166 In cross-examination Dr Gardiner accepted that converting v.6.11 into C code was by itself going to involve a very substantial re-writing of v.6.11. He confirmed that no engineer other than Dr Fells was recruited to carry out the work on v.6.11.

167 Dr Gardiner said that it took Dr Fells until late 2016 just to compile the v.6.11 source code because he did not have access to the compiler that Dr Potamianos had used, namely C30. Dr Gardiner did not provide a convincing answer in cross-examination when it was pointed out that C30 was stored on SEL's server and that it had been the only compiler used by SEL for several years. It seems to me likely that the time taken to compile was due to the decision in June to re-write v.6.11 so that, among other things, it could be compiled under MPLAB X and XC16 compiler. Alternatively, this is further evidence of a lack of urgency.

168 Dr Gardiner also said that they had doubts as to which version of PL/X they had, but in cross-examination accepted that it was now known to be v.6.11, i.e. the exact version released to Bardac in 2014.

169 Dr Fells compiled v.6.11 on 11 November 2016. Dr Gardiner said that it still did not work correctly, but after modification it was released for testing on 16 January 2017 as "v.6.11.01".

170 On 16 March 2017 Dr Gardiner made a presentation to SEL entitled "Product Roadmap". It provides an updated insight into SEL's ideas as to the way forward with PL/X and the instructions that were being given to Dr Fells. A slide headed "PL/X State of Play" stated …

171 This shows that SEL was continuing to sell drives using v.6.13 object code and found the software to be stable with only minor bugs. Dr Gardiner was of the view that the functionality of v.6.11 was close to that of v.6.13, that it had many bugs but these were probably to be found in v.6.13 as well and, as he had already observed, they were minor.

172 Dr Gardiner identified four ways forward …

…

174 Dr Gardiner's evidence on what SEL then did was sparse. However there is no doubt that Dr Fells embarked on a major project to remove bugs from v.6.11 and make improvements to it. It is possible to measure the scale of the project

by the fact that it is still continuing. In the meantime and up to the present SEL has continued to sell products using v.6.13 firmware.

175 In October 2018 SEL received the source code for v.6.13. SEL has not used v.6.13 as a base for further work. It is to be inferred that SEL did not believe that its commercial interests were best served by switching Dr Fells' focus to v.6.13 to remove bugs and to use it as a base for improvements. So far as bugs were concerned this does not come as a surprise. V.6.13 has served SEL very well since its launch in January 2015 and up to the present date. To the extent that v.6.13 has bugs, SEL and its customers have evidently had no trouble in coping with them. With regard to a base for potential improvements, it is to be inferred that SEL took the decision in late 2018 that the version Dr Fells was working on at that time, developed from v.6.11.01, was the better bet.

…

180 It is clear from what SEL actually did (a) upon finding the v.6.11 source code in June 2016 and (b) upon receiving Dr Potamianos' v.6.13 source code in October 2018 that SEL was determined upon an ambitious project of improvement to create much better software. In the meantime, drives have been sold using the tried and trusted v.6.13 software without any modification.

181 I take the view that SEL's priorities in the real events of June 2016 and October 2018 would have been reflected in the no breach counterfactual [i.e. that Dr Potamianos supplied SEL with the v.6.13 source code in January 2016]. Once Dr Fells hypothetically began work in earnest on v.6.13, he would have used that source code as the starting point for an ambitious improvement project. He would have re-written it line by line, or module by module, into C code, attempting to enhance the performance of the software along the way and making the source code compatible with a preferred compiler. In the meantime, products would have been sold, as before, using v.6.13 firmware."

80. Ms Page submitted:

(1) That Mr Stern was right to regard Mr Levine as a reasonable proxy for the behaviour of a willing arm's length buyer in relation to the staff replacement costs, having regard to the considerations that Mr Levine is (i) an engineer by background, (ii) experienced in the management of electrical engineering businesses, and (iii) an experienced M&A agent. The approach of Mr Levine provides the best evidence of the approach of a notional buyer. Ms Hindson said in her evidence: "I would not dream of challenging his opinions. He clearly knows more about this sector than I do, but I was doing a different exercise".

(2) Ms Hindson's exercise, which involved looking at replacing resources in the historic years, overlooks the fact that a purchaser would be buying future profits. While historic EBITDA can be used to gauge the likely future profits, a buyer has to factor in the resources it would require to replicate matters going forward.

(3) In his email of 14 March 2016, Mr Levine set out a breakdown of staff replacement costs that he considered necessary, to include a new CEO (at £150,000) and two new designers/engineers, namely a hardware designer to replace Mr Prescott and a software designer to replace Dr Potamianos. The principle of subtracting costs in respect of a CEO plus two designers/engineers was accepted by Mr Prescott and Dr Potamianos in their response, albeit that they argued that the initial costs of the designers should taper off in the later years.

(4) Ms Hindson's contention that a hardware designer/engineer at a cost of £60,000 p.a. was not necessary was based on being told by Dr Potamianos that Dr Gardiner was recruited as Mr Prescott's successor "in his technical and managerial role" and that Mr Keen was recruited as a successor to Dr Potamianos "in his managerial role and would also fulfil a sales role" (§5.2.10 of her report). However, Mr Levine envisaged that Dr Gardiner and Mr Keen would retain their roles as JMDs and require assistance, and in particular that, in addition to a CEO and Dr Gardiner, a hardware designer would be required to replace Mr Prescott's hardware skills. Mr Levine's approach is a reliable guide to the approach of a notional buyer, because it is based on sound considerations. As he explained in his oral evidence, Mr Prescott possesses a unique knowledge and experience of all aspects of the hardware design of the entire product portfolio accumulated over SEL's full history (mirroring Dr Potamianos' knowledge of the source code); and Mr Prescott provided guidance to Mr Janicki and other SEL staff, who were not a replacement for him. While neither expert could assist on the market rate, both Dr Potamianos and Mr Prescott accepted that £60,000 p.a. would be a reasonable salary for a hardware designer when they reverted to Mr Levine with their figures in 2016. Further, SEL's draft Business Plan identified a need for 4 additional technical employees in the context of its succession planning (including a hardware engineer with a salary of £45,000 p.a. for 2016-2018).

(5) As to the software designer/engineer, it is common ground that such an individual is required, and the issue which divides the parties is whether £37,000 should be allowed based on the costs of Dr Fells or whether £60,000 should be allowed based on the reasonable cost of employing a full time software engineer. The figure of £60,000 is correct for the following principal reasons: (i) it is the figure applied by Mr Levine, (ii) it was accepted by Mr Prescott and Dr Potamianos as a reasonable figure in their response to Mr Levine in respect of the years 2010-2014, (iii) it was only reduced for 2015 because Dr Potamianos sought to argue that the amount should taper off to reflect the reduction in his actual time spent on software in 2015, but this would be irrelevant to a notional purchaser, who would be concerned to budget for the cost of a full time software engineer to ensure that SEL had the required knowledge to support and develop its software in the future.

(6) Conversely, the cost of retaining Dr Fells is not a reliable guide. As Mr Prescott confirmed in oral evidence, Dr Fells was not employed by SEL, but was instead

an independent contractor, and "his hourly rate is equivalent to £65,000". In addition, Dr Fells was not a replacement for Dr Potamianos. As Mr Prescott said:

> "Dr Fells was engaged in a task that should not really have been necessary. All he was concentrating on was trying to restore the status quo with 6.13. He was not working on anything that could forward the fortunes of the company. He was just specially employed to try and recover that situation."

81. In my judgment, the most reliable guide to the cost which a reasonable buyer would take into account in respect of a software engineer is the actual cost to SEL of Dr Fells.

82. By the time of the Valuation Date, Dr Potamianos and SEL had parted company for well over a year, and Dr Fells had been providing software engineering services to SEL in his stead. In my view, it matters not whether Dr Fells was providing his services directly or indirectly, whether his hourly rate would have equated to a salary of £65,000 if he had been employed full time, and indeed precisely what he was focussed on doing.

83. The facts which weigh most with me are that as at the Valuation Date: (i) SEL had seen no need to engage anyone other than Dr Fells to provide software services; (ii) SEL had seen no need to spend more than £37,000 on obtaining such services; and (iii) as found by HH Judge Hacon in the Source Code Quantum Judgment, SEL had been carrying on business satisfactorily, in summary "using the tried and trusted v.6.13 software without any modification" in circumstances where v.6.13 had "served SEL very well since its launch in January 2015" and to the extent that v.6.13 contained bugs "SEL and its customers have evidently had no trouble in coping with them", while Dr Fells embarked "upon an ambitious project of improvement to create much better software", in particular by "remov[ing] bugs from v.6.11 and mak[ing] improvements to it", and "no engineer other than Dr Fells was recruited to carry out the work on v.6.11".

84. Those findings contradict Mr Prescott's evidence that all that Dr Fells was engaged in was "a task that should not really have been necessary", in that he was "concentrating on … trying to restore the status quo with 6.13". HH Judge Hacon had the benefit of much greater evidence (including evidence from Mr Prescott) and much more extensive argument that I have had concerning the matters summarised above, during the course of a trial lasting several days, and I see no basis for going behind his detailed findings, albeit made in a trial involving Dr Potamianos and SEL and not Mr Prescott personally.

85. In my opinion, those conclusions undermine the reliance that can properly be placed upon Mr Levine's figures. If Mr Levine's figure of £60,000 p.a. in respect of the cost of a replacement software engineer is not a dependable guide as to the approach which would have been adopted by a reasonable arm's length buyer as at the Valuation Date, there is no obvious reason why his other figures should be regarded as dependable.

86. Indeed, Mr Levine's calculations attributed a cost of £150,000 to a new CEO, although the experts agreed that the appropriate figure under this head was about £100,000. Mr Stern explained in oral evidence that this figure of £150,000 "may include an element

not of the cost of generating profits but an appropriation of profits" (on the basis that Mr Levine would be taking the £150,000 "for himself") and that Mr Stern had benchmarked the figure for a CEO from Government ONS figures instead, whereas, in Mr Stern's view, the like reservation did not apply to the figures for the engineers. While it is possible that this is the explanation for Mr Levine's inflated figure in respect of a CEO, there is no clear evidence (and certainly no direct evidence from Mr Levine) that it is. At the end of the day, when challenged about whether Mr Levine's figures of £60,000 for each of the engineers could be taken at face value, Mr Stern repeated that he considered that Mr Levine was a reasonable proxy, but added "it is a factual matter".

87. Those conclusions also undermine the reliability of Mr Prescott's evidence. The fact that Mr Prescott's account of the role of Dr Fells is not dependable does not mean that his evidence in other respects should not be accepted; but it does raise doubts about it.

88. Even if a reasonable buyer would have taken the view that a further hardware engineer would be needed in addition to the CEO, the two JMDs, and the other employees who could assist with hardware issues, the question therefore remains as to what cost the buyer would have attributed to that hardware engineer. Although the figure of £60,000 p.a. was used by both sides in the negotiations with Mr Levine in 2016, and indeed by Mr Prescott in calculating what to offer Dr Potamianos in 2015, it is clear on the evidence that it would be possible to employ such an engineer for less than that, and indeed (perhaps depending on seniority) that one could be employed for £45,000 p.a..

89. These factors militate in favour of accepting Dr Potamianos' case that, in accordance with the evidence of Ms Hindson, and as submitted by Mr Pavlovich, the sum of £220,000 (or more) used by Mr Stern in respect of the costs of a CEO and two engineers is too high. So also does the consideration that a CEO and two JMDs seems to me a rather top heavy structure to maintain for a relatively small company like SEL.

90. At the same time, I consider that a reasonable buyer would be concerned that Mr Prescott's unique pool of knowledge and experience might be difficult to replace. I also consider that, as stated by Mr Prescott and, in my view, in accordance with the evidence of Dr Potamianos, the somewhat improvisatory and "all hands to the pump" structure of SEL while it was run by persons who were financially invested in the success of the business gave rise to a leanness of operation which might not be easy to replicate with the same number of employees once both of the shareholders in SRL had sold their shares and ceased to be involved in SEL (even taking account of the prospect that a new CEO would enable Dr Gardiner to be more freed up to deal with hardware).

91. I therefore consider that a reasonable buyer would include provision for an additional hardware engineer. In my view, however, the right provision is for a salary of £45,000 p.a. I accept Dr Potamianos' evidence that SEL operated perfectly well without employing people at the top of the salary range, and I consider that a reasonable buyer would take the same view. SEL's Business Plan also seems to me to support that figure.

92. In making that finding, I have taken into account that, on Mr Prescott's evidence, there was an overlap between the need to make provision for an additional hardware engineer and the "significant issues" raised by him at paragraphs 16(i)-16(xvi) of his 5th witness statement. I have in mind, in particular, Mr Prescott's evidence that Dr Gardiner would not be freed up to replace him on the hardware side because Dr Gardiner was extensively engaged (as indeed was Mr Prescott) in an R&D project, which SEL had felt the need to embark upon due to concerns about ownership of IP and copyright.

93. Accordingly, I consider that the cost of staff to replace Mr Prescott and Dr Potamianos which should be inserted into the calculation is neither (a) £37,000 for each of the years 2016, 2017 and 2018, nor (b) £120,000 for 2016, increased to £122,520 for 2017 and further to £126,564 for 2018, as suggested by Ms Hindson and Mr Stern respectively.

94. On the contrary, I consider that it is £37,000 plus £45,000 for each of those three years.

Cost of a salesperson

95. Ms Hindson considered that in circumstances where a new CEO is recruited, one of the Joint Managing Directors of SEL, Mr Keen, would have more time to devote to sales, such that Z would not be required (§5.2.22 of her report), and she "therefore added back to EBITDA [Z's] salary of £50,000" (§5.2.2.3 of her report).

96. Mr Pavlovich suggested that Mr Prescott's acceptance that a new CEO would give Mr Keen more time to devote to sales carried with it an acceptance that Z would no longer be required. However, Mr Prescott did not agree with that: instead, he maintained that Z was required to stop Mr Keen from getting overloaded, and, further, that Z was engaged to develop new sales and new clients while Mr Keen serviced old ones. Mr Pavlovich submitted that a notional buyer would be able to agree a higher price on the basis either of saving the cost of Z or of additional sales that he would generate if he was retained, so that in either case SEL's maintainable earnings would be higher. He further submitted that as both experts accepted the principle that the historic earnings have to be matched to the resources that produced them, it followed that any excess resources would lead to greater earnings.

97. Ms Page submitted as follows: (1) there is no evidence of a willing buyer taking the approach suggested by Ms Hindson; (2) this is based on the assumption that Mr Prescott was working as a part-time CEO when in fact he was working full-time for SRL/SEL at the Valuation Date, as he said in evidence "very intensively"; (3) a willing buyer would wish to prioritise the retention of sales staff, like Z, with knowledge of SEL's customers, prices and sales strategies and relationships with customers; (4) Z's ability to generate sales was already reflected in the base EBITDA, and the hope that Z would generate more sales in the future is only a further reason why a notional buyer would want to retain his services; and (5) a willing buyer would not seek to agree a price based on dispensing with such staff as this would only increase the purchase

price, contrary to their interests, albeit only (according to Appendix 1 to the experts' Joint Statement) for the 2017 and 2018 years.

98. In this instance, I accept the evidence of Mr Prescott as to the respective roles of Mr Keen and Z, and I prefer the submissions of Ms Page. I do not consider that £50,000 should be added back in for the 2017 and 2018 years as Ms Hindson suggests.

Surplus cash

99. The experts agreed that at the Valuation Date SEL had surplus cash of £450,000 (see §5.4.2 of Ms Hindson's report; §3.34 of Mr Stern's report). Mr Prescott accepts that figure, and Ms Page argued that it is correct. Dr Potamianos, however, does not accept it, and Mr Pavlovich argued that the correct figure is £955,000 - £200,000 = £755,000.

100. As the matter was in issue, and because it did not seem to me to be right that Mr Pavlovich should be permitted to cross-examine Dr Potamianos' own expert, I asked Ms Hindson to explain the basis of her view that £450,000 represents the appropriate figure for surplus cash. Ms Hindson did this as follows:

> "What I am trying to do is to arrive at a figure that would appear to be a reasonable amount of cash that the company could do without, could manage without, not to leave it with just the minimum that it needed to operate on a day-to-day basis, but to give it a buffer for a rainy day or some unexpected expense that it might need or some investment. My starting point was to look at the total level of administrative cost that it incurred and to calculate three months' worth. I am not saying that is an agreed methodology or anything like that. It is just a guide to possibly arrive at a reasonable figure. Then I had a look at the amount of cash that was in the company over its history, which of course changed over time, as the company size changed over time. I looked at the proportions and I also looked at some accounts of other companies, other owner-managed businesses in the mechanical engineering sectors, and had a look at what levels of cash they maintained on their balance sheets. My initial conclusions came to a figure higher than the £450,000, but not by that much, and in discussion with Mr Stern, we agreed that the figure of £450,000 fell within the range that we both considered to be reasonable."

101. Ms Hindson also confirmed that it was relevant that SEL was engaged in a research and development project:

> "I think I referred to investment and that is what I meant. If they needed to invest in developing products for the future, then yes, you would not want to reduce your ability to do that by cutting your cash to the bone.

102. For his part, in the course of his evidence Mr Stern said:

> "I think Ms Hindson made the comment about not cutting it to the bone, which I think is a valid point to make. And it comes back to the issue of what is the amount of surplus cash, how much should be retained in the business, in order to cover the eventualities, and one is looking at it from a valuation point of view. And on that basis, we have agreed £450,000."

103. Ms Page argued that this evidence was supported by the following points:

(1) SEL had historically maintained high levels of cash. That supported SEL's high stock levels and lean business model. Indeed, the retention of sufficient cash in SEL was of such importance to both Dr Potamianos and Mr Prescott during the 2008 banking crisis that they deferred their own invoicing to SEL. Dr Potamianos accepted in cross-examination that (a) at the Valuation Date the 2018 management accounts showed that the annual overheads averaged £465,000 per quarter, and (b) as a general proposition, given SEL's research and development requirements it would be reasonable to retain cash for this purpose in addition to the overheads.

(2) Even in 2015, against the backdrop of Mr Prescott trying to find an acceptable figure at which to offer to buy out Dr Potamianos, Mr Prescott calculated that £327,000 in cash would need to be retained within SEL. Mr Prescott explained in evidence he was able to make an offer on this basis "because as I was going to be buying out Aris and I was going to be remaining, I had the flexibility of being a shareholder and not taking any money, plus the money that Aris was taking would end immediately. So, at the time, I viewed that I could quickly recover the cash position after the event. Also, I had to bear in mind that I had to meet Aris's expectations". Accordingly, the figure of £327,000 has to be seen in the context that Mr Prescott's unique position as a CEO-shareholder enabled him to cease his own billing for a while and take a more generous approach to surplus cash than would be available to a notional buyer with employment overheads to cover. Such a buyer would also not be motivated by a desire to resolve the dispute.

(3) In any event, £200k is wholly inadequate. In this regard, Mr Prescott said that he "would feel very uncomfortable if we only had plus or minus - if we only had £200,000 working capital"; and Dr Potamianos had himself said in a note dated 14 March 2016 that cash reserves of £100,000-£150,000 would be "totally inadequate to cope with any significant variation on the projected targets".

(4) The suggestion that an overdraft is a substitute for adequate working capital is unrealistic: (i) An overdraft is repayable on demand (as Mr Prescott explained "You would put the business at risk if you could not satisfy the overdraft") and (ii) banks charge interest and annual fees (again, Mr Prescott stated that an overdraft and other funding options all "cost more": "… ever since the banking crisis you cannot get any interest on deposit. If you go and get an overdraft, you will get charged 2% or 3% over base rate; so, it would not make any sense …".

(5) Surplus Cash has been calculated by reference to the actual bank balances as at the Valuation Date, which showed cash of £955,168 (see §3.33 of Mr Stern's report). Accordingly, there is nothing in Dr Potamianos' purported concern (see §14 of his 4th witness statement) as to an alleged discrepancy between the cash figure in SEL's y/e 2018 accounts of £1,111,213 compared with a cash figure of

£1,063,341 as at 31 October 2018 in the management accounts. The calculation was not done by reference to these, the actual balances at the Valuation Date being a more accurate basis for the assessment. In any event, what is relevant to the valuation is the surplus cash figure, which the experts agree is £450,000.

104. Mr Pavlovich began by pointing out that Dr Potamianos is not bound by the experts' agreement (see CPR 35.12(5)) and that it is therefore open to him to submit that their figure is too low, particularly when, as both Ms Hindson and Mr Stern accepted, there is no definitive methodology for identifying surplus cash.

105. Dealing first with the amount of the cash balance on the Valuation Date, Mr Pavlovich accepted that the sum of the bank balances (i.e. £955,168.97) should be the most accurate figure. He submitted, however, that this balance was not built up to manage cash flow; and that there were disagreements about how it should be used. For example, in 2016, Dr Potamianos wanted a substantial dividend be paid but Mr Prescott disagreed. Dr Potamianos said: "…it was cash accumulated over 25 years or whatever it was. … It was nothing to do with keeping the balance high for a catastrophe".

106. Moving on to how much of the cash balance was required for the business, Mr Pavlovich accepted that this is hard to judge. However, Mr Prescott's assessment that the cash balance fluctuated by "the order of +/- £100K" is borne out by the monthly cash balances shown in the management accounts, in a table produced by Mr Pavlovich relating to the financial years 2016, 2017 and 2018, leaving aside the fact that litigation costs depleted the balance in the last 12 months or so of the dates shown in that table. Mr Pavlovich thus submitted that £200,000 should be set aside to manage cash flow.

107. In the alternative, Mr Pavlovich submitted that, at the very most, the amount required would be what Mr Prescott assumed in his own calculation of SEL's value as part of his offer for Dr Potamianos' shares in 2015, namely £327,000 (i.e. £1,077k cash less £750k which was described as "realisable"). Mr Pavlovich submitted that Mr Prescott had struggled in cross-examination to explain why this situation is not comparable to the present situation, even though the experts have performed a similar calculation.

108. In fact, when asked about this topic, Mr Prescott's answers included the evidence relied upon by Ms Page, and when it was put him (at a later stage in his cross-examination) that £327,000 must be the most that would be needed to run the business he replied "Well, no. Bear in mind I expected quickly to be able to reinforce that". I see no reason to reject that evidence, and nor do I see that it contradicts the experts' agreed position.

109. Mr Pavlovich submitted that the experts' stance was to the effect that: (a) SEL needed a cash buffer "for a rainy day"; (b) the amount of £505,000 (i.e. £955,000 - £450,000 = £505,000) is quantified in a broad-brush way as three months' administrative expenses (although Mr Pavlovich argued that this does not tally with the figures in the FY18 accounts); and (c) there are some adjustments for excess salaries (which presumably refers to Sameaim and BDL), and no adjustments for legal expenses (which are treated

as a "rainy day" cost). He submitted, however, that the evidence shows that no such buffer was needed in a long period of trading, as Dr Potamianos confirmed in evidence. Moreover, Dr Potamianos explained that even in the financial crisis, SEL took out an invoice discounting facility but never needed it. Mr Pavlovich submitted that the parties' own assessments should carry more weight than the experts' approach, which should be rejected, particularly when (i) as Mr Stern accepted, SEL carries unusually high levels of stock that can generate cash, and (ii) generally, there are few companies that are comparable to SEL, and thus which the experts could look to as comparators.

110. Although these points were attractively put, I am not persuaded that they provide any proper basis upon which to reject the clear, cogent and considered views of not only Mr Prescott's expert but also Dr Potamianos' expert. I readily accept that there is no precise methodology which is applicable, and no definitive answer, and that the experts could have come to a different view, as indeed Ms Hindson says that she initially did (although "not by that much"). In my view, however, the points made by Mr Pavlovich, whether considered separately or cumulatively, do not warrant the conclusion that the figure of £200,000 or the figure of £327,000 are right whereas that of c£500,000 is wrong. This is particularly so, in my judgment, when one takes account of two factors, The first is that the business of SEL had consistently been run with a far higher cash balance than either of the figures contended for by Mr Pavlovich. That suggests that the parties, who were running a business which they knew very well in what they considered to be an appropriate manner, considered that a higher cash balance was needed. According to the experts, their views were over-cautious, so as to justify the conclusion that a much lesser balance of c£500,000 is all that was required. However, it is quite another matter to go further and say that their views were over-cautious to a significantly greater extent than the experts have agreed. The second matter to which I attach importance is that, as indicated above, I accept the evidence of Mr Prescott with regard to the figure of £327,000 which cropped up in the context of his 2015 proposal.

Marketing costs

111. In §5.1.2(c) of her report, Ms Hindson states:

> "Advertising and marketing costs – we agree that excess marketing costs of £78,635 relating to payments to Futuretech in FY17 should be added back to EBITDA. The figure of £78,635 represents the value of payments to Futuretech of £128,635 less annual costs of £50,000."

112. In §3.7(iii) of his report, Mr Stern states:

> "In particular, the experts agree that the following adjustments are to be applied:
> …
> iii. Adding back excess advertising costs incurred in the year ending 31 October 2017 in the amount of £78,635 …"

113. It became clear in cross-examination that the experts' approach was not based on what precise figures for the surrounding years of 2016 and 2018 were "correct". Rather, in the words of Ms Hindson, it was, like the valuation exercise overall, a "slightly broad-brush approach" bearing in mind that, when assessing what level of profits the buyer is going to get in the future "He knows it is not going to be absolutely the same to the pound as in the previous year, but he wants to be in the right ball park". Ms Hindson also agreed that if the figures which should properly be taken for 2016 and 2018 were for some reason higher than £50,000, then the adjustment to be made for the 2017 year would be lower (e.g. if £60,000 was "right", only £68,635 should be added back).

114. Mr Pavlovich submitted that in order to apply the experts' approach consistently, the following adjustments should be made:

(1) In 2016, £10,833 was paid to Futurestech while another marketing business, GCE Marketing, was already engaged. This sum should therefore be added back because of the duplication (following the experts' approach of adding back the "excess" cost paid to Futurestech). Alternatively, the £8,335 paid to GCE Marketing for the handover was not an ongoing cost and should be added back. Mr Pavlovich relied on Mr Stern's acceptance in cross-examination when asked about the £8,335 handover payment that "if one is doing a forensic exercise of that detail, I think that it is reasonable to say that if there is a cost there that is not a recurring cost, then it should be adjusted for" and that the same logic applies as for another termination payment of £46,166 in 2016 in respect of SEL's accountants, which the experts decided to strip out. It should be noted, however, that Mr Stern qualified his answer here by saying "[w]hether we would have adjusted for it in the context of materiality or proportionality, I cannot say".

(2) With regard to the suggestion that was put to Dr Potamianos that the total marketing costs in 2016 were £50,406, which is about the same as the experts' assumed reasonable marketing costs, Mr Pavlovich submitted that this ignores the sums owed to GCE before May 2016, which are recorded as "Copywriting with Gary" (a reference to Gary Elliott of GCE). Including those sums, the total is £64,303: adding £13,897 of costs for "Copywriting with Gary" to £50,406 gives £64,303. Moreover, the experts' opinion is based on the incorrect £50,406 figure.

(3) In 2018, £56,774 (excluding VAT) was earned by Futurestech on an accruals basis. Following the experts' reasoning, £6,774 of this was an excess cost and should be added back.

(4) Dr Potamianos' overarching submission on marketing costs is simple: (a) the experts took the view that Futurestech's higher level of charging was not an ongoing cost; (b) that view should be applied consistently, not only to 2017 but also to the whole period in which Futurestech charged £130,000 p.a., which was September 2016 to December 2017; and (c) accordingly, there is no need to look

at other individual items of marketing spend (except, as an alternative, the £8,335 handover fee paid to GCE Marketing for the handover to Futurestech in August and September 2016).

115. Ms Page submitted that Mr Pavlovich's arguments were fundamentally misconceived:

(1) The approach of the experts was to assess whether there was an excess marketing cost relative to the surrounding years. As Ms Hindson explained in relation to 2017 "my view was that that looked out of kilter compared with the other years".

(2) The arguments for Dr Potamianos completely overlook that the effect of contending for higher marketing figures for 2016 and 2018 is that the figure against which the 2017 costs would be assessed becomes higher, such that the difference with 2017 would become less. This was confirmed by Ms Hindson.

(3) As Ms Hindson also confirmed, a broad brush approach is perfectly proper. Mr Stern concurred: "One is taking invariably a reasonable broad brush approach to identify what is a level of maintainable EBITDA. In 2017, we identified that the charge was out of kilter and we have simply adjusted for that particular year."

(4) It is therefore neither necessary nor appropriate to embark on a detailed forensic exercise. Accordingly, the Court can be satisfied by the experts' agreed approach and should not look behind their agreed adjustment in this respect.

116. Beyond that, Ms Page submitted with regard to the contentions (i) that there were excess costs for 2016 of £10,833 in respect of a Futurestech invoice dated 30 September 2016 which was paid to Futurestech while another marketing business (i.e. GCE) was engaged; alternatively (ii) that £8,335 was paid to GCE in respect of a handover to Futurestech:

(1) Both these payments fell within the invoices for the 2016 financial year.

(2) As a matter of fact, the £10,833 was not a duplicated cost. The Futurestech invoice was in respect of the cost of a German stand provider at a German trade show. As Mr Prescott explained in evidence (a) SEL "used to do a trade show in SPS Nuremberg every year where you had to build a stand, and Mr Levine managed to negotiate a lower price for us with a contact he knew in Germany to build the stand"; (b) GCE simply did not undertake this work: "GCE never involved themselves in the trade show things. GCE used to do Google ads and look after the website. Here, Mr Levine is getting heavily involved in organising and delivering the booth SPS Nuremberg, which is an international trade show we go to every year. So it is comparing apples with pears"; and (c) "Gary Elliott was [not] involved in the SPS show … he was more concerned with doing Google ads and Facebook and Twitter, that sort of thing, media advertising".

(3) As to the GCE handover charge, Mr Prescott confirmed: "It is a temporary thing, and it is justified to make the handover smooth, so the marketing effort is not interrupted. So I viewed that as a valid business expense".

(4) The argument that there should be included within the total invoices for "Copywriting with Gary" was run for the first time in re-examination. When put to Mr Prescott, he explained "when we brought in the business plan in 2016, we made a conscious effort to step up the amount of advertising, because we wanted to try and get more orders in. And if you actually look at the years that followed from the introduction of the business plan, the turnover went up. So, I would maintain that the business plan was working, it was bringing in more sales. So, the increase in the cost of the marketing was justified, and the employment of Mr Levine's company was just a move to consolidate all of those marketing actions under one umbrella. So I consider that to be a sensible business decision".

(5) While it is accepted that the costs of Futurestech, GCE and "Copywriting with Gary" in 2016 is £64,303, this does not assist Dr Potamianos, as (a) it fails to take into account that if the notional starting point for 2016 is higher, then a corresponding adjustment ought to be made to reduce the "excess" amount for 2017, and (b) if it is right that either the £10,833 or £8,335 should come off, the figure reduces to £53,470 or £55,968 respectively which is broadly in line with the notional figure of £50,000 which the experts have adopted in any event.

(6) The experts agree that that no adjustment should be made for 2016, and there is no justification for disturbing their conclusion.

117. As to the 2018 financial year, Ms Page pointed out that Dr Potamianos' position in his opening Skeleton Argument that payments of £19,353 represented excess costs which should be added back in was flawed. Moving on to the position which Mr Pavlovich sought to rely upon in his closing submissions, namely that the total Futurestech and GCE invoices considered by the experts for 2018 were £56,774 and that £6,774 of this sum should be treated as an "excess" amount for 2018, Ms Page submitted:

(1) The alternative view is that this figure contains no "excess" element, which implies a corresponding reduction to the figure for 2017 (i.e. to £71,861).

(2) Such tweaking is inappropriate and unnecessary in light of the experts' agreed approach. The experts agree that adjustment should be made for the 2017 financial year, and there is no justification for disturbing their conclusion.

118. I prefer the arguments of Ms Page on these issues. I accept that I am not tied by the joint views of the experts, and that it is open to me to disregard their views and apply my own view of what is fair and sensible in furtherance of the overall objective of

determining what is fair, just and equitable. In this instance, however, not only have the experts reached a joint view about marketing costs. Also, first, they have each adhered to that view in spite of having been afforded the opportunity to reconsider it in light of each of the points relied upon by Dr Potamianos; and, second, they have explained why they consider that their original approach is right and why the kind of adjustments which Mr Pavlovich submits I ought to make are not, in their view, appropriate. I am not persuaded that there is any justification for disturbing their persisted-in conclusions.

119. There is an issue as to whether, as a matter of fact, the marketing costs for 2016 should be reduced by either £10,533 or £8,335, but even if, in principle, there is a factual foundation for stating that those costs should be reduced by one or other of those sums, both experts declined to accept that it would be appropriate to adjust their agreed figure for 2017 accordingly. If, contrary to those joint views, a reduction for 2016 was appropriate, it seems to me that it ought to be as follows: £64,303 - £8,335 = £55,968 (i.e. I would prefer Dr Potamianos' alternative case rather than his primary case). As to 2018, it does not follow from the fact that £56,774 was earned by Futurestech that £6,774 of this was an excess cost and should be added back. On the contrary, if the experts' slightly broad brush approach is to be rejected in favour of an approach which is more precisely tied to the actual figures for expenditure, it is equally if not more reasonable to conclude that the deduction for the 2017 expenditure should be based on this figure, as opposed to the amount by which the 2017 expenditure exceeded £50,000.

120. In my judgment, the upshot of the foregoing is that, if Dr Potamianos' invitation for me to revisit the experts' approach to the underlying facts were to be accepted, the "right" figure for 2017 would be between £55,968 and £56,774 (e.g. £56,400). I have not calculated the consequences for the valuation of Dr Potamianos' 40% shareholding in SRL of substituting for the figure used by the experts of £78,635 (i.e. £128,635 - £50,000 = £78,635) the figure of £72,235 (i.e. £128,635 - £56,400 = £72,235), but it would reduce it by a relatively small amount. Even if, contrary to all the foregoing, his points under this head were right, I question whether they justified the costs of arguing them. This is an instance where Ms Page's criticisms of his approach seem justified.

The effect on value of (a) the cost of remedial work to the Source Code and (b) further issues

121. The argument that the value of SEL should be adjusted to take account of the cost of remedial work to the source code is based on the contents of the letter of claim from SEL's solicitors, MB, dated 8 January 2019 to the solicitors for BDL and Dr Potamianos, BM, sent pursuant to the Professional Negligence Pre-Action Protocol. That letter is 11 pages long. It was answered by a three page letter from BM dated 29 April 2019. That in turn prompted a two page reply from MB dated 12 December 2019.

122. The issues raised in this correspondence are complex. The letter of claim of 8 January 2019 contains detailed sections entitled "Background" and "Your clients' duties" before moving on to a section entitled "The issues with the source code and documents

delivered up by your clients". This section then sets out a very long list of contentions. I do not repeat them in this judgment on the grounds that they comprise or may comprise confidential matters principally within the scope of an Order made pursuant to CPR 31.22 during the course of these proceedings, which Ms Page asked to be redacted from the publicly available version of this judgment, as to which Mr Pavlovich was neutral.

123. Unsurprisingly in light of the nature and complexity of these allegations, two pages later the MB letter before claim goes on to say that "expert evidence will be required".

124. In the intervening pages, the letter sets a number of matters (as to much of which the final sentence of paragraph 122 above also applies) under the following headings:

> "**Your clients' failures**
> …
>
> **Breach of contract, negligence, director's duty**
> As a result of the issues detailed above your clients have breached:-
> 1. Clause 4.1 of the 1997 Contract because they have failed to use their best endeavours to develop our client's business to its full potential in the most economic efficient and profitable way and in accordance with best business practice;
> 2. Clause 5 of the 2000 Contract because they have failed to undertake the Services in a professional manner at all times and have failed to undertake the Services in the capacity of a specialist;
> 3. Clause 7 of the 2000 Contract because they have failed to devote such time, attention, skill and ability as the Contract Works required;
> 4. Clause 2.1 of the 2015 Contract because they failed to provide Services with all proper skill and care; and
> 5. Their duties of care to our client because they failed to exercise the level of skill and care to be expected of a reasonably competent software programmer professing expertise in the field of digital motor controllers and in particular the software for such controllers.
> In addition
> 6. Dr Potamianos has acted in breach of his obligations as a director under the provisions of the Companies Act which we have identified above. He should have taken steps to correct the deficiencies and to warn our client of their existence.
>
> **The losses suffered by our client as a result of your clients' breaches**
> …
>
> **An estimate of our client's claim**
> Based on its review to date and subject to expert evidence in due course our client estimates that it will cost in the region of £468,000.00 …
>
> This estimate does not include making any improvements to the software …
>
> The above estimates are for coding only …"

125. Ms Page submitted that the value of SEL should be adjusted not only to take account of these matters but also to take account of the further "significant issues" raised by Mr Prescott and listed at paragraphs 16(i)-16(xvi) of his 5th witness statement dated 21 April 2020, which reads as follows:

"I believe that a due diligence process of SEL in September 2018 would in fact have revealed some very significant issues, as follows:-

i) The PL/X and JL/X source code would only compile on an obsolete compiler.

ii) There had been no development of the flagship product and it was losing ground to the competition.

iii) The source code used in production had known bugs which would cause damaging problems in certain applications. SEL faced the risk of legal action from end users whose businesses had been affected by the bugs which SEL was unable to respond to.

iv) SEL suffered reputational damage from selling faulty product.

v) We were waiting for delivery up of the source code and all the documentation required to be able to use it and had no clarity about what would be delivered up.

vi) The style of the code prevents it from being ported to a different microprocessor. This had already caused 7 years of delay and cost moving from the Intel to the Microchip processor. This situation could easily re-occur and a buyer would have the same problem. The only solution is a re-write from scratch in high level language - an enormous task.

vii) [An issue concerning alleged source code provenance ("the provenance issue")].

viii) SEL did not own the configuration tool used with the flagship product and needed to create its own.

ix) The CE approvals on the flagship product were about to expire and the Electro Magnetic Compatibility approvals process needed repeating. This is an expensive and time-consuming task.

x) SEL had been historically operating with a very lean workforce, which has flattered the profits.

xi) The profile of SEL's workface was aged and the older people were the ones with the historical experience in DC Drives. A new buyer was going to have to manage the retirement of this group and find replacements.

xii) The machine used to test the PL/X flagship product in production was only supported by one person in his late 60s.The software that runs it is written in Pascal and the hardware is based around a 20-year old PC running on windows 98. This machine needs completely upgrading but it cannot be taken out of production. The only solution is to buy or make a completely new machine, which is a large cost liability with uncertain timescales.

xiii) The product manuals had been neglected and all needed modernising.

xiv) The business system was over 20 years old and consisted of different packages which didn't all communicate with each other. It was designed by David Van Der Wee and when he left there was no one with that skillset in SEL. Will

Pearson was given the task of sourcing a new system. The switchover was scheduled to be on 1 November 2018. Switching to a new business system is notorious for creating unexpected business casualties.

xv) In an effort to mitigate the potential of not owning the source code SEL embarked on a 5 year R&D project to design a new product range. This is a significant liability for a potential purchaser.

xvi) We also had the prospect of a damages case but as of 28 September 2018 had not assessed the level of damages, or the prospect of recovery. We knew that it would tie up cash to fund legal fees and would take a significant amount of management time."

126. In a letter from MB dated 12 August 2020, the following was said (again, much of the detail has been omitted from this public judgment for the reasons given above):

> "Our client will contend at trial that the valuation of your client's shares in [SRL] should be adjusted by £218,400.00 … for the following reasons …
>
> 7. Our client estimates that it will cost in the region of £468,000.00 …
>
> 8. This estimate does not include …
> It is assumed that this will take an engineer one man-year at a cost of £65,000.00. It is assumed that there will be overheads of 20% on that figure, totalling £13,000.00."

127. The figure of £218,400 contained in that letter appears to be calculated as follows: £390,000 + £78,000 + £65,000 + £13,000 = £546,000; £546,000 x 40% = £218,400. On one view, that letter is only addressing the alleged costs … resulting in the claimed figure of £468,000 contained in MB's letter of claim dated 8 January 2019 plus the alleged costs … which add the claimed figure of £78,000 which is referred to in paragraph 8 of the letter. (Some details omitted for the reasons given above). On another view, that letter is also addressing under the rubric of "the quality of the source code" at least some of the "significant issues" which are referred to in Mr Prescott's 5th witness statement, because (for example) that letter refers to the issue identified at paragraph 16(vii) of that witness statement. On any view, it does not appear to be addressing all of those "significant issues", although Ms Page's written closing submissions at [117] seem to subsume all of those issues into the figure of £218,400:

> "[Mr Prescott] contends that an adjustment should be made to the price of the shares of £218,400 or such other amount as the court sees fit to reflect a commercial negotiation. The risk of a windfall to [Mr Prescott] in the event SEL succeeded with a claim in respect of the quality of the source code can be avoided by an order for payment of a sum representing deferred consideration of 40% of the net recoveries of the claim."

128. Ms Page's written closing submissions on these issues ran to over 17 pages. They included, in summary, the following points:

(1) The issues are divorced from the source code damages claim: that claim did not include any element in respect of the quality of the code and/or documentation (it was for damages caused by the failure of BDL/Dr Potamianos to provide the source code/documentation in breach of contract and BDL's failure to perform Schedule 200815).

(2) It is apparent from §§4.23-4.24 of Mr Stern's report that he considers that as the condition of the source code and availability of any supporting documents was unknown, it is highly likely that a willing buyer would have been concerned about the potential costs associated with understanding and making fit for purpose the IP; however, the problem with undertaking a valuation of the shares is the "inability to apply any commercial reality to the negotiated price and potential structure of any sale transaction".

(3) The Court, in exercising its wide discretion under section 996 of the Companies Act 2006 is not fettered by any such inability. Rather it should apply the principle of reality to the calculated valuation undertaken by the experts. In reality, a willing seller and a willing buyer would have started with a calculated valuation but at the end of the day there would have been a commercial negotiation to take account of matters arising from the due diligence (most potently the quality of the source code) and, for the reasons given by Mr Prescott in his evidence, it is submitted that a willing buyer would have negotiated downwards.

(4) Ms Hindson accepted that there would have been a commercial negotiation in relation to the quality of the source code; and that it is realistic to assume that the willing sellers would have taken all necessary steps to ensure that the source code and supporting documentation was available to the buyer at the Valuation Date and that if the source code was an important feature of SEL's trading activities, a willing purchaser would have taken all necessary steps to ascertain the condition of the source code and whether or not it was fit for purpose. She also said:

> "Yes, there will always be a commercial negotiation, but you cannot overlook the fact that the profits generated in 2016, 2017 and 2018 were generated with the source code being in whatever condition it was in those years. If it had been in a different condition, possibly, the profits would have been different. So, it is taken into account to some extent because those profits are the result of operating with the source code in the condition that it was in those years."

(5) According to the Joint Statement of the experts:

> "The impact on the agreed price of any necessary expenditure on the maintenance or development of the Source Code would have been a matter for negotiation between the parties to the sale and purchase transaction".

(6) As to the notion that defects will be reflected in the historic profits generated in the 2016-2018 years: this is not certain; and, in any event, there will "always" be

a commercial negotiation. In the present case there were defects and problems of a character which were immaterial to SEL's ability to generate historic EBITDA but presented a risk to SEL in the future which would be recognised by a new owner, in particular: (a) the provenance issue; (b) the use of an obsolete compiler; (c) bugs; (d) the code was not portable to a different microprocessor; (e) the aged workforce; (f) SEL did not own the configuration tool used with the PL/X product; (g) CE approvals were about to expire; (h) product manuals were out of date; and (i) business systems required investment.

(7) As at the Valuation Date, the following problems were known, or would have been known to a willing buyer: (a) the provenance issue; (b) the absence of any software specifications and test results; (c) that there were functional/behavioural differences between units with v.6.13 and the code that SEL found in mid-2016; (d) that there were known bugs in v.6.13 (as to which, Ms Page made extensive references to the documents, the evidence of Mr Prescott, and various concessions made by Dr Potamianos in cross-examination), such that SEL concluded that the quality of the source code found in 2016 and v.6.13 delivered up in October 2018 was poor and the style of the code is not easily maintainable, and sent the above letter of claim on 8 January 2019.

(8) A willing buyer who had taken steps to ascertain the quality and fitness for purpose of the source code would have had similar concerns and/or SEL's concerns would have become known to a willing buyer during the due diligence exercise, in particular: (a) the lack of supporting documents; (b) issues relating to readability; (c) top level software design/structure which negatively impacted on maintainability; and (d) programming style that negatively impacted on maintainability.

(9) Mr Prescott considered that "the fundamental issues and uncertainty surrounding the source code as of 28 September 2018 rendered SEL unsellable to anybody who wished to continue to develop the PL/X and JL/X" and they would have to have been willing to tolerate the following "major headaches": (a) removing bugs in v.6.13 with no documentation; (b) re-writing the source code to make it readily maintainable and portable; (c) suffering continuing losses from having to ship v.6.13; (d) risking further deterioration in SEL's reputation whilst waiting to have bug free code; and (e) dealing with and funding the ongoing litigation and quantum claim.

(10) Given the prevalence of the known issues with the software with SEL's flagship product, the critical importance of its dependability and the problems SEL had experienced in resolving its issues, it is entirely reasonable to conclude that a willing buyer would estimate that remedial costs would be necessary and seek to negotiate the calculated value down on that basis.

(11) Further, as set out in paragraphs 16(i)-16(xvi) of Mr Prescott's 5th witness statement dated 21 April 2020, due diligence would not only have revealed the above problems with the source code at the Valuation Date but also many further significant issues in addition to those concerning the source code. There is no basis for not accepting Mr Prescott's evidence on these issues.

(12) The experts' calculated values should in any event be subjected to the "principle of reality".

(13) In sum, there is overwhelming evidence of SEL's difficulties with the source code and business problems at the Valuation Date. It is a matter of fundamental importance that the price at which the shares are ordered to be purchased is fair and that it reflects reality. The Court should not ignore the reality of the problems with the quality of the source code and the business.

(14) The conclusion that an adjustment should be made is compelled by: (a) the expert evidence – which supports the reality that a commercial negotiation would have taken place both in relation to the source code and other business issues; (b) the fact that SEL had problems (including with the source code) of a character which did not manifest themselves in its historic EBITDA because they presented future risks which had not crystallised at the Valuation Date; (c) the admissions made by Dr Potamianos in his oral evidence as to the facts and reality of a commercial negotiation; (d) the principle of reality: it would be unreal to conclude that a notional buyer would simply have paid a price reflecting the calculated value without a commercial negotiation (and this is contrary to the expert evidence); (e) the requirement of fairness: Mr Prescott should not be forced to pay a price for the shares which, in reality, they never had; it would be quite unfair for Dr Potamianos to profit at his expense in this way; to ignore the reality would, in effect, result in Mr Prescott being required to pay a price greater than the market value; this would not be fair and equitable in all the circumstances and would go beyond what is necessary to cure the unfair prejudice established in this case.

129. Mr Pavlovich submitted as follows.

130. Mr Prescott was unable to make good his claim that the source code delivered up by BDL in the Source Code Claim is of poor quality in the absence of (a) extensive copies of the source code and other technical documents to demonstrate the alleged problems; (b) live evidence from Dr Gardiner and Dr Fells, and (c) appropriate expert evidence. In the result, Mr Prescott's evidence consisted of lengthy, largely self-serving documents raising a number of alleged areas for improvement in the code. However, as any user of computer software knows, there is always room for improvement. Such work, even fixing "bugs", is part of the normal development process. Accordingly, the only credible evidence on the quality of the source code comes from Dr Potamianos, as the only witness qualified to comment. Mr Prescott accepted in cross-examination that firmware and programming are not part of his area of expertise.

131. Dr Potamianos' case on this question is set out in the letter from BM dated 12 August 2020. First, he contends that the valuation should not be adjusted, because he would have provided any documentation or explanation of the source code that was required in a sale (and of course it would be in his interests to facilitate a sale). Second, and in any event, the quality of the source code was not poor, and, as found in the Source Code Quantum Judgment, the code available to SEL was sufficient for its business. Alternatively, any work that is required on the source code is already reflected in Dr Fells' fees and no further adjustment is required. Dr Fells has been working for SEL (via Sameaim) since 3 February 2016 and is undertaking the development work that SEL considers necessary (see the Source Code Quantum Judgment at [158]ff, which contradicts Mr Prescott's evidence to the effect that Dr Fells was working solely on a "recovery project").

132. As to Mr Prescott's case concerning costs which amount in total to £546,000, Dr Potamianos's evidence that these figures are "not in touch with any reality" should be accepted. This is a prime example of Mr Prescott exaggerating his complaint about the source code, as he did in the Source Code Quantum trial. Indeed, his complaint has already been dealt with there, as illustrated by his extensive reliance on the Source Code Quantum claim witness statements and by the fact that about £2m was claimed there for delays in improving the PL/X firmware (see [219]ff in the Source Code Quantum Judgment). Consequently, there is nothing in any of the specific points raised by Mr Prescott; and there is no reason for the price to be "negotiated downwards" by the notional buyer as he suggests. Indeed, the "principle of reality" relied on by Ms Page is a reason for the Court to consider the substance of these points rather than speculating about a hypothetical negotiation.

133. Further to the above, Mr Pavlovich submitted as follows with regard to a number of the "significant issues" identified by Mr Prescott:

    (1) "The provenance issue". Mr Prescott's case on this point remains unclear … It is not obvious why this should cause a problem … I should accept that Dr Potamianos created new source code when he joined SEL, albeit influenced by the previous code. In this context, the threshold to create a new copyright work is not high. (Some details redacted for the reasons given in paragraph 122 above).

    (2) "Lack of software requirements specifications and other documents". This point was not ultimately pursued in the Source Code claim quantum trial, in which SEL accepted that nothing relevant was created after 2007: see [34] of the Source Code Quantum Judgment. In any event, the source code contains comments that describe how it works. Dr Potamianos explained in cross-examination that the "missing" documents would only be appropriate "in a very structured multi-team environment", and would make little difference in a sale; what mattered was that there should be continuation and that he and Mr Prescott together would provide whatever explanations and support were required. In practice, Dr Fells was developing the firmware at the Valuation Date.

(3) "Functional differences between v6.13 of the source code and the code that SEL found in 2016". It remains unclear why these alleged differences cause problems for SEL. As appears from the Source Code Quantum Judgment, SEL decided not to use v6.13 for development. In any event, there are no material differences between v6.13 and v6.11 (and only about 130 lines of code are different). Again, Mr Prescott has been unable to develop the point for want of appropriate evidence: asked about v6.13, he said that there were seven crucial parameters which were different but when it was put to him that "… you are not able to give evidence to the court about the significance of those parameters, are you?", he replied "Not in detail, no. I just know that they, that is the problem". The evidence shows that Dr Fells considered he had fixed the "Driveweb writes bug" before the Valuation Date, and Dr Potamianos' evidence is that this and the RD5 diagnostic issue were minor. The fuse-blowing bug is irrelevant because it only existed in v6.12, which SEL did not use either for sales (SEL used v6.13) or for development (SEL used v6.11).

(4) "Bugs in v6.13". This point was addressed in the source code quantum trial, in which it emerged that Dr Gardiner considered that v6.13 is "Stable with only minor bugs". It was found that there was no trouble in coping with any bugs that exist (see [170]-[171] and [175] of the Source Code Quantum Judgment); and, further, that SEL preferred to rely on Dr Fells' work rather than on developing v6.13 (see *ibid* [175] and [180]-[181]). Yet again, Mr Prescott lacks the evidence to develop this point. Instead, at paragraphs 9.aa and 67.e.x-xii of his skeleton argument he relies on bugs reported in Dr Fells' development versions (v6.11.01, v6.11.02 and v6.14 onwards) or resulting from using Dr Fells' new compiler. As HHJ Hacon found, Dr Fells did make errors that a 'notional engineer' would not have made: see [234] of the Source Code Quantum Judgment. If necessary, it can be assumed that the notional buyer would have replaced Dr Fells with an engineer who did not make such mistakes. As for the "standby field" bug in v6.13, Dr Potamianos' evidence was that there was an easy workaround. As for the "alter password" bug, Dr Potamianos explained that no customer had ever noticed it, so there was no urgency in fixing it. As for the alleged problems with customers X and Y, they are irrelevant: they arose after the Valuation Date, had nothing to do with the standby field bug, and in fact related to other issues, possibly including a product supplied to Y by a third party.

(5) "Obsolete compiler/portability issues". These points are irrelevant. SEL is not using v6.13 for development and therefore does not need to have the code in its preferred form. Further: (i) There is no evidence that the code requires adaptation for a new platform in the foreseeable future. In fact, Dr Potamianos considers it extremely unlikely that the entire Microchip platform will become obsolescent. Mr Prescott accepted in cross-examination that even now there is no indication this will happen (although it is fair to say that he also pointed out "… but it is only two years"). Mr Prescott's suggestion that the previous sale of SEL

foundered because of the obsolescence of the Intel platform does not assist him, as that was a known fact unlike the putative obsolescence of the Microchip platform. In any event, there were clearly multiple reasons for the lack of a sale, the obvious one being price. (ii) In accordance with the evidence of Dr Potamianos, the required compiler was easy to locate on SEL's server, and was specifically adapted for SEL's PL/X product. As found by HHJ Hacon, Dr Gardiner had no convincing answer to this point; and, in any event, SEL had decided in June 2016 to rewrite the code for a different compiler, which made the old compiler irrelevant (see the Source Code Quantum Judgment at [163(5)] and [167]). Reliance was placed on the following passage in the cross-examination of Mr Prescott:

> "Q. So as at the valuation date, Dr Fells was already engaged in working on the new compiler and the old compiler was irrelevant, was it not?
>
> A. Yes. By the time we received the code, Dr Fells had invested a lot of time in bringing 6.11 up to something that was useful so we decided to carry on with that rather than start afresh with 6.13. So, Dr Fells examined 6.13, found the changes, the differences in these parameters, and he is now trying to accommodate those in the work he has already done. Again, that seemed like the most sensible way of proceeding at the time.
>
> Q. Therefore, the old compiler was irrelevant on the valuation date, was it not?
>
> A. Yes, but the fact was that 6.13 would not compile on the new compiler."

(6) "Poor quality code that is hard to maintain". This point, which is elaborated in SEL's letter of claim dated 8 January 2019, raises a host of tiny issues such as the naming of variables in the source code. These issues have no substance and have been addressed in BDL's response dated 29 April 2019. In any event, the point is irrelevant in light of SEL's decision to rely on Dr Fells' work instead of the source code delivered up by BDL. The issues were ventilated in the source code claim to the extent that SEL considered appropriate and Dr Potamianos dealt with them there. For example, the complaint about the SPI2 module operating in a "forbidden mode" was addressed in Dr Potamianos' evidence, and he observed that the firmware would not have functioned effectively for years if SEL's complaint had any validity. Dr Potamianos addressed the technical detail in cross-examination in the source code claim. Further, Mr Prescott lacks the evidence needed to make such criticisms. This lack of evidence was clear in cross-examination, for example regarding comments in the code, readability, and programming style. Further, there is no immediate maintenance requirement. HHJ Hacon found that v6.13 already has the required features to satisfy 90% of general applications (see the Source Code Quantum Judgment at [239]). Dr Potamianos explained that the DC drives market is mature in terms of product

development, with most drives sold replacing drives in existing systems, and with new custom won by the small size of SEL's drives and ready availability of stock (rather than new product features).

134. Paragraph 63 of SEL's Particulars of Claim in the Source Code Claim pleads: "By letter dated 24 October 2016, BDL's solicitors informed the claimant's solicitors that software acceptance specifications and test results did not exist. Pending provision of such Source Code and Documents as are in the possession or control of BDL or Dr Potamianos, the claimant is not able to say whether the work undertaken by BDL was conducted (a) in accordance with best business practice as required by clause 4.1 of the 1997 Contract (b) in a professional manner as required by clause 5 of the 2000 Contract or (c) with all proper skill and care as required by clause 2.1 of the 2015 Contract. However the absence of such materials indicates that it was not. The claimant reserves its right to make a claim for breach of the above mentioned provisions of the 1997, 2000 and 2015 Contracts when the Source Code and Documents which BDL and Dr Potamianos are obliged to provide have been provided to the claimant".

135. However, SEL has not brought any such claim, in spite of its letter of claim dated 8 January 2019. If it did sue, the potential recovery should be added to the value of SEL for the present purposes. In other words, any defects would have both a positive effect on the valuation, reflecting the right to sue for damages, as well as a negative effect due to the defects themselves. The overall effect would be negligible. Thus, the fairest approach is to leave SEL to sue if it wishes, in which case Dr Potamianos and BDL will bear 100% of any damages ordered (unlike the consequences of a recovery in the Source Code claim, where Dr Potamianos would only bear 60%). Mr Prescott cannot reasonably complain about litigation risk and enforcement in circumstances where SEL has taken so long to decide whether to sue.

136. Further, the assorted complaints listed by Mr Prescott do not advance his case because the experts have not seen fit to make any additional allowance for those matters. In this regard, Ms Hindson's evidence was that these matters were features of SEL at the time it generated the earnings used in the valuation, and "… the buyer is buying the historic profits that SEL was able to generate … and … whatever flaw or warts … are already in there so they are already accounted for in that way" and "… if these issues were not there … then the assumption is that the historic profits would have been higher". Many of these issues were ventilated in the source code quantum trial. None is properly explained before me. For example, the alleged need for SEL to create its own configuration tool is mere assertion; and renewing CE approvals ought to be a routine process, which the notional buyer would be able to complete, as Dr Potamianos observed. Mr Prescott accepted that some of the items are normal business tasks.

137. I have not found it entirely easy to decide what would be fair, just and equitable with regard to these issues, which were very fully argued by both sides. At the end of the day, however, I am not persuaded that they require any adjustment to the value of the shares in SRL as at the Valuation Date, for the following principal reasons:

(1) First, as the MB letter before claim dated 8 January 2019 effectively recognises, in order properly to determine the validity and significance of the complex and manifold allegations contained in that letter "expert evidence will be required". There was no such evidence before me. Mr Prescott lacked the requisite expertise. It is noticeable that neither Dr Gardiner nor Dr Fells was called to give evidence (and it was not suggested that they were unavailable). I see considerable force in the submission that without such evidence Mr Prescott was not in a position either to make out these allegations or to make out the significance of the same. Indeed, the letter itself expressly states: "Based on its review to date and subject to expert evidence in due course our client estimates that it will cost in the region of £468,000.00 to document and understand the software to a level where the software could be readily maintained/developed" (emphasis added).

(2) Second, I have little doubt that these claims are greatly exaggerated. I say that for two principal reasons: (a) having regard to the fact that in spite of their alleged value (i.e. £546,000, comprising the above figure of £468,000 plus the alleged additional costs of £78,000 set out in paragraph 8 of that letter before claim) and although the letter before claim was sent in January 2019 no proceedings have yet been commenced, and (b) in the light of the fact that in the source code quantum claim damages in the total sum of £5,331,413 were sought, which claim resulted in recoveries of about £23,730.00 or about 0.5% of the sums claimed, and the fact that that claim, like the claim before me, was based to a substantial extent on the evidence of Mr Prescott in which HH Judge Hacon had so little confidence.

(3) Third, both this claim for £546,000 and the claims arising from the further "significant issues" raised by Mr Prescott and listed at paragraphs 16(i)-16(xvi) of his 5th witness statement dated 21 April 2020 have already been raised in part in, and are inconsistent with the findings made in, the source code quantum claim.

(4) Fourth, with regard to the claims based on those further "significant issues", in broad terms I accept the submissions of Mr Pavlovich, and, if and to the extent that I do not fully accept them, I do not consider that my departure from them makes any material difference. For example, with regard to the provenance issue, I consider that Ms Page was right to rely on the findings in the Liability Judgment which she did. Ms Page was also right to submit that, in principle, such issues alone could have a very significant effect on the value of SEL. At the same time, I consider that Mr Pavlovich was right to submit that, on the materials before me, any case to the effect that these issues are, in fact significant is not made out, for the reasons that he gave. (Some details omitted for the reasons given above).

(5) Fifth, even if there was substance in these source code issues and/or these further "significant issues", their depressing effect on the value of SEL would be ameliorated to some extent by the availability of claims for damages in respect of the same. Plainly, some matters would not be capable of amelioration in this way (for example, that "SEL had been historically operating with a very lean

workforce, which has flattered the profits" and that "[t]he profile of SEL's workface was aged and the older people were the ones with the historical experience in DC Drives. A new buyer was going to have to manage the retirement of this group and find replacements."). Further, even those which could be ameliorated in this way would not result in full amelioration (as Mr Prescott states: "We also had the prospect of a damages case but as of 28 September 2018 had not assessed the level of damages, or the prospect of recovery. We knew that it would tie up cash to fund legal fees and would take a significant amount of management time."). Nevertheless, the fact that potential recoveries fall to be added back to the value of SEL is a real complicating factor.

(6) Sixth, this is part of a larger problem concerning quantification of the effect on the value of the shares in SEL of the various issues asserted by Mr Prescott. If, for example, I was persuaded that the age profile of SEL's workforce would or might have a depressing effect on the amount which the notional willing buyer would be prepared to pay for the shares in SRL, I have no means of quantifying that effect. It may be tempting to say that, in these circumstances, rather than make no allowance for this phenomenon, I should make some allowance, perhaps erring on the side of caution. But what allowance would be appropriate even on this basis - for example, would it be £1,000, £10,000, £100,000, or some other figure?

(7) Seventh, I consider that an important factor when assessing what is fair, just and equitable in all the circumstances is that SEL has a right to claim damages as set out in the MB letter before claim dated 8 January 2019 and in addition, on the face of it, in respect of a number of the other "significant issues" identified by Mr Prescott. If those claims are anything like as substantial as Mr Prescott asserts, those rights have significant value; but, in any event, their true value can be properly determined in proceedings in which they form the subject of the action. Accordingly, if I make no deduction in respect of the value of Dr Potamianos' shares in SRL to take account of those claims, the value of those claims will not be lost to Mr Prescott, because he will be able to direct SEL to bring those claims, and, as the 100% shareholder in SRL, he will obtain the benefit of any recoveries. (On one view, that is unfair to Dr Potamianos, and it could be said that Dr Potamianos is entitled to protection against that result. It is clear from the submissions of Mr Pavlovich, however, that Dr Potamianos is prepared to accept that consequence in exchange for obtaining an immediate payment for his shares which does not take account of the value of the issues asserted by Mr Prescott.) On the other hand, if I was to make a deduction in respect of the value of Dr Potamianos' shares in SRL to take account of those claims, there is nothing to stop SEL from seeking recovery from BDL and Dr Potamianos in reliance on the same, the net effect of which would be that Mr Prescott would obtain the benefit of those claims twice over: once, by way of reduction of the price at which he is required to buy out Dr Potamianos; and a second time as the 100% shareholder in SRL, and thus the ultimate beneficiary of any recoveries which SEL may effect.

(8) Eighth, I was not persuaded that, as Ms Page submitted, Dr Potamianos could be protected against the risk of a windfall for Mr Prescott by an order that Mr Prescott should pay Dr Potamianos deferred consideration of 40% of the net recoveries in the event that SEL succeeded in any claim in respect of the quality of the source code. First, as formulated by Ms Page this proposal would not extend to all the forms of claim which, in accordance with Mr Prescott's evidence, are or might be available to SEL. Second, even if that problem could be overcome by a reformulation of the proposal, this would result in Dr Potamianos suffering an immediate reduction in the sums which he will receive for his shares (of the order of £218,400 or more) while at the same time retaining only the prospect of receiving further monies from Mr Prescott at a future date in the event that recoveries are made by SEL. As Mr Prescott will be free to transfer ownership and control of SEL to a third party, and, moreover, will be under no obligation to retain or secure this potential deferred consideration until such time as it becomes clear what claims SEL may make and what recoveries SEL may effect, it does not seem to me that this would provide effective protection overall.

138. I am reinforced in my conclusions above by considering the effect on the value of SEL of accepting the issues, problems and complaints advanced by Mr Prescott. First, they would render SEL "unsellable", and therefore for all practical purposes worthless, as, I believe, Mr Prescott was prepared to accept, if not positively to assert. In the language of Briggs LJ in *Chilukuri v RP Explorer Master Fund* [2013] EWCA 1307 that would mean that "no well-advised prospective purchaser … would have touched these shares with a barge pole". Second, they would depress the value of SEL to a very low level in comparison to its net asset value, and, as far as I can see, below the value of the cash of £955,168.97 which SEL held in its current account on the Valuation Date. In this regard, there was a difference of opinion between the experts. Ms Hindson was of the view that any figure which was less than the value of SEL's net assets must be too low, whereas Mr Stern was of the view that the correct principle is that SEL could not be worth less than the net value of its assets *on a break up basis* and that the better benchmark to use in comparison to a maintainable EBITDA valuation "would be to say that the owners of a business would not sell the business for less than they could achieve were they to have an orderly winding down of the assets and payment of the liabilities". I do not consider that I have to resolve that difference, because even on Mr Stern's view, which is the more favourable to Mr Prescott, SEL had a value considerably in excess of that which would be produced by acceptance of Mr Prescott's case. The consequences of accepting the effect on the value of SEL of the issues, problems and complaints he asserts are very far removed from the views of the experts, even making all due allowance for the prospect that their valuation based on maintainable EBITDA produces a figure which they were each prepared to accept might be subject to an element of commercial negotiation on an actual sale in reality.

QUASI-INTEREST ON THE SHARE PRICE

139. Mr Pavlovich submitted that it would be fair to add "quasi-interest" to the share price to reflect the fact that the sale is taking place after the Valuation Date and that in the intervening period Dr Potamianos will have been kept out of his money, and will have received no benefit from his shares in that time, whether in the form of dividends or the further Balancing Payment, whereas all the benefits have accrued to Mr Prescott. The suggestion that Mr Prescott's previous offers to buy Dr Potamianos' shares provide a reason not to award quasi-interest is unfounded: Mr Prescott's highest offer was £1.34 million in October 2015, but Dr Potamianos has obtained a better result by retaining his shares, including at least the price for his shares and the Balancing Payment. Moreover, the offer was made at an early stage, funding for the offer was in doubt, and a sale to a third-party was a possibility: see [141] of the Appeal Judgment. In any event, the fact remains that Mr Prescott chose to contest both liability and quantum, and Dr Potamianos should not be penalised for any resulting delay. Mr Pavlovich made the like submissions as to the appropriate rate as he made in respect of the Balancing Payment.

140. Ms Page submitted that it would be quite unfair for the share price to be augmented by the equivalent of interest for the following reasons:

(1) Dr Potamianos has not been unfairly deprived of the value of his shares. Mr Prescott went to great trouble in 2015, in consultation with Dr Potamianos, to put together an acceptable offer for the latter's shares. On 16 October 2015, Mr Prescott offered to purchase Dr Potamianos' shares for £1.34m applying the agreed multiplier and the methodology discussed. When this was rejected, Mr Prescott made a further improved offer of £1.34m plus a 4 year contract for BDL at £60,000 p.a. (i.e. an additional £240,000 in total). This was also refused. Both experts in these proceedings have valued Dr Potamianos' shareholding in SRL at substantially less than these sums.

(2) At the time of these offers no amount in respect of the Balancing Payment was claimed (or was due) and it is (a) premature; and (b) a false comparison to say that Dr Potamianos has achieved a better result in the present proceedings.

(3) The purchase price has not yet been fixed for the shares, and as such there is no sum on which interest can run. It follows that it cannot be said that Dr Potamianos has somehow been kept out of the purchase price.

(4) Dr Potamianos stands to benefit from a very favourable Valuation Date. The reality is that the world is currently in the middle of a global pandemic and financial crisis owing to COVID-19. The market value of Dr Potamianos' shares today is likely to be less than at the Valuation Date. Mr Prescott faces having to buy the shares at a 2018 price in the 2020 financial climate.

(5) For the same reasons, there is a good chance that Dr Potamianos would have lost money, had he invested the value of his shareholding in September 2018.

(6) Dr Potamianos' conduct is relevant to the discretion as to quasi-interest. In light of the Court's findings in this regard, the Court should not endow him with yet further benefits at Mr Prescott's expense.

(7) The unfairly prejudicial conduct found by the Court is fairly and equitably compensated for (and put right for the future) by the combination of the share purchase order (with its beneficial Valuation Date) and the Balancing Payment (by which Dr Potamianos has already received the benefit of "rough justice").

(8) There is no justification for the relief to be further augmented in favour of Dr Potamianos by an award of quasi-interest in all the circumstances of this case.

141. In this instance, and in contrast to the approach which I consider right in respect of the Balancing Payment, I consider that the better course is to wait until it is possible to ascertain the final outcome of (a) the findings above and (b) the consequential orders made following the Source Code Quantum Judgment. At that stage, the Court will be in a better position to assess, for example, whether Dr Potamianos has been kept out of the purchase price for his shares in SRL by the unwillingness of Mr Prescott to admit and pay what is due to him or by his own unwillingness to accept reasonable proposals from Mr Prescott. Such issues may well, as envisaged by the Court of Appeal, have a bearing on who should be ordered to bear the costs of the present proceedings. As at present advised, on the one hand, the resolution of the same issues (which cannot be achieved at this time) may also be relevant to the proper exercise of the Court's discretion as to whether and if so at what rate and for what period to award quasi-interest; and, on the other hand, if in the final analysis that is not relevant, it will cause no prejudice to wait.

CONCLUSION

142. I ask Counsel to agree an order which reflects the above rulings. I will deal with any arguments about costs, the form of the order, and any other issues such as permission to appeal, either (if both Counsel agree to this) on the basis of written submissions alone, or else on an adjourned hearing on some convenient date. It is my intention that the time for seeking permission to appeal should not start running in the meantime.