

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 28 May 2021

Before :

**MR ASHLEY GREENBANK**  
**sitting as a Deputy Judge of the High Court**

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Between :

ALAN BURNELL  
- and -  
(1) TRANS-TAG LIMITED  
(2) ROBERT AIRD

**Claimant**

**Defendants**

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Edward Davies QC (instructed by Norton Rose Fulbright LLP) for the Claimant  
Richard Leiper QC and Charlotte Davies (instructed by Clyde & Co LLP) for the  
Defendants

Hearing dates: 1, 2, 3, 4, 7, 8, 9 and 10 December 2020  
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**This judgment was handed down by Mr Ashley Greenbank (sitting as a Deputy Judge of the High Court) remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 28 May 2021 at 10:30am.**

**Mr Ashley Greenbank (sitting as a Deputy Judge of the High Court):**

**INTRODUCTION**

1. This case concerns a dispute about circumstances surrounding the collapse of the business of the First Defendant, Trans-Tag Limited (“TTL”).
2. I have set out the facts in greater detail below, but, in summary, TTL’s business involved the design, manufacture and sale of a range of devices (referred to as “Tags”), which allowed for the remote tracking, monitoring and analysis of goods, equipment and people. TTL was also involved in the development and manufacture of a product, which was designed to be installed on vehicles that were at risk of being stolen and commandeered (for example, by terrorists), and which allowed the vehicles to be monitored and controlled remotely, without the knowledge of the occupants. (This product is a combination of software installed on specifically designed hardware. I have referred to this product as “Restore” or “Restore OneBox”. Where I need to refer to the hardware alone, I have referred to the hardware as “OneBox”.)
3. At all material times, the majority shareholder in TTL was a company called Monogram Capital Limited (“Monogram”). Monogram was controlled by the Second Defendant, Mr Robert Aird.
4. The Claimant, Mr Alan Burnell, became involved with TTL in 2016 and, in due course, became an investor in and the chief executive officer (CEO) of TTL. The Defendants say he also became a director of TTL.
5. Mr Burnell’s claim against TTL and Mr Aird relates to a loan which he made to TTL in two tranches, in July 2016 and February 2017, in the aggregate principal sum of £250,000 (the “Loan”). Mr Burnell claims against TTL for repayment of the Loan.
6. Mr Burnell also claims against Mr Aird for breach of contract. Mr Burnell says that the Loan was made as part of an arrangement negotiated between Mr Burnell and Mr Aird, under which Mr Burnell was to receive shares in TTL. Mr Burnell says that Mr Aird has breached that agreement by failing to procure the issue or transfer of shares in TTL to Mr Burnell, and that his loss is the sum of £250,000 that he loaned to TTL.
7. In response to Mr Burnell’s claim, TTL has brought a counterclaim against Mr Burnell.
8. By its counterclaim, TTL claims, in summary, that Mr Burnell sought to gain control of TTL’s valuable rights to manufacture and sell the Tags and Restore for his own benefit in breach of his duties as a director of TTL and/or in breach

of his equitable duty of confidence to TTL. TTL claims against Mr Burnell for damages for losses, and for an account of profits.

## **THE HEARING AND THE EVIDENCE**

### **The evidence**

9. I was provided with various bundles of documents by the parties. The bundles of documents included:
  - (1) two witness statements of Mr Burnell, the Claimant;
  - (2) two witness statements of Mr Rainer Kriisk, a technology consultant and former director of TTL, who gave evidence on behalf of the Claimant;
  - (3) a witness statement of Mr Julian Gover, a partner in Kona Partners LLP, an investment management business established by the Claimant, who gave evidence for the Claimant;
  - (4) two witness statements of Mr Aird, the Second Defendant;
  - (5) three witness statements of Mr Stephen Clark, a sales and marketing professional and a former director of TTL, who gave evidence on behalf of the Defendants; and
  - (6) a witness statement of Mr Neil Pfister, a solicitor, a partner in Druces LLP, and a former partner in Downs Solicitors LLP, who gave evidence for the Defendants.
10. All of the witnesses gave evidence and were cross-examined on their statements. Mr Kriisk gave evidence via a video link; the other witnesses gave evidence in person.

### **Observations on the witness evidence**

11. In his closing submissions, Mr Davies reminded me of the guidance offered by Leggatt J in *Gestmin SGPS S v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) (at [22]) on the approach to be taken to the assessment of witness evidence that the best approach is “to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts”. Given the shortcomings in some of the witness evidence, to which I refer below, I have been mindful of that guidance. This has meant that I have relied to a large extent on the voluminous amounts of email and social media correspondence which was contained in the bundles.
12. I should make some brief comments on the witness evidence.

13. Mr Burnell was cross-examined for a significant period of time and clearly found the process uncomfortable. (I note that Mr Burnell suffers from Asperger Syndrome, which may have contributed to his discomfort.) He was mindful throughout of how his evidence might affect his case. His caution led him, at times, to contradict earlier evidence, his written statement and at times his own pleaded position.
14. Mr Aird's evidence was clouded by his conviction that Mr Burnell was, almost from the outset of the key events in this case, engaged in some form of conspiracy with others, principally Mr Julian Gover and his brother Mr Lucien Gover, to acquire for himself the assets and business of TTL. I will comment on this theory in due course. However, one effect of Mr Aird's predisposition was a tendency to recharacterize events so as to be consistent with his theory.
15. Mr Clark had been put under enormous pressure to provide evidence in support of Mr Aird's case. He remains very wary of Mr Aird. He dealt comfortably with the less contentious parts of his evidence but at times sought to rationalize events after the event in a manner consistent with the Defendants' case, notwithstanding his views at the time. I found his evidence on the issues regarding the technical development of the products to be rather broad brush. He could not speak to those issues with the confidence and authority of Mr Kriisk.
16. Mr Kriisk spoke confidently and easily about the technical aspects of the business, the problems that had been encountered in the development of the products and the steps that could or could not be taken to remedy them. He also spoke passionately about the reasons behind the collapse of the business. He was more evasive about the circumstances surrounding Mr Burnell's ultimate acquisition of the shares in the Estonian company (which I have referred to as "TTS" in this judgment) which licensed the intellectual property rights to TTL.
17. I found Mr Julian Gover's evidence on the construction of the financial models and the proposal that was put to Mr Aird credible. The issues with his evidence related mainly to the areas that were missing from his written evidence. As with Mr Kriisk, Mr Julian Gover was more guarded in his description of later events.
18. Mr Pfister was at pains to demonstrate that at all times he was acting for and on behalf of the company and not Mr Aird. The fact remains that, for the most part, he took his instructions from Mr Aird and gained his information from Mr Aird. My impression is that he was unlikely to challenge Mr Aird's view of events.

## **The expert evidence**

19. I was also provided with copies of two expert reports containing expert valuation evidence. The reports were provided by Mr Robert Sharp of Valuation Consulting, who provided evidence on behalf of the Defendants, and Mr David Mitchell of BDO LLP, who provided evidence on behalf of the Claimant. Mr Sharp and Mr Mitchell were both cross-examined on their evidence. Mr Sharp appeared by video link; Mr Mitchell gave evidence in person.
20. I will comment on the expert evidence in the section of this judgment that deals with valuation.

## **THE FACTS**

21. In this section, I have set out most of my findings of fact. For the most part, they are in chronological order. I have, however, also dealt with some questions of fact in the sections below where I address the various issues between the parties. Those sections therefore also contain some of my findings of fact and I have sought to identify where those findings are made.
22. Some of the facts in this case, and the inferences to be drawn from them, are hotly disputed. Where an issue is particularly contentious, I have sought to identify my reasons for preferring the account of one party over the other.

## **Background**

23. Mr Kriisk is a technology consultant specializing in electronics and industrial automation. He moved from Estonia to the UK in 2003. Mr Kriisk and Mr Clark first met in 2007 when Mr Kriisk was working as the Chief Technical Officer of a start-up business. At the time, Mr Clark was a director of a company called Vari-Trac Limited, which was a supplier to Mr Kriisk's business.

### ***The beginnings of the Tags business***

24. At some point in 2011 or early 2012, Mr Kriisk approached Mr Clark about the idea of designing and developing a series of wireless battery powered remote tracking and sensor devices (the Tags) to be sold to various industry sectors.
25. Separately, Mr Kriisk approached Mr Jaan Laul, a childhood friend from Estonia, about the idea. It was agreed that Mr Laul would set up an Estonian company (which became Trans-Tag Systems OÜ ("TTS")) for the project, which would design and develop the hardware and software for the Tags and that Mr Kriisk would set up a UK-based company (which became TTL) to arrange for the manufacture, distribution and sale of the Tags. Mr Kriisk would work with

TTS to develop the Tags, and Mr Clark, through TTL, would be responsible for sales and marketing of the Tags.

26. Mr Clark introduced Mr Kriisk to Mr Aird, as a potential investor in the project. Mr Aird is an experienced businessman and investor. He had previously been involved in several successful technology companies and, in particular, he was the founder and, at one time, chief executive of Oeconics Group Plc (“Oeconics”). Mr Clark had been employed by Oeconics at the time when Mr Aird was the chief executive.

### ***The incorporation of TTL and TTS***

27. TTL was incorporated in England and Wales on 7 March 2012. Following the incorporation of TTL, Mr Aird, Mr Kriisk and Mr Clark were appointed as the directors of the company. Mr Aird was appointed Executive Chairman.
28. At the time of its incorporation, the issued share capital of TTL comprised two ordinary shares of £1 each. Those two shares were held by Monogram, a company controlled by Mr Aird. Mr Kriisk and Mr Clark did not hold any shares in TTL.
29. TTS was incorporated in Estonia on 12 April 2012. The original management board members and original shareholders were Mr Laul, a colleague, Mr Indrek Ploompuu, an associate of Mr Kriisk, and Mrs Leidi-Aili Laul, Mr Laul’s wife.

### ***The beginnings of the Restore business***

30. In early 2013, Mr Kriisk approached Mr Laul about designing and writing software for a project sponsored by the Home Office’s Centre for Applied Science and Technology (“CAST”) called “Restore”, which was seeking to develop ways in which vehicles that were at risk of being stolen and commandeered (for example, by terrorists) could be monitored and controlled remotely, without the knowledge of the occupants. The functionality requirements for the Restore project were set by the Home Office.
31. It was agreed that TTS would design and develop the software for the Restore project, and that TTL would source the hardware for the software to operate on. TTL entered into a contract with Axiom Manufacturing Service Ltd (“Axiom”) under which Axiom agreed to design and build the hardware for the Restore product, which took the form of a single box processor to house the Restore software. The hardware produced by Axiom is referred to as “OneBox”.

***The operation of the business in its early stages***

32. In these early stages, no formal documentation was put in place to govern the commercial relationship between TTS and TTL or the relationship between Mr Aird, Mr Kriisk and Mr Clark.
33. Mr Aird funded TTL by way of loans to develop its products, much of which were used to pay monthly fees to Mr Kriisk and Mr Clark. Mr Kriisk and Mr Clark worked largely from home, using their own equipment. They met Mr Aird occasionally, using office space rented from Regus. Mr Aird was not involved in the day to day running of the business.
34. No fees were paid to TTS. The understanding appears to have been that TTS would be remunerated following the successful completion of the project.
35. The relationship between TTL and TTS (and therefore Mr Laul and Mr Ploompuu) was handled exclusively by Mr Kriisk.

**Negotiations to formalize the arrangements (June 2014 to May 2016)**

36. The development of the Tags products ran into difficulties in 2013.
37. At the instigation of Mr Aird, who was beginning to become concerned about the costs of the project and the lack of progress, initial discussions took place in June 2014 between Mr Aird, Mr Kriisk and Mr Clark about formalizing arrangements between themselves. At some point, Mr Laul was also contacted about the need to put arrangements between TTL and TTS on a more formal footing.
38. The discussions between Mr Aird, Mr Kriisk, and Mr Clark concerning the proposed shareholder agreement and between TTL and TTS regarding a possible licence agreement to govern the use of intellectual property in the software which was being developed by TTS became protracted.
39. In the period between October and December 2015, Mr Kriisk visited Estonia on several occasions at Mr Aird's behest to discuss the proposed terms of the licensing arrangements with Mr Laul. There were material difficulties in these negotiations because Mr Laul was not convinced of the need for a formal legal arrangement between TTL and TTS. Notwithstanding these difficulties, on 18 December 2015, Mr Kriisk and Mr Laul agreed heads of terms for a licence agreement between TTS and TTL. TTL instructed Mr Pfister of Downs Solicitors LLP to draft the licence agreement and a draft was sent to TTS over the Christmas period.
40. As the discussions over the licence agreement with TTS and the shareholder arrangements became more and more protracted, relations between Mr Aird, Mr

Kriisk, and Mr Clark deteriorated. Progress on the development of the products stalled. Mr Aird at first threatened to cease funding TTL and finally ceased funding TTL (and the monthly payments to Mr Kriisk and Mr Clark) in early March 2016.

41. On 10 March 2016, Mr Aird sent an email to Mr Kriisk and Mr Clark. In that email, Mr Aird stated that he was not prepared to introduce further funds into TTL until it was “commercially and financially” viable. He suggested that TTL be put up for sale in order to recover his investment, but that Mr Kriisk and Mr Clark should each be entitled to 5% of any proceeds. As an alternative, Mr Aird put forward a proposal under which, if Mr Kriisk and Mr Clark could procure that TTS entered into the licence agreement with TTL: TTL would, on certain conditions, enter into service agreements with Mr Kriisk and Mr Clark; Mr Kriisk and Mr Clark would each receive 7.5% of the shares in TTL provided that Mr Kriisk and Mr Clark agreed to pay a proportionate share of any option fee which would be payable under the licence agreement to acquire an interest in the intellectual property; and Mr Aird would make interest free loans of £18,000 to each of Mr Kriisk and Mr Clark, which were intended to fund them for a further six months and which would be repayable after two years.
42. Following this email, relations between the parties appear to have deteriorated further. Some consideration was given to seeking a buyer for the company or seeking a third party investor. As part of the correspondence, Mr Aird expressed his concern that TTL did not have access to property and intellectual property which he regarded as assets of the company. Mr Kriisk’s and, to an extent, Mr Clark’s principal concerns remained securing their financial futures.
43. On 22 March 2016, Mr Aird, Mr Kriisk, Mr Clark and Mr Stefan Cassar (who was assisting Mr Aird) met at the Holiday Inn in Guildford in an attempt to reconcile the various differences. No agreement was reached at the meeting, but negotiations continued after the meeting.
44. Following that meeting, on 23 March 2016, Mr Aird put forward a revised proposal. This proposal included suggestions that the licence agreement with TTS should be completed subject to a change to allow TTL to test the software for one of the Tags products and to a provision for staged payments, that TTL should enter into service agreements with Mr Kriisk and Mr Clark conditional upon the achievement of certain milestones including obtaining further funding for the business, that Mr Kriisk and Mr Clark would each receive shares in TTL representing 5% of the issued capital at no further cost to themselves, and that Mr Aird would fund TTL for a further three months.
45. There followed an exchange of correspondence between Mr Aird and Mr Laul concerning the terms of the proposed licence agreement between TTL and TTS. It is not necessary to recite the detail of this and the ensuing correspondence.



However, it is clear from the discussions at this stage – and some of the earlier correspondence - that Mr Laul’s agreement to the terms of the licence agreement was conditional upon arrangements being in place, whether in the form of service agreements, shareholder arrangements or otherwise, to secure the involvement of Mr Kriisk and Mr Clark in the venture and that Mr Aird agreed to that condition.

### **The Agreements (May 2016)**

46. A deal was eventually reached.
47. On 2 May 2016, 98 new ordinary shares in TTL were allotted and issued. Following the issue of the new shares, Monogram held 90 ordinary shares and Mr Kriisk and Mr Clark each held 5 ordinary shares.
48. On 4 May 2016, various documents were signed:
  - (a) a “licence agreement” (the “Licence Agreement”) made between TTL and TTS, which governed the terms on which intellectual property rights were licensed by TTS to TTL and set out the terms on which TTS granted an option to TTL to acquire the intellectual property rights in Tags and Restore;
  - (b) a “joint venture agreement” (the “Joint Venture Agreement”) made between TTL, Monogram, Mr Kriisk and Mr Clark, governing the arrangements between the shareholders in TTL;
  - (c) a side letter from TTL to Mr Kriisk and Mr Clark providing for various payments to Mr Kriisk and Mr Clark and pursuant to which TTL agreed to enter into service agreements in agreed form with Mr Kriisk and Mr Clark when TTL had, in Mr Aird's opinion, secured funds sufficient “to service the [service agreements] and [TTL's] operational and other outgoings for 12 months”. The side letter was signed by Mr Aird on behalf of TTL and separate copies were counter-signed by Mr Kriisk and Mr Clark to indicate their agreement to its terms.

### ***The Licence Agreement***

49. The main terms of the Licence Agreement were, in summary, as follows.
  - (a) The agreement recited that all the intellectual property in the licensed products (Tags and Restore) was owned by TTS and that TTS would deliver licensed products to TTL for manufacture.

- (b) TTS granted TTL an exclusive licence to manufacture, use and sell or otherwise supply the licensed products worldwide with the exception of Estonia and Finland.
- (c) TTL agreed to pay royalties to TTS at rates calculated by reference to the cost of each unit sold subject to an annual minimum royalty. (The proposed royalty rates and anticipated royalty revenue, on the basis of various assumptions, were set out in a schedule to the Licence Agreement.)
- (d) TTS granted TTL an option to purchase the intellectual property associated with the licensed products. The option was exercisable at any time within five years of the date of the Licence Agreement. The exercise price of the option varied, depending upon the time at which it was exercised, from a price of £1.8 million, if the option was exercised within the period of three years from the date of the agreement, up to £2.4 million, if the option was exercised any time after the fourth anniversary of the date the agreement. In each case, royalty payments paid or due to TTS under the Licence Agreement were set off against the exercise price subject to a pre-agreed maximum.
- (e) TTL agreed to pay a premium of £60,000 in consideration for the grant of the option. The premium was payable in three instalments: £30,000 on the date the agreement, £20,000 after testing and acceptance of the licensed products and £10,000 within five days of receipt from TTS of all manufacturing and test data.
- (f) TTS agreed to provide know-how and technical assistance in order to enable TTL to manufacture and sell the licensed products.
- (g) All confidential information disclosed by TTS to TTL, including the existence and terms of the Licence Agreement, TTS's know-how and any other information which would be regarded as confidential by a reasonable business person was agreed to be confidential as between TTS and TTL. In particular, TTL agreed not to use any such confidential information except for the purpose of exercising or performing its rights and obligations under or in connection with the Licence Agreement.
- (h) The Licence Agreement could be terminated:
  - i. on the exercise of the option by TTL;
  - ii. by notice to expire on either the fifth, tenth or fifteenth anniversary of the date the agreement, provided that TTS undertook not to exercise its right to terminate on the fifth or the tenth anniversary of the date of the agreement;

- iii. if either party failed to pay any amount due under the Licence Agreement on the due date of payment and remained in default for not less than 60 days after being notified in writing to make such payment;
  - iv. if either party committed a material breach of the Licence Agreement and either that party failed to remedy the breach within a period of 14 days after being notified to do so or the breach was not capable of remedy;
  - v. on certain insolvency events;
  - vi. if either party suspended or ceased or threatened to suspend or cease carrying on all or part of its business.
50. Following the execution of the Licence Agreement, TTL paid the first tranche of the option premium, £30,000, to TTS.

### ***The Joint Venture Agreement***

51. The main terms of the Joint Venture Agreement were, in summary, as follows:
- (a) Monogram, Mr Kriisk and Mr Clark would each subscribe at par for ordinary shares in TTL so that following these subscriptions the shares in the company would be held as to 90 shares by Monogram, 5 shares by Mr Kriisk and 5 shares by Mr Clark. (Although this subscription is described as a completion obligation in the Joint Venture Agreement, these shares were issued on 2 May 2016 (referred to above).)
  - (b) Mr Kriisk and Mr Clark would be entitled to receive additional shares in TTL on the achievement of certain “milestones”:
    - i. “2.5% each of the shares in [TTL]” when Restore and “Microtag” (one of the Tags) had received certain relevant certifications and 20 units of each of Microtag and Restore had been sold;
    - ii. “7.5% each of the shares in [TTL]” on the repayment in full (with interest) to Mr Aird and his associated companies of all loans made by them to TTL;
    - iii. “3.75% each of the shares in [TTL]” on the achievement of the sales targets set out in a schedule to the agreement (which was in the same form as the schedule to the Licence Agreement governing the royalties to be paid to TTS);
    - iv. “3.75% each of the shares in [TTL]” on a sale, merger or initial public offering of shares in TTL at any time between the third

and the fifth anniversary of the Joint Venture Agreement valuing the company at no less than £5 million or the valuation of the company by an independent valuer on the fifth anniversary of the agreement at no less than £5 million.

- (c) The parties recognized that TTL would require further investment from third party investors and that it may be necessary to offer shares or rights to acquire shares to investors to secure that investment. In the period before the loans made by Mr Aird and his associated companies had been repaid, Monogram would have the right to determine the terms on which such investors acquired shares in TTL. In particular, the rights of Mr Kriisk and Mr Clark to acquire further shares in the company (as set out at (b) above) were expressed to operate by reference to the rights to shares in TTL held by the parties to the Joint Venture Agreement “ignoring any shares or share options sold or granted in favour of additional investors”.

The relevant provision of the Joint Venture Agreement is clause 4. It is in the following terms:

**“4 Dilution**

The parties hereto recognize that for the Company to attain its objectives, additional investors may be required and the parties understand that shares (or share options) in the Company may be sold/granted to additional investors. For as long as loans are due to Monogram and Milestone Two has not been reached, Monogram shall have the right to determine the terms on which investors acquire shares in the Company. Thereafter, the dilution of shares shall be agreed by shareholders on a simple majority of shares held in the Company at the relevant time. It is agreed between the parties that all shareholdings (including unissued milestone shares) of all parties will be diluted pro rata to accommodate additional shareholders. For the avoidance of doubt, the reference in Milestones to shares in the Company shall be a reference to shares in the Company held by the parties hereto ignoring any shares or share options sold or granted in favour of additional investors.”

- (d) Clause 5.1.1 provided for the appointment of Mr Aird as Chairman and CEO and allowed for the appointment of two non-executive directors nominated by Mr Aird. (I have set out the provisions of Clause 5.1.1 more fully at [336] below.)
- (e) Clause 5.1.7 contained a further provision governing dilution of shareholdings. It provided that each of the shareholders agreed “to dilute their respective shareholdings (and any unissued [shares to which they might be entitled at (b) above]) in the same proportions” to allow shares to be issued to new investors;

- (f) Monogram would provide additional loan capital for three months from the date of the agreement based on targets and projected expenditure set out in a schedule to the agreement;
- (g) If, in the opinion of Mr Aird, funding for TTL “sufficient to run the operations of the company for 12 months” had not been secured within that three month period, there would be no obligation on Mr Aird (or Mr Kriisk or Mr Clark) to continue to fund TTL.
- (h) Mr Kriisk and Mr Clark would enter into service agreements with the company. The service agreements would be conditional on securing additional funding for TTL.
- (i) The maximum number of directors would be seven unless otherwise agreed in writing by the shareholders.
- (j) Board meetings would be convened “at regular intervals not exceeding three months, by not less than seventy-two hours’ notice in writing accompanied by an agenda specifying the business to be transacted”.
- (k) In the event of any conflict between the terms of the Joint Venture Agreement and the Articles of Association, the terms of the Joint Venture Agreement were to prevail “as between the Shareholders”. The term “Shareholders” was defined to mean Monogram, Mr Clark and Mr Kriisk or “any person to whom they may properly transfer their shares pursuant to the terms of [the Joint Venture Agreement]”.

### *The Side Letter*

52. The side letter confirmed that:

- (a) Mr Clark and Mr Kriisk would be paid £3,500 on the signing of the Licence Agreement, £3,500 on the delivery of the first Tags and Restore products tested, certified and ready to manufacture and sell, and £3,500 at the end of each of the next three months;
- (b) at the end of that period, either the service agreements would come into force or all of the directors could agree to continue the arrangements for the payments of £3,500 per month until further funding was achieved;
- (c) the service agreements would come into force only when, in the opinion of Mr Aird, TTL had secured sufficient funds “to service the [service agreements] and [TTL’s] operational and other outgoings for 12 months”.

53. An agreed form of service agreement was attached to the side letter. It provided for a salary of £70,000 per annum.

#### **The introduction of Mr Burnell to the business (May to July 2016)**

54. At some point in early May 2016, Mr Aird met Mr Burnell at a school cricket match. Mr Aird mentioned his investment in TTL to Mr Burnell. Mr Burnell expressed some interest in the business.
55. On 9 May 2016, Mr Aird sent an email to Mr Burnell to follow up on Mr Burnell's expression of interest, to which he attached a copy of a report from Mr Clark which identified some potential clients. Mr Aird followed up that email with a later email to which he attached a copy of a draft of the Licence Agreement which he described as TTL's "main asset". The draft attached to the email was not, however, the final version of the Licence Agreement which had been signed on 4 May 2016, but an earlier version, branded with the logo of Downs Solicitors LLP, which was not present on the final version. However, the principal terms of the draft were substantially the same as those in the final version. Mr Aird and Mr Burnell met on 16 May 2016 to discuss Mr Burnell's potential investment in TTL.
56. A board meeting of TTL had been arranged for 23 May 2016. In advance of that meeting, on 17 May 2016, Mr Aird informed Mr Clark and Mr Kriisk that he wanted to introduce them to someone who may be interested in investing in TTL. He did not name Mr Burnell. Mr Aird also sent an email, on 22 May 2016, to Mr Clark and Mr Kriisk stating that he was hoping to introduce a potential investor to them at the board meeting on the following day.
57. Mr Burnell met Mr Kriisk and Mr Clark for the first time at the board meeting of TTL on 23 May 2016. Mr Aird was also at that meeting. Following the meeting, on 24 May 2016, Mr Burnell sent an email to Mr Aird providing his initial impressions of Mr Kriisk and Mr Clark and the prospects for the business. He emphasised the need for management time and focus and the "huge key man risk around [Mr Kriisk]".
58. In his reply, also on 24 May 2016, Mr Aird identified several "key short term actions" for the development of the business. These included:
- (a) "create office environment" for Mr Clark and Mr Kriisk;
  - (b) "locate and appoint meticulous person to stay on top of [Mr Kriisk and Mr Clark]" and ensure that the products received relevant certification within the following three to four months;

- (c) the appointment of various advisers to analyse the potential market for the technology, to assist in the production of a credible business plan, and to assist in the production of a marketing strategy;
  - (d) locate and appoint an understudy to Mr Kriisk.
59. Following a telephone call on the same day, Mr Aird sent Mr Burnell further information about TTL. This included details of the existing share capital structure and ownership, details of the current directors, details of the loan finance that had been made available by Mr Aird and Monogram, which he described as amounting to approximately £500,000, an outline of the terms of the agreements signed on 4 May 2016 and details of the contract that had been signed with Axiom on 6 February 2015. The email also contained a suggestion on the part of Mr Aird that he would like to see the appointment to the board of Ms Nohra Currie, Mr Aird's wife, and Mr Burnell.
60. There followed a period of negotiation between Mr Aird and Mr Burnell over Mr Burnell's possible involvement in TTL. The negotiations were conducted largely through email correspondence, but Mr Aird and Mr Burnell also met on various occasions. The key points arising from the negotiations were as follows.
- (a) Mr Aird mentioned his desire to "step back" from the business.
  - (b) There was agreement that Mr Burnell and Mr Aird should be "equal partners" in the business, and this was reflected in a proposal that Mr Burnell should have an equal shareholding to Mr Aird in TTL.
  - (c) There was no agreement on the effect of the arrangements between Mr Burnell and Mr Aird on Mr Kriisk and Mr Clark's shareholdings in the company. There was, however, some acknowledgment that Mr Kriisk and Mr Clark's participation in the company would need to be addressed. (Mr Burnell had not seen a copy of the Joint Venture Agreement at this stage.)
  - (d) Much of the discussion revolved around the level of Mr Burnell's proposed investment in TTL, whether his investment should be matched by further investment by Mr Aird and the relative priority and terms of repayment of any new funding as compared with the investment already made by Mr Aird.
61. Mr Aird also noted that he was planning to take an extended holiday in the Summer of 2016. It was proposed that Mr Burnell would be given day to day control of the business during the period whilst Mr Aird was away.

62. On 10 June 2016, Mr Aird sent an email to Mr Burnell which contained some outline heads of terms. The relevant section of that email was in the following terms:

“AB agrees to inject £250k capital into [TTL] on the basis that RFA matches £ for £. £100k each on day one, £150,000 each on 1 October 2016 unless mutually agreed otherwise.

(Parties to investigate EIS qualification)

AB agrees to direct and run [TTL] on a day to day basis for one year without remuneration unless period shortened or lengthened by mutual agreement.

AB agrees that RFA loan stock of £500k will attract a coupon of 7.5% pa, payable half yearly in arrears. Loan stock repayable ahead of any other shareholder distribution, but in any event within three years. RFA debenture to remain in place.

RFA agrees that AB and RFA will become equal shareholders with equal authority (tax advice needed as to how best to achieve...).

Effect on JV agreement with RK/SC to be considered and adjustments agreed with them as necessary.

AB agrees that if he does not fulfil his obligations as above in full then RFA will be entitled to reassume control and take back shares (basis mechanisms...?).

AB agrees that in the event of impasse RFA has option to buy back shares (basis...?).

AB joins board. Nohra joins board. Maybe find another non-exec with FD experience?

Form of shareholder agreement between us?”

(The references in this email to “AB” are to Mr Burnell, “RFA” to Mr Aird, “RK” to Mr Kriisk, and “SC” to Mr Clark. “Nohra” is a reference to Ms Currie, Mr Aird’s wife.)

63. Mr Burnell responded to this email on 12 June 2016. He agreed with some of the matters disclosed in the email but raised issues with others. The negotiations continued in particular in relation to the level of Mr Kriisk and Mr Clark’s potential stake in TTL if the relevant milestones set out in the Joint Venture Agreement were achieved, board composition, whether Ms Currie should be on the board, the terms of Mr Aird’s loan stock and the proposal for that loan stock to be repaid after a period of three years. In the course of those discussions and correspondence Mr Aird sought to reassure Mr Burnell that the dilution provisions in the Joint Venture Agreement would allow Mr Aird (through Monogram) to limit the proportion the share capital of TTL that would



ultimately be owned by Mr Kriisk and Mr Clark. Mr Aird also put forward proposals to ensure that equality of voting on the board would be maintained.

64. Following a meeting at Mr Aird's home, on 20 June 2016, Mr Aird sent a further email to Mr Burnell in which he sought to summarize the results of their negotiations. The passage in that email in which Mr Aird set out an outline of the points that they had agreed was in the following terms.

“Alan, the following is what I think we have agreed. I may have missed something so please let me have your comments while fresh in our minds,

- 1) You will come in as an equal equity partner with me by 1 October.
- 2) We will inject £250k each in the form of a loan to TT. £100k each on 1 July and £150k each on 1 October. Coupon and repayment date free.
- 3) These loans will rank first for repayment after my existing loan.
- 4) You will be issued with shares to equal to 18% of the equity of TT upon receipt of the £100k.
- 5) You will be issued with further shares to equate to 27% upon receipt of the £150k.
- 6) If you fail to inject the £150k, I will be entitled to buy back your shares at cost plus the repayment of your £100k loan and reassume control of TT.
- 7) My existing loan will rank ahead of any other distribution or repayment or remuneration to shareholders, carry a coupon of 7.5% payable half yearly in arrears and be repayable at any time, but no later than three years from 4 May 2016.
- 8) All loans will be secured against the assets of the company.
- 9) Any equity dilution will require mutual agreement.
- 10) SJC/RK to agree to adjust to 80:20 share split maximum or such alternative arrangement as you and I may accept.
- 11) You will run the company on a day to day basis as CEO from 1 July. I will remain chairman. You will not require remuneration.
- 12) By 31 October we will develop a new business plan.
- 13) Voting will be structured to ensure our mutual interests are protected. If Nohra is on the board she can stand in for me so maybe you should have an option to elect a sixth member (please let me have your ideas on this bearing in mind current board structure and chairman casting vote).

14) Understood that this deal is based on the idea that AB will run the company and that it will be your main focus.

15) Understood that once equal equity partnership has been achieved, in the event of the demise/incapacitation of one of us, we will need to put in place a mechanism whereby the survivor will not have control issues and the survivor will act in the best interests of the demised person's family/estate."

65. The email went on to explain that Mr Aird would not have sufficient funds available to make a contribution on 1 July, but that he could commit to advancing funds on 1 August 2016. He asked whether it would be acceptable to Mr Burnell if he were to provide his funding after Mr Burnell had made his contribution.
66. Over the following few days, there was an exchange of email correspondence between Mr Aird and Mr Burnell. In that email correspondence some of the matters which were referred to in the email of 20 June 2016 were clarified and expanded upon.
- (a) It was acknowledged by Mr Aird that although Mr Burnell would devote substantial time to the business, it would not be his sole focus.
  - (b) Mr Burnell challenged the suitability of a chairman's casting vote in what was essentially a joint venture. This issue was not resolved.
  - (c) There was an exchange of views on the question of dilution following which Mr Aird and Mr Burnell appear to have agreed that any sale or dilution of their shares would require a seventy five per cent (75%) majority of voting shares.
  - (d) Mr Burnell questioned the treatment of the existing loan stock. He asked whether Mr Aird's existing loan stock and the new loans should be treated equally in terms of their repayment and coupon. Mr Aird explained that his original proposal was intended to reflect the fact that his funding had been in place for over four years with no coupon and that under the joint venture agreement agreed with Mr Clark and Mr Kriisk in May 2016 interest would become payable on his loan stock after two years. In response, Mr Burnell suggested a compromise whereby all of the loan stock should bear interest which should rollup for three years unless the company's cash flow allowed for earlier repayment of interest and/or principal, but conceded that Mr Aird's existing loan stock should be repaid first. These issues do not appear to have been resolved at this stage.
67. Notwithstanding the outstanding issues, Mr Burnell agreed to provide his first £100,000 of funding on 1 July 2016.

68. On 28 June 2016, Mr Aird sent a draft email to Mr Burnell. The draft was an email to Mr Clark and Mr Kriisk in which Mr Aird informed Mr Clark and Mr Kriisk of the new funding that was to be made available by Mr Burnell and himself. This email was then sent to Mr Clark and Mr Kriisk on 29 June 2016. The main points raised in the email were as follows.
- (a) Mr Aird and Mr Burnell would each provide £250,000 of new funding to TTL.
  - (b) Following the investment by Mr Burnell, the ownership of the share capital of TTL would be owned by Mr Aird, Mr Burnell, Mr Clark and Mr Kriisk in the proportions 45:45:5:5. If the milestones in the joint venture agreement were achieved, Mr Clark and Mr Kriisk would have the opportunity to increase their shareholdings to 10% of the share capital so that the share capital would be held in the proportions 40:40:10:10.
  - (c) Mr Burnell would provide his first £100,000 of funding immediately. He would then undertake due diligence for a further three months by working closely with Mr Kriisk and Mr Clark.
  - (d) Mr Aird made it clear that he was not prepared to continue to fund TTL alone.
69. On 1 July 2016, a meeting took place at Mr Aird's home to discuss the current status of the business. Mr Aird, Mr Kriisk, Mr Clark and Mr Burnell were present. Mr Burnell was introduced as the new Chief Executive Officer.
70. On 4 July 2016, Mr Burnell transferred funds for his initial investment of £100,000 to TTL. The investment was acknowledged by Mr Aird on 7 July 2016.

#### **Initial discussions concerning Mr Clark and Mr Kriisk's participation (July 2016)**

71. On 8 July 2016, Mr Aird sent an email to Mr Clark and Mr Kriisk, copied to Mr Burnell, in which he confirmed that he would be on holiday for the Summer and that Mr Burnell would have day to day control of the business. He mentioned that it would be necessary to modify the Joint Venture Agreement and that it was "down to" Mr Clark and Mr Kriisk to make sufficient progress in the development of the products to ensure that the second tranches of Mr Burnell and Mr Aird's loans could be advanced at the end of September.
72. In the immediate aftermath of Mr Burnell's introduction as CEO of TTL, Mr Aird and Mr Burnell had engaged in an exchange of email correspondence concerning the effect of Mr Burnell's investment on the participation of Mr Kriisk and Mr Clark in the equity of TTL. In this exchange, they developed

a proposal for the restructuring of Mr Kriisk and Mr Clark's rights so that, after repayment of any financial investment, Mr Kriisk and Mr Clark would each participate equally with Mr Aird and Mr Burnell in the next £4 million of any value that was realized from the business (so that each of them would receive £1 million). Thereafter Mr Kriisk and Mr Clark would have a five per cent (5%) interest in any value realized in excess of £4 million, but subject to the company's ability to purchase that right for an amount of £500,000.

73. Mr Burnell met Mr Kriisk and Mr Clark on 9 July 2016 and described this proposal to them together with some suggested changes to the regular payments which Mr Kriisk and Mr Clark otherwise received.
74. Mr Burnell arranged a further meeting with Mr Clark and Mr Kriisk on 25 July 2016 to discuss the status of product development (as to which see below) and the form of Mr Kriisk and Mr Clark's participation in the company. In advance of that meeting, Mr Aird sent an email to Mr Burnell confirming that he was happy with the broad outline of the proposal in relation to Mr Kriisk and Mr Clark's future participation. He also reminded Mr Burnell that the arrangements for monthly payments to be made to Mr Kriisk and Mr Clark would also come to an end on 3 August 2016. He suggested that those arrangements could continue for a short period, say two or three months, but that as a quid pro quo Mr Kriisk and Mr Clark should be prepared to forgo any bonus to which they might be entitled for the production of a saleable product in the light of the continuing delays in product development.
75. At the meeting on 25 July 2016, Mr Burnell set out the proposal for Mr Kriisk and Mr Clark's future participation substantially in the form that I have outlined above. In his subsequent messages and emails to Mr Aird, Mr Burnell describes his having "torn up" the previous arrangements subject to a review in September "when we have product".
76. Mr Aird, in his evidence, maintained that these statements led him to believe that it had been agreed that the obligations in the Joint Venture Agreement regarding the service agreements had fallen away. In my view, that is not a realistic interpretation, nor do I accept that it was Mr Aird's view at the time. It is clear from later events – for example, the discussion which Mr Burnell and Mr Aird had with Mr Pfister on 28 February 2017 (see below) – that Mr Aird was aware that the obligations in the Joint Venture Agreement remained in place.
77. In his evidence, Mr Kriisk says that he took Mr Burnell's statements to mean that, although there was an acknowledgement that the pre-existing arrangements would need to change, nothing was resolved; the existing arrangements would remain in place unless and until an alternative was agreed in September 2016 by which time it was hoped that there would be some progress in the

development of products. In my view, that is a more accurate description of the position that was reached. There was no agreement on the changes required to the arrangements with Mr Kriisk and Mr Clark at this stage. The position was simply deferred for review at a later date.

### **Product development delays (July to October 2016)**

78. The discussions concerning the structure of Mr Clark and Mr Kriisk's participation in the business took place in parallel to various discussions regarding the development of the products.
79. At the meeting on 9 July 2016, Mr Burnell tasked Mr Kriisk with obtaining a timetable for the delivery of a working MicroTag product from TTS. Mr Burnell also asked Mr Kriisk to concentrate on trying to obtain accreditation from CAST for the Restore product and Mr Clark to develop a marketing plan for Restore and Tags.
80. As TTS continued to have problems with the development of Tags, TTS was asked to focus initially on the Restore project. At some point in July 2016, TTS delivered the Restore software to TTL. The Restore software was installed on a vehicle and successfully tested by the Home Office on 20 July 2016. This was an important stage in obtaining accreditation for the product from CAST. It is important to note, however, that this testing related primarily to the software. The hardware for the product (OneBox) needed to undergo further testing in order to obtain the "CE" accreditation that would allow it to be sold in the EU.
81. At the meeting on 25 July 2016, in addition to the discussion about the structure of Mr Clark and Mr Kriisk's arrangements to which I have referred above, Mr Burnell also expressed his concerns about delays in the development of products and set specific tasks for Mr Kriisk and Mr Clark principally in relation to the development of the Restore product.
82. Mr Burnell reported to Mr Aird on all the aspects of the meeting in an email on the same day expressing his frustration at the lack of progress. He also reported that he had set up a WhatsApp group which included Mr Kriisk and Mr Clark, to enable them to provide more regular updates on meetings and developments.
83. In his response, on 28 July 2016, Mr Aird asked to be included in the WhatsApp group. Mr Burnell did not include Mr Aird in the group at this time or at any later stage. (This was the case even though he did invite the Gover brothers to join the Whatsapp group in November 2016.)
84. The problems with the development of Restore and the Tags continued. Mr Aird and Mr Burnell became increasingly frustrated at the lack of progress.

85. In his evidence, Mr Kriisk attributed the problems with Restore to difficulties with the hardware which was being developed by Axiom and, another supplier, Appian. TTL had an arrangement with Axiom to produce OneBox and an arrangement with Appian to provide printed circuit boards (PCBs). There were numerous difficulties with both and Mr Kriisk was often having to lend his experience to resolve these difficulties. The problems with the hardware led to it failing to obtain CE accreditation on three separate occasions. The changes required to correct these problems would have required significant additional cost and Axiom, who were not being funded by TTL to undertake the development, ultimately refused to continue the development as costs mounted.
86. As regards the development of the Tags, Mr Kriisk's evidence is that TTS was undertaking the software development in the time available outside other fee-paying projects. Once again, TTL was not paying TTS to fund the development so TTS would divert resources to other projects and this led to delays. The additional pressure which Mr Aird and Mr Burnell sought to place on TTS to meet product development targets was, if anything, counter-productive.
87. I have accepted Mr Kriisk's evidence on these matters.
88. On 10 September 2016, Mr Burnell met with Mr Kriisk and Mr Clark to discuss the delays in product development. His focus was on Restore as it seemed closer to becoming a saleable product at the time. He asked Mr Clark to prepare a timeline of the delays to Restore, which Mr Clark produced the following day.
89. On 11 September 2016, Mr Burnell reported to Mr Aird on the meeting that he had with Mr Clark and Mr Kriisk the previous day expressing his disappointment at the continued delays in product development. He referred to Restore as being at a "terminal point" unless prompt action was taken and suggested that the board of TTL should meet within 24 hours to discuss the matter. No meeting was held.
90. Mr Clark attended a meeting with Axiom on 16 September 2016 to discuss the issues surrounding the manufacture of the hardware for Restore. TTL sought to place an order with Axiom for the manufacture of 20 OneBox units to house the Restore software. Axiom refused to supply the units.
91. The problems with the development of the products continued. In an exchange of emails on 4 October 2016 in which Mr Burnell and Mr Aird shared their frustration at the continuing delays, Mr Burnell suggested that the second round of funding which he and Mr Aird had contemplated making in October 2016 should not be advanced. Mr Aird agreed and reported that only £40,000 of the £100,000 investment made by Mr Burnell had been expended, mainly in making payments of consultancy fees to Mr Kriisk and Mr Clark and in the purchase of a vehicle for testing Restore.

92. By this time, Mr Aird had not advanced any further funds to the business to match Mr Burnell's funding, as anticipated in their exchange on 20 June 2016, and no shares in TTL had been issued to or transferred to Mr Burnell.

### **Deterioration in the relationship between Mr Aird and Mr Kriisk**

93. There was a terse email exchange between Mr Aird and Mr Kriisk between 10 and 11 October 2016 regarding the development of the Tags.
94. In this exchange, Mr Aird sought to lay the blame for delays in the development process at the door of TTS, whom Mr Kriisk defended robustly. There was a discussion of the obligations under the Licence Agreement, which Mr Kriisk referred to as a "weak contract", which did not require TTS to deliver any particular work product. Mr Aird did not agree. Towards the end of this exchange, Mr Aird threatened to withdraw funding from TTL and, in effect, stop paying the monthly fees to Mr Kriisk and Mr Clark. Mr Kriisk responded by threatening to "walk away" from the project. Matters were, however resolved with Mr Aird, after speaking to Mr Burnell, ultimately undertaking to allow Mr Kriisk and Mr Clark to continue with the development of the products without interference from Mr Aird.

### **The introduction of the Gover brothers to the business (October 2016).**

95. At some point in October 2016 Mr Burnell asked Mr Julian Gover and Mr Lucien Gover to assist him with the management of TTL. Julian and Lucien Gover are brothers and were partners in an investment management business founded by Mr Burnell, known as Kona Partners LLP.
96. In an email on 14 October 2016, in which Mr Burnell also addressed the current status of the development of Restore and the Tags, Mr Burnell informed Mr Aird of the involvement of the Gover brothers. In his witness statement, Mr Aird suggested that he did not consent to the involvement of the Gover brothers in the business. However, in cross-examination he accepted that Mr Burnell's email was in terms that invited him to object if he wanted to do so and he did not. In fact, at the time, Mr Aird welcomed their input.
97. Mr Burnell decided to involve Mr Julian Gover and Mr Lucien Gover in the business to assist him in strengthening the corporate governance and providing some structure to the business. They also played a role in the project management of the development of the prototypes for Restore and the Tags and so they became involved in the supervision of the work which was being done by Mr Kriisk and Mr Clark. At least initially, Mr Kriisk and Mr Clark were wary of their input and regarded them as aligned with Mr Burnell and therefore Mr Aird.

**The movement of the offices of TTL to Hascombe Farm (November 2016)**

98. In the period between November 2016 and January 2017, certain other steps were taken which TTL and Mr Aird say are evidence of a plan for Mr Burnell, with the assistance of the Gover brothers, to take over the business and exploit the products for their own purposes.
99. When Mr Burnell became the CEO, TTL had no physical office space. Mr Kriisk and Mr Clark often worked from home. When business premises were required, they used rented virtual office space in Guildford. Mr Burnell decided that he would be better able to supervise the work undertaken by Mr Clark and Mr Kriisk if they were to work at a central location. He asked Mr Clark and Mr Kriisk to work more regularly from offices at Hascombe Farm in Sussex (the “Farm”), which was also the headquarters of Mr Burnell’s other businesses, including Kona. (In an email to Mr Aird dated 20 November 2016, Mr Burnell informed him that Mr Kriisk had agreed to work at least four days a week from the Farm.)
100. In his evidence, Mr Aird sought to characterize the transfer of the business to the Farm as part of the steps that he alleges Mr Burnell took to seize control of the TTL business. There is no evidence that this was the case. Mr Burnell told Mr Aird that he had asked Mr Kriisk and Mr Clark to work from the Farm. Mr Aird visited the Farm on various occasions and made no objection to the arrangements at the time. Indeed, Mr Aird accepted in cross-examination that it provided a good working environment. Furthermore, Mr Aird had identified a need for a central location for the business in his earlier discussions with Mr Burnell before Mr Burnell became CEO (see Mr Aird’s email of 24 June 2016, the terms of which I have set out above).
101. I therefore accept Mr Burnell’s evidence that the purpose of the transfer was to create an environment in which Mr Kriisk and Mr Clark would work more efficiently and could be more easily supervised by Mr Burnell and the Gover brothers.

**The centralization of TTL’s systems (October 2016 to January 2017)**

102. Mr Burnell also took steps to centralize TTL’s storage of data and its email system. When he took over day-to-day management of the business, there was no central email system. Mr Kriisk and Mr Clark had individual TTL email accounts, which were owned by Mr Clark. There was no central email account or client database. There was no physical server or other central storage location for documents, data or other computer files. Instead there was a Dropbox account which was controlled by Mr Kriisk.



103. Mr Burnell enquired of Mr Kriisk about the possibility of transferring data to a central cloud-based server almost immediately after he became CEO. However, the transfer took some time to accomplish. In the autumn of 2016, Mr Burnell engaged the IT manager of Kona, a Mr Thomas, to assist with the transfer of data to a rented cloud-based server. The transfer was finally completed in January 2017. The transfer allowed for the creation of a central email account, allowing equal access to all emails, and for the central storage of data. Mr Aird was aware of this transfer and did not object to it. Again, the creation of central email and document storage systems were one of Mr Aird's priorities in his earlier discussions with Mr Burnell. Mr Aird was not, however, given access to the email account.

### **The financial models (November 2016)**

104. The next major episode in this drama concerns the production of various projections and models by Mr Julian Gover. These projections or models were designed for two separate purposes: the first being the basis for discussions with Mr Aird concerning the reduction in the proportion of the equity in TTL held by Mr Aird, for reasons which I will address below; and the second being to provide an alternative model for providing remuneration to Mr Kriisk and Mr Clark.
105. Mr Gover based his models on information provided to him initially by Mr Clark. This information included the business plans and a prospectus for potential investors which Mr Clark had prepared in May 2016. It also included the projections for the royalties payable to TTS which had been annexed as a schedule to the Licence Agreement. Mr Gover updated the models from time to time to take account of additional information provided by Mr Kriisk and Mr Clark.

### ***The equity model***

106. Mr Julian Gover and Mr Lucien Gover were not being paid for the work that there were doing for TTL. They were expecting their rewards to be in the form of an equity participation in TTL. Mr Burnell was not expecting his equity stake to be diluted so any participation by the Gover brothers would need to be "funded" by a reduction in the participation of Mr Aird, Mr Kriisk or Mr Clark or a combination of them.
107. Mr Julian Gover began working on a financial model for the equity participation in early November 2016. He produced a model pursuant to which, on the achievement of certain milestones, and the repayment of loans, Mr Aird's participation over time would be reduced from 45% to 10%. This model – which I have referred to as the "equity model" – initially showed that Mr Kriisk's and Mr Clark's stakes in the business might each increase from 5% to

15% on the achievement of various milestones and that Mr Burnell's stake would increase from 45% to 60%. Following an exchange of emails with Mr Burnell on 8 November 2016, the equity model was changed to remove the increase in the equity stake attributable to Mr Kriisk and Mr Clark so that the fall in Mr Aird's participation would accrue to Mr Burnell alone, leaving Mr Burnell with an 80% stake. It was Mr Julian Gover's evidence, which I accept, that although the equity model showed the fall in Mr Aird's participation as accruing to Mr Burnell, this was intended to provide the fund out of which Mr Julian Gover and Mr Lucien Gover would obtain a participation in the company.

108. In his witness statement, Mr Julian Gover suggested that he had begun working on the equity model following a meeting at the Farm on 9 November 2016 attended by Mr Burnell, Mr Julian Gover, Mr Lucien Gover and Mr Aird. That is not true. The first iterations of this model were prepared in advance of that meeting. At the meeting on 9 November 2016, Mr Burnell introduced Mr Julian Gover and Mr Lucien Gover to Mr Aird for the first time. Mr Burnell explained what he anticipated the Gover brothers would be able to bring to the business. Mr Aird did not object to their involvement.
109. Mr Julian Gover and Mr Burnell also say that at that meeting Mr Aird gave the impression that he would be willing to reduce his involvement in TTL and give up some of his equity participation. Mr Aird says that, although he was not averse to giving up equity in the business to true "value creators", he gave no such impression at the time. It seems clear to me, however, that Mr Julian Gover and Mr Lucien Gover must have left the meeting with at least some hope or expectation of an equity participation in the company; there was no other reason for them to continue to work in the business, as they did, for no remuneration. In due course, Mr Aird met with the Gover brothers, in January 2017, to discuss a more developed proposal for them to acquire a stake in the business and there is no reason why they would have continued to develop that proposal unless the prospect that an equity stake might be forthcoming had been held out to them.

### *The royalty model*

110. The second set of models was designed to assist with the development of a proposal to replace Mr Kriisk's and Mr Clark's rights to increased equity in the business, derived from the Joint Venture Agreement, with a right to a cash sum. The extent to which this model interacts with the equity model is not clear. Mr Julian Gover developed this model in anticipation of a meeting with Mr Kriisk and Mr Clark on 15 November 2016 at the Farm, which was followed by a meeting involving Mr Aird at the Holiday Inn in Guildford on 16 November 2016.
111. The basic assumption underlying this model was that Mr Kriisk and Mr Clark would each be paid a bonus calculated by reference to a proportion of the gross

sales of the products instead of becoming entitled to an increase in their equity participation on the achievement of certain milestones. The model showed that each of them would be entitled to a maximum aggregate payment of £1 million. The parties referred to this model as “the royalty model”.

112. The royalty model included three scenarios: a “low” scenario, with the starting point being based on an updated figure for the sales of Tags and Restore provided by Mr Clark but based on the model that he had developed in May 2016; and a “medium” and a “high” scenario based on a starting point provided by Mr Kriisk as to his realistic and optimistic expectations of sales of the products in 2017. These starting figures were projected forwards on the basis of various assumptions as to growth in sales and changes in operating costs over a period of ten years. The model did not include any adjustment to the equity stake of Mr Aird, Mr Kriisk or Mr Clark. Mr Aird’s equity stake remained at 45% throughout.
113. The royalty model calculated the bonuses due to Mr Clark and Mr Kriisk by reference to a separate “royalty” for sales of each of Tags and Restore. The royalties were not divided equally between Mr Kriisk and Mr Clark. Instead the bulk of the royalty attributable to Tags was shown as accruing to Mr Kriisk and the bulk of the royalty relating to Restore was shown as accruing to Mr Clark.
114. The model showed that on the “low” scenario, the Tags royalty would accrue the maximum £1 million over a period of eight years but that the Restore royalty would not be paid out in full over ten years. On the “medium” scenario, the Tags royalty and the Restore royalty would accrue their full value of £1 million over five years. On the “high” scenario, the Tags royalty would accrue the full value of £1 million over three years and the Restore royalty over four years.
115. Mr Julian Gover says that he produced a copy of the royalty model for all those who had participated in the 16 November meeting. Mr Aird says in his second witness statement that he does not recall being shown a copy of the model and that the first time he became aware of the model was when he was shown material as part of the disclosure exercise. I do not accept that evidence. It is contradicted by evidence of the other participants in the meeting. Following the meeting Mr Aird sent an email to Mr Burnell confirming that he understood the royalty model.
116. Both Mr Kriisk and Mr Clark say that they considered that the outline proposal was acceptable in principle. However, they were concerned about the split of the bonuses between the sales of Tags and Restore in the royalty model and the differential basis on which it was paid between them.

117. There was considerable dispute between the parties as to the importance and the veracity of the figures in the royalty model. This issue is of some significance as the figures in the royalty model form the basis of some of the calculations in the valuation prepared by one of the expert witnesses, Mr Sharp. I have addressed this issue in my discussion of the valuation evidence below.

**Negotiations with TTS (December 2016 and January 2017).**

118. There were further delays to the production of the manufacturing files for the Tags. Although the discussions with TTS had previously been conducted through Mr Kriisk, Mr Aird contacted Mr Laul directly on 30 November 2016 to suggest a meeting to resolve the issues. Mr Laul did not respond. Mr Burnell sent a further email to Mr Laul on 12 December 2016 requesting a timeline for receipt of the manufacturing files for the Tags and requesting a meeting in January 2017.
119. In the interim, Mr Burnell asked the Gover brothers to investigate other potential suppliers of the software. On 19 December 2016, Mr Julian Gover, Mr Lucien Gover and Mr Kriisk met two potential suppliers: 42 Technology and PlexTech. Following those meetings Mr Lucien Gover confirmed to Mr Burnell that PlexTech would be able to prepare the software for the Tags but that it would take 9 to 12 months of further work and cost several hundred thousand pounds. The estimates from 42 Technology were similar. A formal proposal from 42 Technology was later received in which 42 Technology estimated the costs for a “full redevelopment” as being £320,000 (excluding VAT and disbursements) and the costs for a “partial redevelopment” as being £220,000 (excluding VAT and disbursements). TTL did not pursue these estimates.
120. Also on 19 December 2016, Mr Laul responded to Mr Burnell’s email. He apologized for the delays to the production of the manufacturing files and said this was due to TTS finalizing another project for another customer. He suggested that the manufacturing files should be completed by the end of the year and that it would be possible to meet in Estonia after 16 January 2017.
121. The manufacturing files were not completed by the end of the year.
122. Mr Aird and Mr Burnell travelled to Estonia on 16 January 2017. Mr Kriisk was already in Estonia and joined the meeting with Mr Laul. He acted as interpreter. At the meeting, Mr Laul asserted that a payment of £30,000 was due from TTL to TTS under the Licence Agreement on the grounds that TTS had delivered manufacturing files for one working product, Restore, and that the final payments of the option price were now due under the Licence Agreement. Mr Aird refused to make payment. Mr Laul responded angrily but the position was smoothed over by Mr Kriisk.

123. Following the meetings in Estonia, Mr Burnell and Mr Aird exchanged email correspondence over the text of an email to Mr Laul to summarize the respective positions of TTL and TTS following the meeting. Mr Burnell's version of the email was more conciliatory. In it, he set out a timetable for the delivery of the manufacturing files for some of the Tag products against a series of three staged payments of £10,000 each, the final payment of which was to be made following the manufacture of the Tags after testing. In the email, Mr Burnell also offered to make a further payment of £30,000 on the date of the final staged payment in respect of the amounts due for the option price under the Licence Agreement.
124. Mr Aird's comments on the email were more confrontational. He suggested the inclusion of a provision that would remove the staged payments if any of the relevant deadlines were missed, allow for a set-off against future royalties due under the Licence Agreement for costs incurred by TTL as a result of the delays in the production of the Tags and imposed further conditions on the payment of the £30,000 under the Licence Agreement for the balance of the option price.
125. There was no agreement between Mr Burnell and Mr Aird on the terms of this email. Mr Burnell sent his version of the email, without amendment, to Mr Laul on 23 January 2017. He did not seek Mr Aird's consent to send the email. TTS did not respond to the email.

#### **Problems with Restore (November 2016 to January 2017)**

126. As I have mentioned above, TTL was in a dispute with Axiom regarding the contract for the manufacture of the hardware for Restore OneBox. Axiom was refusing to undertake further development on the hardware due to costs that had previously been incurred and changes to the specification, which it asserted had been made by TTL. Axiom refused to fulfil an order for 20 units placed by TTL in September 2016.
127. On 24 November 2016, Mr Aird and Mr Burnell attended a meeting with Mr Paul Murphy of Axiom. Mr Murphy provided an estimate for the cost of producing OneBox units, which was significantly in excess of previous estimates: his estimate was a cost per unit of £1,500 compared with previous estimates of up to £750. Once again, he refused to fulfil the order for 20 units. Mr Burnell requested further information concerning the increased estimate of the production cost in an email on 14 December 2016. Mr Murphy did not respond.
128. Mr Burnell spoke to Mr Murphy on 5 January 2017. In that call, Mr Murphy made it clear that Axiom were not prepared to fulfil the order for the units that had been placed in September 2016.

129. As I have mentioned, the initial testing of the Restore software by the Home Office had taken place in July 2016. The software had passed that initial testing. The next phase in the approval process was to obtain certification for the software from CAST. On 16 January 2017, CAST issued a certificate for the Restore software. Certification was granted at a “green” level of certification. This level of certification allowed Restore OneBox to be installed in “low risk” vehicles only. Other conditions were also attached to the certificate. TTL wrote to CAST with its comments on the conditions on 18 January 2017. The letter was in the name of Mr Lucien Gover, who signed himself as a “director” of TTL.
130. On 19 January 2017, Mr Burnell met with Mr Murphy of Axiom in a further attempt to resolve the contractual dispute with Axiom. Mr Murphy again refused to complete the order for OneBox units. Mr Burnell made an offer to purchase the intellectual property in the OneBox hardware so that TTL might be able to manufacture the hardware itself or procure the manufacture of the unit by another supplier. Mr Burnell made a formal offer in this respect by email following the meeting. Axiom did not respond.
131. TTL continued to seek to clarify the conditions which had been imposed on the certification of Restore with the Home Office and which restricted its marketability. There was a meeting with the Home Office on 31 January 2017 for this purpose. Mr Burnell and Mr Lucien Gover attended the meeting on behalf of TTL following which Mr Burnell prepared an email for submission to the Home Office setting out TTL’s position. This draft was shared with Mr Aird together with the supporting documents some of which Mr Aird accessed through the DropBox account.
132. The level of certification for the Restore software reflected a system under which authorization was given for the use of the software in different types of vehicle. At the time at which the software was tested by the Home Office, there were three levels of certification: “green” for use with low risk vehicles, “yellow” for intermediate risk vehicles, and “red” for high risk vehicles such as articulated lorries and emergency vehicles. In the period after the initial Home Office testing, the certification criteria were changed by CAST and this three-tier system was intended to be replaced by a different two-tier system. Nonetheless TTL received a “green” level certificate for Restore under the outdated three-tier system.
133. There was some dispute between the parties about the effect of the level of certification of the Restore software on its marketability. This has an impact on the valuation issues, which I address later in this judgment. For now, I should record that, although the certification was limited to the “green” level, Mr Kriisk’s evidence was that TTL’s software was the only software ever to obtain this level of certification. I accept his evidence. That said, the certificate

required was not the full level of certification that TTL had hoped for and which may have permitted a more rapid commercialization of the product notwithstanding the contractual difficulties with Axiom. A higher level of certification would have allowed the products to be marketed to owners of higher risk vehicles (such as emergency vehicles and articulated lorries) and those users may have been more able and more prepared to bear a higher unit price for the product, which may well have justified the costs of further development to produce a working product.

### **The Gover brothers' proposal to Mr Aird (January and February 2017)**

134. As I have mentioned above, the other set of models prepared by Mr Julian Gover contemplated a proposal for Mr Julian Gover and Mr Lucien Gover to obtain an equity stake in TTL as Mr Aird's stake reduced. They continued working on the proposal throughout December 2016 and there were further discussions with Mr Aird in relation to it.
135. On 5 January 2017, Mr Julian Gover sent a copy of the proposal to Mr Aird. It proposed the transfer of 15 of the shares held by Monogram to Mr Burnell and the Gover brothers upon the successful manufacture of a working Tag device, together with an option for the company to repurchase Mr Aird's remaining 30 shares over time in a manner which would provide an overall return to Mr Aird of approximately £10 million.
136. Mr Aird did not engage with the proposal immediately. A meeting did, however, take place at Mr Aird's home on 14 January 2017 at which the proposal was discussed in broad terms. Mr Aird discussed the proposal with Mr Burnell in advance and agreed with him that Mr Burnell would not attend. As part of the exchange of emails, Mr Burnell sent an email emphasising the contribution that he and the Gover brothers had made to the business. He did, however, indicate that, if Mr Aird wanted to engage more experienced people, he would be "ok with that". He also referred to the fact that his shares in TTL had not yet been issued, but stated that his and Mr Aird's "verbal agreement is good enough for me".
137. The Gover brothers, Mr Aird and Ms Currie, Mr Aird's wife, were present at the meeting on 14 January. Further discussion of the proposal was deferred pending Mr Aird and Mr Burnell's trip to Estonia to resolve issues in relation to the Tags.
138. Following the trip to Estonia, and the certification of the Restore software, Mr Julian Gover sought to contact Mr Aird about the proposal. Mr Aird responded on 5 February 2017 in an email which he had shared with Mr Burnell in advance. In that email, Mr Aird said that he wanted to become more involved in the running of the business (in particular, the commercialization of Restore);

he did not want to move away from the concept of an equal partnership between himself and Mr Burnell; and so any dilution required in order to accommodate any shareholding of the Gover brothers should be shared equally between Mr Burnell and himself. He also suggested that the shareholdings of Mr Clark and Mr Kriisk should be diluted to 1% at “the soonest appropriate time” to recognize the “cost, chaos, incompetence, and perhaps deceit they have visited upon us”. His alternative proposal was that share options should be granted to the Gover brothers and Ms Currie conditional upon the achievement of certain milestones by TTL or that the Gover brothers could acquire an immediate equity stake, if they were prepared to loan monies to TTL on the same terms as Mr Burnell.

139. Following a discussion with Mr Burnell, Mr Julian Gover responded to Mr Aird the following day, while expressing some hope that they could reach an agreement, stated that he and his brother were not prepared to continue to work for TTL for nothing based on “a participation to be agreed in the future”. He noted that Mr Aird’s position seemed to be in conflict with his “prior agreement that [he (i.e. Mr Aird) was] happy with the concept of trailing down [his] equity... within the business”.
140. On 6 February 2017, Mr Aird made a revised proposal, which still maintained the equality of shareholdings between himself and Mr Burnell. Under this proposal, the Gover brothers would each receive a 4% stake in TTL on the achievement of the manufacture and sale of working Tags and Restore products. The proposal assumed that Mr Clark and Mr Kriisk’s stakes would each be reduced to 1%, thus preserving Mr Aird and Mr Burnell’s stakes at 45% each. The email confirmed that Mr Burnell would continue to make decisions as CEO on a day-to-day basis and expressed Mr Aird’s desire for the Gover brothers to remain involved. Mr Aird described this as “a reversal of [his] retirement plan”.
141. Mr Julian Gover responded to Mr Aird later that day confirming that he and his brother were not prepared to continue to work for TTL on that basis and suggesting that Mr Aird resolved his arrangements with Mr Burnell.
142. The Gover brothers met Mr Burnell on the morning of 8 February 2017 and confirmed that they did not want to commit further time to TTL. It was Mr Julian Gover’s evidence that the Gover brothers ceased their involvement with TTL from that time with the exception of circumstances in which they were asked for a second opinion by Mr Burnell or where Mr Clark or Mr Kriisk asked for their assistance. This is not entirely accurate as can be seen from later events.
143. Mr Aird has asserted that the proposal put forward by the Gover brothers was orchestrated by Mr Burnell as part of a plan to take control of TTL or its business. The evidence does not support Mr Aird’s claim. Mr Burnell was



aware of the proposal. He was shown a version of the equity model by Mr Julian Gover as early as 8 November 2016. Although he took no part in the negotiations between Mr Aird and the Gover brothers, Mr Burnell was also aware of the developments in those negotiations. However, there was no concerted plan to oust Mr Aird from TTL against his wishes. Mr Aird accepted in cross-examination that there was nothing underhand about the proposal that the Gover brothers made. It was simply unacceptable to him. At least until Mr Aird's change of heart in February 2017, Mr Burnell and the Gover brothers were working on the assumption that Mr Aird was prepared to reduce his participation in the business over time. Mr Aird had given some indications to this effect. Mr Burnell and the Gover brothers assumed that this would permit increased participation by them.

144. The conclusion of this episode represents a turning point in the relationship between Mr Aird and Mr Burnell. Up to this point, although they had their differences, their relationship was cordial and business-like. Following Mr Aird's rejection of the Govers' proposal, their relationship becomes more strained and Mr Burnell becomes more protective of his financial position in the company.

#### **The renegotiation of Mr Aird and Mr Burnell's agreement (February 2017)**

145. Following the meeting with the Govers on 8 February 2017, Mr Burnell sought a meeting with Mr Aird to discuss the Govers' continued involvement in TTL. Mr Aird responded asking Mr Burnell to let him know what the Govers' bottom line might be.
146. Mr Burnell and Mr Aird met at Mr Aird's home that evening. Ms Currie was also present. Mr Burnell brought up the subject of his own investment in TTL. It was at this meeting that Mr Aird and Ms Currie first raised concerns about a conspiracy involving the Govers and Mr Burnell to exclude Mr Aird from TTL. Mr Burnell rejected this notion. He suggested that he would walk away from the business provided that his loan was repaid. Despite this, the outcome of the meeting was that Mr Aird and Mr Burnell began to renegotiate the arrangements between them.
147. After this discussion, and over the course of the next few days, there followed an exchange, usually by email, of working drafts of a revised agreement between Mr Aird and Mr Burnell to cover the arrangements between them. In the course of this exchange, Mr Aird assured Mr Burnell that he was sure that there was "nothing untoward" in Mr Burnell's previous discussions with the Govers.

148. Mr Burnell and Mr Aird finally reached a broad agreement on the revised terms. Mr Aird indicated his agreement to the terms in an email on 13 February 2017. Mr Burnell confirmed his agreement on 14 February 2017.

149. I have summarized below some of the main provisions of the revised agreement, and the history of the negotiations.

- (a) The agreement was entitled “Agreement between Robert Aird and Alan Burnell”. However, at the foot of the agreement was the following provision:

“The above terms are accepted for and on behalf of Monogram Capital Limited by Robert Aird director and Alan Burnell.”

- (b) Paragraph 1 of the agreement referred to the loans of approximately £600,000 which had been made by Mr Aird to TTL before Mr Burnell made his initial investment of £100,000. It provided for the correct amount to be certified by the auditors of TTL in due course. These loans are referred to in the agreement as “RA Loan 1” or “Series I Loans”.
- (c) Paragraph 2 refers to the first tranche of £100,000 of the Loan made by Mr Burnell to TTL in July 2016 “in exchange for 18 ordinary TTL shares” to be transferred from Monogram.

Mr Burnell included a provision to the effect that the shares must be transferred “with immediate effect”. Mr Aird’s amendments to the original provision were to include a provision which allowed for shares to be issued by TTL to Mr Burnell rather than transferred to Mr Burnell by Monogram. These changes were agreed.

- (d) Paragraph 3 noted that following the transfer of TTL shares to Mr Burnell (referred to in paragraph 2) Mr Burnell would hold 18 per cent. of the equity in TTL and Monogram would hold 72 per cent.

Mr Aird added a provision which allowed Monogram to transfer some of its retained shares to another entity controlled by Mr Aird or to Ms Currie. Mr Burnell agreed to this change.

- (e) Paragraph 4 of the agreement provided for new loans to be made by Mr Burnell and Mr Aird; these loans were in reality the fulfilment of their obligations to provide further investment to TTL as agreed in June 2016. Paragraph 4 provided that Mr Burnell would make a further loan of £150,000 and that Mr Aird would make a further loan of £250,000 “upon which” Monogram would transfer a further 27 shares in TTL to Mr Burnell.

- (f) In paragraph 5, it was agreed that Mr Aird's Series I Loans (i.e. those made before Mr Burnell's original investment) would be coupon free and with no fixed repayment date, but would be repaid if a liquidity event or events valued TTL at greater than £10m.

In the exchange of drafts between them, Mr Aird included a provision to the effect that the Series I Loans could also be repaid out of distributable profits if such profits arose before a liquidity event, with one third of any such distributable profits being allocated to the repayment of the Series I Loans. Mr Burnell deleted this provision stating that he would agree to lower the value of the liquidity events by way of compromise. Mr Aird objected to this change and requested that his original amendment (allowing the repayment out of distributable profits) should be reinstated.

In a final exchange of emails prior to their agreement, in an email dated 11 February 2017, Mr Burnell restated his position that "new money ranks ahead of old" and then stated that he "agreed to 1/3 of distributable profits against loans" without differentiating between Series I Loans and Series II Loans. Mr Aird expressed his agreement to the terms of this email in an email dated 13 February 2017 and this is followed by Mr Burnell's final confirmation on 14 February 2017.

- (g) Paragraph 6 provided that the new loans, advanced by each of Mr Aird and Mr Burnell under this agreement, and the first tranche of £100,000 advanced by Mr Burnell in July 2016, which were together referred to as Series II Loans, would rank equally with each other, carrying no coupon and having no fixed repayment date.

This provision appears to have been agreed, but, in a later amendment, Mr Aird sought to make the provision subject to the amendment that he had sought to make to paragraph 5 permitting the repayment of the Series I Loans out of distributable profits if such profits were available in advance of a liquidity event. Once again, this point, which is left open in the travelling draft, was addressed by the exchange of emails on 11, 13 and 14 February to which I refer at (f) above.

- (h) Paragraph 7 provided for the Series II Loans to rank ahead of Series I Loans for repayment. This appears to have been agreed, but, in a later amendment, Mr Aird marked this paragraph as subject to the changes made to paragraph 5. Yet again, this point was addressed by the exchange of emails on 11, 13 and 14 February to which I refer at (f) above.

- (i) Paragraph 8 initially allowed the board of directors to determine dividends, other shareholder distributions or loan repayments. Following changes made in the travelling draft, these decisions were reserved to shareholders.
- (j) Paragraph 9 provided for all loans to be secured against the assets of TTL.
- (k) Paragraph 10 included provisions for sanctions if either Mr Burnell or Mr Aird or Monogram failed to lend their additional funds to the company in accordance with paragraph 4.

As noted below, the new loans were made and so these provisions are not relevant for our purposes.

- (l) Paragraph 11 provided for any equity dilution to require the mutual agreement of Mr Aird and Mr Burnell.
- (m) Paragraph 12 contained provisions regarding the day-to-day running of the business. It was agreed that Mr Burnell would remain as CEO and would run TTL on a day-to-day basis. Mr Aird would be executive chairman. Neither Mr Burnell nor Mr Aird was to be paid other remuneration by TTL.
- (n) Paragraph 13 contained a provision dealing with circumstances arising on the death or incapacity of Mr Burnell or Mr Aird.
- (o) Paragraph 14 initially contained provisions regarding the use of any distributable profits to create a bonus pool, pay dividends or make loan repayments. It was agreed that this provision should be deleted and the shareholders should decide on the distribution of any profits.
- (p) Paragraph 15 contained provisions regarding the location of the business. It was agreed that this provision should be deleted.
- (q) Paragraph 16 initially contained a provision for the appointment of directors. It initially provided that any shareholder with a holding of 5% or more would be a director, but that Mr Aird and Mr Burnell could each appoint one additional director. It was agreed that this provision should be deleted. However, Mr Aird commented that Mr Clark and Mr Kriisk were currently directors, which created an imbalance on the board which needed to be addressed.
- (r) In paragraph 18, Mr Aird sought to include a provision with the following effect:

“[Mr Aird] and [Mr Burnell] agreed that [Mr Clark] and [Mr Kriisk] should agree to reduce their shareholdings prior to the introduction of the £400,000 [i.e. the new loans]. If they are not ready to agree [Mr Aird] and [Mr Burnell] will consider other ways of achieving this without their consent such as partial capitalisation of the loan monies.”

Mr Burnell did not agree to the insertion of this provision. He proposed that these matters should be the subject of a commercial discussion with Mr Clark and Mr Kriisk. Mr Aird accepted Mr Burnell’s position but expressed a concern that if the loan monies were advanced, he and Mr Burnell may lose a negotiating opportunity.

150. On 11 February 2017, Mr Aird confirmed that he had made a further advance of £100,000 to TTL.
151. As I have mentioned above, in the course of the exchange of drafts, Mr Aird included a provision allowing for the transfer of ordinary shares in TTL by Monogram to Mr Burnell to be replaced by an issue of shares by TTL to Mr Burnell, which would ensure that Mr Burnell held the same proportion of the share capital of TTL. This provision on its terms related only to the initial transfer of 18 shares in connection with Mr Burnell’s initial investment of £100,000. However, Mr Aird and Mr Burnell treated this provision as applicable to the shares which were to be made available to Mr Burnell in respect of both his initial investment and the new loan of £150,000.
152. Accordingly, in an email sent on 11 February 2017 as part of the exchanges of emails for the purposes of agreeing the terms of the draft agreement, Mr Burnell asked for 90 new ordinary shares to be issued to him by TTL to match Monogram’s existing shareholding rather than receive a transfer (or transfers) of shares from Monogram. (The effect of this was, of course, to dilute the shareholdings of Mr Clark and Mr Kriisk.)
153. In the same email, in relation to the draft terms, Mr Burnell stated “All agreed”, and confirmed that he would advance the second tranche of his loan (£150,000) on 13 February 2017.
154. Mr Aird responded on 13 February 2017, saying, “yes, all good to go” and asking if the second tranches could be paid the following week. Mr Burnell responded by email on 14 February, simply stating, “All agreed”.
155. On 20 February 2017, Mr Aird confirmed by email that he had advanced the second tranche, making an aggregate loan of £250,000. Mr Aird stated, “When you have put in your £150k I will get the shares issued”.
156. Mr Burnell responded on 24 February 2017, informing Mr Aird that he had paid the £150,000 second tranche of his loan. He asked Mr Aird to “go ahead and arrange for [TTL] to issue 90 new ordinary shares to me” and to send the share

certificate to his home. Mr Aird responded, on the same day, that he was “happy to do”.

157. In his email confirming the advance of the funds, Mr Burnell asked if Mr Aird would arrange for appropriate filings at Companies House in relation to the issue of the new shares and his appointment as a director of TTL. He also reminded Mr Aird that all new loans (i.e. Series II Loans) would rank ahead of old loans (i.e. Series I Loans) and all loans would carry no coupon. Mr Aird responded, confirming that he would take care of the formalities at Companies House but questioned the ranking of loans. Mr Burnell referred him to the exchange of emails on 11, 13 and 14 February to which I refer above.

**Events leading to the board meeting on 7 March 2017 (February and March 2017)**

158. Before I set out the events leading to the meeting on 7 March 2017, which is one of the key events in this case, I should record the status of the development of the products at this time (mid-February 2017):
- (a) Reports in the Press about the certification of Restore had generated some interest in the Restore software from the Road Haulage Association and the Metropolitan Police.
  - (b) However, TTL was still seeking to renegotiate some of the conditions which had been imposed by the Home Office on the certification of the Restore software, which would allow the system to be marketed more widely.
  - (c) Also, in relation to Restore, Mr Aird and Mr Burnell were considering whether or not it might be possible to source a new, cheaper, supplier of the hardware to replace Axiom.
  - (d) In order to assist with the development of the manufacturing files for Tags, Mr Kriisk had placed orders with a Chinese supplier, ALLPCB for the manufacture of some of the printed circuit boards for some of the Tags. Mr Kriisk placed this order on behalf of TTS but payment for this order was made by TTL and was authorized by Mr Burnell.

***Mr Clark and Mr Kriisk are asked to provide matching funding***

159. On 27 February 2017, Mr Aird sent an email to TTL’s accountants, FSM, stating that it had been agreed that TTL would issue new ordinary shares to Mr Burnell and Mr Aird so that, following the share issue, the share capital in TTL would be owned by Mr Aird, Mr Burnell, Mr Clark and Mr Kriisk in the proportions 90:90:5:5. He asked FSM to advise further.

160. Also on 27 February 2017, Mr Burnell met Mr Clark and Mr Kriisk. Mr Clark and Mr Kriisk asked about their service agreements. Mr Burnell asked Mr Aird for copies. In response Mr Aird mentioned that he had asked the accountants to prepare the paperwork for the share issue, but questioned whether it might be necessary to offer Mr Kriisk and Mr Clark the opportunity to match the funding provided by Mr Aird and Mr Burnell in order to preserve their existing stakes in TTL.
161. Mr Burnell agreed to disclose the proposed share issue to Mr Kriisk and Mr Clark and to give them the opportunity to match his and Mr Aird's funding. Mr Aird sent a suggested agreement for this purpose to Mr Burnell. This draft agreement assumed that Mr Clark and Mr Kriisk would not provide additional funding and recorded their agreement to the share issue.
162. Mr Burnell spoke to Mr Kriisk and Mr Clark on the same evening. He told them of the proposed share issue, and offered them the opportunity to match the funding, which they declined. Mr Kriisk and Mr Clark raised the question of their service agreements. Mr Burnell told them that they had no entitlement to service agreements, but Mr Kriisk and Mr Clark referred to various exchanges and discussions with Mr Aird in which they had been given assurances that they would continue to be paid as consultants until funding was in place, at which point their service agreements would come into effect.
163. Mr Burnell reported this conversation to Mr Aird and asked him to confirm the position. In a later email, he also confirmed that Mr Clark and Mr Kriisk had declined the opportunity to match the funding and asked Mr Aird to "go ahead and issue my shares and my directorship".
164. The following morning (28 February), Mr Clark sent Mr Burnell copies of the service agreements and copies of various emails and documents which Mr Kriisk and Mr Clark said confirmed their view.
165. That same morning, Mr Aird responded to Mr Burnell's email of the previous evening setting out his view that the service agreements would only take effect if, in Mr Aird's opinion, TTL had secured sufficient funding, which in his view it had not, and that he was under no obligation to fund the company after 4 August 2016 if such funding had not been secured. He also noted that the various documents permitted the dilution of Mr Kriisk and Mr Clark's equity stakes. He suggested that he and Mr Burnell should speak to the company's lawyers, Downs, to ensure that all the necessary requirements were met. He also suggested that they should discuss with Downs the difficulties concerning the contractual position with Axiom and CAST certification in relation to Restore. Mr Burnell asked whether it would be possible to have a meeting with Downs later in the day.

*The meeting with Mr Pfister (28 February 2017)*

166. Mr Aird and Mr Burnell met Mr Pfister of Downs solicitors in the afternoon of 28 February 2017. Mr Pfister's note of the meeting suggests that the matters discussed included the following:

- (a) Mr Burnell and Mr Aird confirmed that the current shareholdings in TTL were: 90 ordinary shares held by Mr Aird, 90 ordinary shares held by Mr Burnell, 5 ordinary shares held by Mr Clark, and 5 ordinary shares held by Mr Kriisk. (However, at this stage, no shares had been issued to Mr Burnell).
- (b) There was a discussion of the effect of the joint venture agreement on the ability of Monogram to dilute the shareholdings of Mr Clark and Mr Kriisk. Mr Pfister's initial advice was that there was a right for Monogram to dilute Mr Clark and Mr Kriisk's shareholdings in order to introduce a new investor.
- (c) The subject of the ownership of the intellectual property in the Tags and Restore software was also discussed together with the terms of the Licence Agreement, the potential exposure of TTL to TTS, and the risk to TTL of Mr Kriisk leaving the company. Mr Kriisk was recognized as a "critical individual" who needed to be handled with "kid gloves".
- (d) Mr Pfister had not previously reviewed any of the documents other than the Licence Agreement. (He had prepared an early draft of the Licence Agreement, but had not been involved in the preparation of the final version.) Mr Pfister therefore reserved his position in relation to the interaction of the Joint Venture Agreement, the Licence Agreement, the side letter and the service agreements. He agreed to provide written advice on the terms of the Joint Venture Agreement.
- (e) At the meeting Mr Pfister was asked to process Mr Burnell's appointment as a director of TTL with Companies House. Mr Pfister made an electronic filing of a form AP09 (appointment of director) in the course of the meeting. The filing showed that Mr Burnell had been a director of TTL with effect from 1 July 2016.

Mr Burnell said in his evidence that he did not pay any attention to the date of 1 July 2016 on the form. However, given the circumstances, it is implausible that Mr Burnell was not aware of the date on the form. I find as a fact that he was aware and that he consented to the filing being made on that basis.

167. Although it is not reflected in Mr Pfister's meeting note, Mr Aird had to leave before the end of the meeting. Mr Pfister and Mr Burnell completed the



discussion of the terms of the joint venture agreement in Mr Aird's absence. In this part of the meeting, Mr Burnell questioned whether Mr Pfister was acting for Mr Aird or TTL. Mr Pfister asserted that he acted for TTL and not Mr Aird.

***Discussions regarding the service agreements***

168. It is Mr Kriisk's evidence that, on 1 March 2017, Mr Burnell had a discussion with Mr Kriisk and Mr Clark in which he acknowledged that he had invested £250,000 in TTL. Mr Clark and Mr Kriisk also suggested that the Joint Venture Agreement, the Licence Agreement and the service agreements were all linked and provided Mr Burnell with copies of relevant emails leading up to the execution of the agreements on 4 May 2016. I have accepted this evidence as it fits best with the chronology of related events.
169. Mr Burnell called Mr Pfister on 1 March 2017. Mr Lucien Gover also attended this call. Mr Burnell raised various concerns including:
- (a) that the Licence Agreement, the Joint Venture Agreement and the services agreements should be regarded as linked given the basis on which TTS had entered into the arrangements
  - (b) the risk of Mr Clark and Mr Kriisk leaving the company as a result of their service agreements not taking effect and their being diluted by the share issue to Mr Burnell; and
  - (c) his concern that the option to purchase the intellectual property under the Licence Agreement might become unenforceable if TTL did not honour its obligations to make payments due to TTS under the Licence Agreement (which Mr Aird was refusing to pay).

Mr Pfister did not agree with these concerns, but agreed to look at them further. Mr Burnell agreed to send copies of relevant documents and emails to Mr Pfister.

170. In a later email, attaching copies of the relevant documents and emails, Mr Burnell acknowledged Mr Pfister's advice that the Licence Agreement was not on its terms linked to the Joint Venture Agreement, but reiterated his concern that, in commercial terms, there was a link between the agreements; they were all signed on the same day and Mr Laul made it clear that he would only enter into the Licence Agreement if the position of Mr Kriisk and Mr Clark with TTL was secure. Mr Pfister called Mr Burnell later in the day in response to this email. He said that he would give his written advice later.
171. Also on 1 March 2017, Mr Clark sent an email to Mr Burnell on behalf of himself and Mr Kriisk formally asking for the service agreements to be put into effect with effect from 1 March 2017. The email referred to the agreements

with Mr Aird on 4 May 2016 and suggested that once the service agreements were in place, there should be some discussion of new “milestones” for increasing Mr Clark and Mr Kriisk’s equity participation in TTL. This email was written at the request of Mr Burnell, who had asked Mr Clark and Mr Kriisk to make this request formally so that he could then forward it to Mr Aird for discussion.

172. Mr Burnell forwarded the email to Mr Aird and Mr Pfister. He reiterated his concerns about the linkage between the agreements.
173. Later that evening, Mr Burnell sent an email to Mr Aird, copied to Mr Pfister, in which he asked for confirmation that Mr Aird’s accountant had procured the issue of the 90 shares in TTL to him.
174. On 2 March 2017, Mr Clark wrote to Mr Burnell noting that, from the Companies House filings, Mr Burnell had been appointed as a director of TTL with effect from 1 July 2016 and inferred that Mr Burnell had made his investment on or about that date. Mr Clark asked Mr Burnell to call a board meeting to discuss the matters raised in the emails from the previous day together with the possibility of converting Monogram’s loans to TTL into loan stock with a coupon and fixed repayment date as set out in the Joint Venture Agreement. Mr Clark said that Mr Kriisk would refuse to travel to Estonia – to progress the development of Tags – unless and until this matter was resolved. Mr Burnell responded to the effect that he was prepared to call a board meeting but that he would need an appropriate agenda to do so. He copied Mr Aird on this response.
175. Mr Clark then prepared an agenda for a board meeting with the assistance of the Gover brothers. The agenda included the activation of the service agreements for Mr Kriisk and Mr Clark, the treatment of Monogram’s loans under the Joint Venture Agreement, the milestones for future equity participation by Mr Kriisk and Mr Clark and the arrangements for further dilution of equity stakes of shareholders.
176. There was also an exchange of emails between Mr Burnell and Mr Aird in which Mr Burnell described Mr Kriisk as “kicking off” and suggesting that he would call a board meeting unless he heard otherwise from Mr Aird. Mr Burnell confirmed that he would vote “No” at any board meeting to the activation of the service agreements and “No” to the conversion of the loan stock on the grounds that that was a matter between the parties to the Joint Venture Agreement.
177. Mr Aird, in his response, mentioned that he had told the accountants to “hold off” the share issues pending a review of Mr Clark and Mr Kriisk’s claims against TTL. He did not accept that the Licence Agreement was potentially invalid. He suggested increasing the number of shares to be issued to Mr Aird

and Mr Burnell so that each held 900 ordinary shares, further diluting Mr Clark and Mr Kriisk, to give himself and Mr Burnell “a better bargaining position”.

178. Mr Aird also put forward the possibility that he and Mr Burnell should withdraw their funds to “remove any argument about sufficiency” (i.e. under the Joint Venture Agreement and the side letter) and offered to repay Mr Burnell’s loans if he wanted to exit from the company.
179. On the following day (3 March 2017), Mr Clark sent an email to all directors, including Mr Burnell, seeking to convene a meeting. Mr Aird responded refusing to attend on 3 March 2017, but suggesting that he would be willing to meet on or after 7 March 2017. Mr Clark sought to reconvene the board on 7 March 2017 so that Mr Aird could attend.
180. On 3 March 2017, there was an exchange of emails between Mr Aird and Mr Burnell. Mr Aird was wary of having the board meeting unless Mr Burnell and Mr Aird had agreed a path forward which was confirmed by the lawyers. He put forward a proposal to dilute Mr Kriisk and Mr Clark’s shareholdings further by issuing shares in TTL so that Mr Burnell and Mr Aird each held 9,000 shares, to terminate Mr Clark’s consultancy with TTL and to enter into Mr Kriisk’s service agreement. He suggested that he and Mr Burnell should meet with Mr Pfister in advance of the meeting. Mr Burnell did not respond.
181. On 6 March 2017, Mr Aird sent an email to Mr Clark saying that he would not be available to meet on 7 March 2017. He also questioned whether or not the main matter for discussion at the meeting (the activation of the service agreements) was a proper subject for a board meeting as it was a matter between the parties to the Joint Venture Agreement. He suggested a meeting to address this issue on 9 March 2017, subject to the circulation and agreement of an appropriate agenda. Mr Burnell responded to Mr Aird following this email to suggest that it might be preferable to have a board meeting to discuss the issues.
182. There followed a heated and acrimonious email exchange between Mr Kriisk and Mr Aird. Mr Kriisk insisted on having a board meeting to discuss the service agreements on 7 March 2017 and expressed his anger that Mr Aird, having agreed to the meeting, was now proposing not to attend. Mr Aird responded saying that the funding provided by Mr Burnell and Mr Aird remained conditional and was not sufficient to meet the requirements of the Joint Venture Agreement. He raised various allegations against Mr Kriisk concerning possible breaches of company rules by withholding information and using personal email accounts. He also suggested that Mr Kriisk may be in breach of his fiduciary duties to TTL, and asserted that there could be no valid board meeting on 7 March 2017 as he had not given his consent to short notice.

183. Mr Kriisk denied the allegations, accused Mr Aird of bullying, and insisted that the board meeting would proceed.
184. In advance of the meeting, Mr Aird and Mr Burnell exchanged emails in which Mr Aird initially proposed to send letters to Mr Clark terminating his arrangements and to Mr Kriisk activating his service agreement as he had previously proposed. Following the exchange with Mr Burnell, he did not do so. Mr Burnell said that he proposed to attend the meeting and encouraged Mr Aird to attend too. Mr Aird authorized Mr Burnell to exercise his votes as his proxy.

### **The meeting on 7 March 2017**

185. The meeting was held on 7 March 2017 in Guildford. Mr Kriisk, Mr Clark and Mr Burnell were all present. Mr Aird did not attend. The minutes of the meeting, which are expressed to be “minutes of a meeting of the board of directors” record a discussion of the following matters:
- (a) There was a discussion of the allegations made by Mr Aird against Mr Kriisk in his email of the previous day.
  - (b) Mr Burnell refused to provide confirmation of the status of the funding that had been made available by Mr Aird and Mr Burnell. Mr Clark and Mr Kriisk raised the question of the solvency of TTL in the event that the funding provided by Mr Aird and Mr Burnell remained conditional. It was agreed that a further board meeting should be held on 10 March 2017 to consider the solvency position of the company in the light of up to date financial information.
  - (c) Mr Kriisk asked Mr Burnell if he had been appointed as a director of the company. Mr Burnell confirmed that he had, but he was unable to confirm whether or not he had been appointed as “one of Mr Aird’s two directors” under the provisions of the Joint Venture Agreement. Mr Clark and Mr Kriisk assumed that Mr Burnell had been appointed under the Joint Venture Agreement.
  - (d) Resolutions were put to the meeting that the service agreements for Mr Clark and Mr Kriisk should commence on 1 July 2016 or 1 March 2017. These resolutions were not passed. Mr Burnell voted against the resolutions and purported to exercise the votes of Mr Aird to vote against the resolutions.
  - (e) A resolution to “cancel” the service agreements was passed. Mr Clark and Mr Kriisk voted in favour. Mr Burnell abstained.

- (f) It was agreed that full details of the loan accounts from Monogram would be obtained and provided to directors.
  - (g) It was agreed that future milestones for the increase in the equity participation of Mr Clark and Mr Kriisk were a matter for discussion in the context of the Joint Venture Agreement.
186. The draft minutes were prepared by Mr Clark with the input from Mr Kriisk and with assistance from Mr Julian Gover. They were circulated by Mr Clark that evening to all the attendees and Mr Aird.
187. Also on 7 March 2017, Downs issued their note of advice (dated 6 March 2017). The note of advice recorded Downs' understanding that 90 shares had been issued to Mr Burnell and concluded that the Licence Agreement should be treated as a "stand-alone document" (i.e. its enforceability was not dependent upon the other agreements) but that the position was not "clear-cut".
188. Later on the evening of 7 March 2017, and after receiving the draft minutes, Mr Aird wrote to Mr Burnell expressing his concern at the matters which had been discussed, and the fact that he had not received an agenda in advance. He stated that he did not accept the validity of the meeting and that he would be taking legal advice. He expressed his appreciation that Mr Burnell had not accepted his offer to refund Mr Burnell's investment.

#### **The fall-out from the meeting on 7 March 2017**

189. The following morning, 8 March 2017, Mr Aird sent an email to Mr Burnell, Mr Kriisk and Mr Clark, in which, amongst other things:
- (a) he expressed his view that the board meeting was not valid on the grounds that inadequate notice had been given and an agenda had not been circulated;
  - (b) he dismissed any concerns that the company was insolvent and the need for a board meeting to discuss the solvency of TTL;
  - (c) he denied that Mr Burnell was "one of [his] directors" appointed pursuant to the Joint Venture Agreement but stated that Mr Burnell "is appointed as part of the condition of putting his funds in".
  - (d) he announced that Mr Kriisk's service agreement would be activated and that Mr Clark's arrangements would be terminated on one month's notice; and

(e) he refused consent for a board meeting on 10 March 2017, but agreed to consider it if an agenda was circulated, and suggested a meeting of parties to the Joint Venture Agreement on 10 or 13 March.

190. Mr Aird had not given Mr Burnell any notice of his intention to send this email, but he did, in a further email to Mr Burnell, suggest that the decision on the service agreements was revocable at a subsequent board meeting.

***Mr Kriisk resigns***

191. There followed another acrimonious email exchange between Mr Aird and Mr Kriisk. Mr Kriisk accused Mr Aird of treating him and Mr Clark with contempt. He asserted that the meeting on 7 March 2017 was a valid board meeting and that the matters discussed were appropriate for such a meeting. He noted that if the company was solvent and was in possession of the funds to which Mr Aird referred, then it was in breach of the agreements made in May 2016 if it did not activate the service agreements. He regarded that breach as a breach of all of the other agreements, and, in particular the Licence Agreement, because TTS had only signed the Licence Agreement on the basis that Mr Kriisk and Mr Clark's position with TTL was secure. Mr Kriisk said that he had resigned as Chief Technical Officer "as of yesterday" and tendered his resignation as a director of TTL. There was no need for the proposed meeting on 10 March 2017 because he and Mr Clark were "not anymore part of this company".

192. Mr Aird responded by reminding Mr Kriisk of his contractual and fiduciary duties, suggesting to Mr Kriisk that he would need to honour the three month notice period in the service agreement, which had taken effect that day, and noting that his resignation as a director would only take effect when it was accepted.

193. Mr Clark was also considering whether or not to resign as a director of TTL. He was, however, persuaded by Mr Julian Gover not to do so.

194. There are some suggestions arising from the evidence concerning the motivation for Mr Kriisk's resignation that I should address at this point. Mr Clark put forward the view in his written evidence that Mr Kriisk's heated response had been stirred up by Mr Burnell. Mr Aird's view was that Mr Kriisk would not have reacted in this way if he had not had a better option (i.e. an offer from Mr Burnell). I cannot accept these views. This was Mr Kriisk's own decision, made after many months of simmering resentment of Mr Aird. Mr Burnell had not made any offer to Mr Kriisk at this stage. Mr Clark accepted in cross-examination that he shared Mr Kriisk's concerns at the way they had been treated by Mr Aird and that it was within Mr Kriisk's character to react in this way.

195. At this point, Mr Burnell sent an email to Mr Aird, Mr Kriisk and Mr Clark asking them all to refrain from further hostile email exchanges. He asked for 48 hours to discuss matters with each of them and to attempt to broker a solution. Following this email, he sent an email to Mr Clark telling him that he should not feel “not part of the process” but that Mr Aird and Mr Kriisk needed to “take a deep breath”.
196. Mr Burnell expressed his concerns to Mr Aird. They agreed to meet that evening at Mr Aird’s home. Their accounts of this meeting are conflicting. What is clear is that they discussed possible ways forward for TTL. Mr Burnell says that he suggested seeking to negotiate a split of the business, with TTL continuing to take forward the Restore business, but leaving TTS to exploit the Tags business with the involvement of Mr Kriisk. Whatever the precise formulation of Mr Burnell’s proposal, Mr Aird did not agree to it. Ms Currie was present for part of this meeting and she had a disagreement with Mr Burnell.
197. On the morning of 9 March 2017, Mr Aird sent an email to Mr Burnell suggesting that further shares in TTL should be issued so that they each held 900 ordinary shares and that steps should be taken to “formalize” their loan terms. Later in the day, he called Mr Pfister at Downs to request advice on the validity of the board meeting that was held on 7 March 2017.
198. Mr Burnell and Mr Lucien Gover met Mr Kriisk later that day. Mr Kriisk insisted that he would not work with Mr Aird again. Mr Burnell discussed a proposal with Mr Kriisk under which TTL’s business would be split in a manner similar to that which he had described to Mr Aird the previous evening. Following that discussion, Mr Burnell called Mr Aird, who rejected the proposal. Mr Clark says that he was not informed of the proposal before it was put to Mr Aird.
199. On the evening of 9 March 2017, Mr Aird sent an email to Mr Kriisk accepting Mr Kriisk’s resignation as a director. He did not speak to Mr Burnell in advance of sending this email.

***Demands by Mr Burnell for repayment of his loan***

200. The following morning, on 10 March 2017, Mr Aird sent an email notifying Mr Burnell, Mr Kriisk and Mr Clark that Ms Currie had been appointed to the board of directors of TTL. He asked Mr Clark to confirm that he was resigning as a director.
201. Mr Burnell responded to this email challenging Mr Aird’s ability to take these actions unilaterally, referring to the fact that he had not been issued with any shares in TTL as agreed and demanding that his loan be repaid immediately.

202. At this point the relationship between Mr Burnell and Mr Aird broke down completely. In the correspondence between them Mr Burnell accused Mr Aird of having created a crisis for the business by refusing to honour the rights of Mr Kriisk and Mr Clark to their service agreements, by planning to dilute their existing equity stakes and by threatening them with legal action in relation to their contractual and fiduciary duties. He also accused Mr Aird of misleading him about the plans to issue shares in TTL to him. He made further demands for the return of his loan. At one point, he concluded, "If you choose not to return my loan as you suggested today without a litany of unenforceable and ludicrous conditions, I will remain a director and take the appropriate action to protect my loan."
203. For his part, Mr Aird asserted that he would permit the issue of shares to Mr Burnell provided that appropriate legal processes were first undertaken; referred to Mr Burnell being complicit in the plans to dilute Mr Kriisk and Mr Clark and to defer the activation of their service agreements; and stated that he was willing to repay the investment made by Mr Burnell provided that assurances were given that neither Mr Burnell nor the Gover brothers would be involved in any business which could potentially compete with TTL in the same sector.
204. The email exchanges continued. In an email on 13 March 2017, Mr Aird again alleged that Mr Burnell was involved in a conspiracy with Mr Kriisk, Mr Clark, Mr Laul and the Gover brothers to gain control of TTL and its assets, which Mr Burnell denied. Mr Burnell in turn sought to blame Mr Aird for the breakdown of the relationship with Mr Kriisk and Mr Clark and continued to demand the repayment of his loan. Mr Aird offered to complete the agreement with Mr Burnell and to procure the issue of shares to him or to repay Mr Burnell's loans subject to a restrictive covenant being given by Mr Burnell and the Gover brothers or to allow Mr Burnell to buy him out. Mr Burnell asserted that he just wanted to be repaid, but would consider the proposal of a restrictive covenant.
205. On 14 March 2017, Mr Burnell sent a further email to Mr Aird requesting the repayment of his loan. This email is instructive as it provides a contemporaneous summary of Mr Burnell's state of mind and his motivations.

My single concern is the return of my loan. I have been very clear that I will take whatever action I can to recover my loan.

Please read the emails from last week. You said that the loans were contingent and could be withdrawn at anytime. I have no control or visibility of the Bank account.

In the spirit of your latest email, please agree to not enter into any expenditure. I don't have to worry myself about any of the issues within TT if I get my loan back. Hopefully you may consider my actions purely in the light of someone who wants the return of his money.



If you read your emails , you decided to bring about a conflict with RK/SC. This has been a strategy which I disagreed with. You were certain you knew them and would win. Perhaps in hindsight if you had actually met with them at last Tuesday's meeting, you would have realised things had moved on.

I don't share your confidence in TTL any longer. I get nervous when you haven't issued any shares. On Friday you sought to put new conditions upon this matter. The pattern of your negotiation skills and reading emails, caused me to behave rashly. I just want my money back. I can leave you to pursue your strategy and I don't have to pay for its potential failure. I am basically a trader and I don't like the risk/return.

Addressing your liquidity questions. I wish to withdraw my money. You can withdraw yours at any time. Again please read your emails. The agreement with TT Ou is valid. The royalties due are 500k. I assumed as part of your strategy is to use this, that these are liabilities. I don't share your confidence about getting product, channel partners etc. This is a commercial strategy that is clearly your area of expertise.

I want to walk away with my money returned. I am well aware of my responsibilities. I don't want to cause you any harm. I want you to pursue your strategy. Being involved will undermine that strategy. In the cold light of day, I think TTL is facing a challenging future. I allowed my emotions to rule my head. The dream was always so powerful. All it took was one meeting and the possibilities seemed endless. I am embarrassed to admit that it made me irrational economically. TTL with its history and structure was always going to struggle. The lack of actual IP and strategy of not owning anything was in hindsight flawed. RK was the key man and your relationship with him was fraught. I mistakenly believed I could control that.

I would encourage you to attend the meeting tomorrow. Of course you will use your 90% shareholding to overturn everything. If you had actually issued my shares as per our agreement, you could not do so. Therefore you cannot issue them and try to claim I am a shareholder in a liquidation. The issue of solvency is actual. You remind me of my responsibility. I am merely using your emails to ensure my strategy of getting my loan.

I get very nervous when I face economic loss. I want to cut my position. I become singularly focused upon it. This is a flaw in my character which I have used successfully in my career as a positive. Please return my loan. I will agree to postpone all meetings and all emails. I will meet you next week, next month, next year. I don't mind when. I do mind when I have no control. You can perhaps understand that next week means you begin loading the Board with connected parties and can basically do whatever you want. You own 90% of the company and control the Board. Your first move to is remove all current Directors , and then my only avenue of return of my loan is a creditors route which although we can both agree will be successful, takes time and money. I don't believe you are legally allowed to withhold my loan against allegations of conspiracy. You can use other legal means to pursue that or any other restrictive covenant.

In conclusion, please return my loan. I will resign as a Director. TTL is once again yours. We can return to being parents.

***The receipt of the invoices from TTS***

206. On 13 March 2017, TTS (Mr Laul) sent two invoices to TTL (Mr Burnell): one for £30,000 in respect of instalments of the option fee due under clause 3.2 of the Licence Agreement on the basis that the fee was due in respect of the delivery and testing of the Restore software; and one for €23,751 in respect of minimum royalties due under clause 10.6 of the Licence Agreement.
207. On 14 March 2017, Mr Burnell sent an email to Mr Aird concerning the invoices from TTS. Although his covering email refers to invoices in the plural, he attached only the invoice relating to the payment of instalments of the option fee. (I am satisfied that this was an error. It is clear from Mr Burnell's email that he had received more than one invoice from TTS. If Mr Burnell had – as Mr Aird alleges – been wanting deliberately to conceal the second invoice, he would not have referred to it.)
208. Mr Aird questioned whether any sums were due under the Licence Agreement. He later sent an email to Mr Laul also questioning whether or not the relevant conditions had been met for the issue of the invoice under the Licence Agreement and asking for future correspondence to be directed to him.
209. Mr Aird also sent an email to Mr Burnell asking whether in his communications with Mr Laul he had varied the terms of the Licence Agreement and making further allegations of a conspiracy.
210. The following morning, 15 March 2017, Mr Burnell responded to Mr Aird's email rebutting any suggestions that he had varied the Licence Agreement and noting that there had been no response from TTS to his previous suggestions (on 23 January 2017) to reschedule the payments under the Licence Agreement. He suggested that he and Mr Aird should discuss the matter with Mr Pfister at the meeting later that day.

**Preparation for the meeting on 15 March 2017**

211. In the meantime, on 13 March 2017, Mr Clark sought to reconvene the board meeting that had been scheduled for 10 March on 15 March 2017. Mr Aird questioned the validity of the meeting on the grounds that no agenda had been circulated and stating that he would not, in any event, be available. Mr Clark responded providing an outline agenda.
212. The following events occurred on 14 March 2017.

- (a) Mr Aird sent an email to Mr Burnell and Mr Clark restating his assertion that the board meeting called for 15 March 2017 would be invalid, but confirming that he would attend. In this email, Mr Aird also notified Mr Burnell and Mr Clark that his son, Mr Christian Aird, would also attend the meeting as a director and would be appointed by Monogram as one of its nominated directors later that day; that Ms Currie could not attend, but that he (Mr Aird) would exercise her votes by proxy; and that Downs would attend the meeting to take minutes and advise on process.
- (b) Mr Aird then circulated a written resolution to each of Mr Clark and Mr Kriisk, in their capacities as shareholders of TTL, pursuant to which it was proposed that the shareholders would appoint Mr Christian Aird and Ms Currie as directors by ordinary resolution.
- (c) On the instructions of Mr Aird, Mr Pfister of Downs circulated his advice on the validity of the meeting held on 7 March 2017 and the meeting due to be held on 15 March 2017. The advice concluded that:
  - i. the meeting held on 7 March 2017 [was invalid] because Mr Aird had not been provided with written notice containing an agenda;
  - ii. the meeting to be held on 15 March 2017 [would also be invalid] because the notice of the meeting did not include a written agenda;
  - iii. any attempt to declare the company insolvent without the meeting being in possession of the full facts may be “deemed to be a breach of directors’ fiduciary duties”.
- (d) Later that evening, Mr Burnell sent an email to Mr Pfister challenging his advice and the assumptions on which it was based and asking Mr Pfister to revise his advice. Mr Pfister refused.
- (e) Mr Burnell issued a statutory demand against TTL demanding repayment of his £250,000 loan. The statutory demand asserted that the loan was repayable on demand. (The demand was not served until 16 March 2017.)
- (f) Mr Aird sent an email to Mr Clark advising him that his services were no longer required but that TTL would “honour the one-month notice period agreed” and asking him to return his company ‘phone and computer at the meeting the next day.

### **The meeting on 15 March 2017**

213. The meeting took place later that day. Mr Aird, Mr Burnell and Mr Clark all attended the meeting. Mr Christian Aird also attended. Mr Pfister was not

present. The reason given for his non-attendance was that he considered that it would not be appropriate for him to attend a meeting which he regarded as invalid. It was agreed that Mr Christian Aird would take the minutes.

214. The draft minutes prepared by Christian Aird record the following matters:
- (a) Mr Aird continued to assert that the meeting was invalid. He said that he was attending the meeting to ensure that Mr Burnell and Mr Clark would not seek to pass any invalid resolutions.
  - (b) The minutes of the meeting on 7 March 2017 were not approved. Mr Burnell and Mr Clark voted to approve the minutes. Mr Aird and Mr Christian Aird voted against their approval and Mr Aird sought to exercise Ms Currie's vote by proxy to vote against the approval of the minutes. This was challenged by Mr Burnell.
  - (c) There was a discussion concerning the solvency of TTL, in particular the concern that Mr Aird might withdraw his or Monogram's funding from TTL at short notice. Mr Burnell asked Mr Aird for commitments that Mr Aird and Monogram's funding would remain in place. There was also a discussion of the lack of available financial information to enable directors to form a view on the solvency of the company.
  - (d) The issue of the service agreements for Mr Clark and Mr Kriisk was also discussed. This was part of the discussion as to whether the company had sufficient funds for the service agreements to commence under the terms of the Joint Venture Agreement. Mr Aird asserted that the company did not have sufficient funds to meet obligations under the service agreements and its other obligations whilst it did not have a working product.
  - (e) The issue of the invoices which had been received from TTS was also raised. Mr Aird noted that TTL had paid for the PCBs which had been ordered from ALLPCB. He questioned who had issued the order for the PCBs and why the PCBs had not been delivered. Mr Burnell assumed that TTS had issued the order, but he acknowledged that he had authorized a payment in order to ensure that a working product could be produced. Mr Burnell refused to liaise further with TTS concerning this matter whilst Mr Aird continued to raise allegations of a conspiracy between Mr Burnell and others including TTS.
  - (f) Towards the end of the meeting Mr Burnell stated that he "resigned as CEO".
215. Mr Christian Aird circulated the draft minutes of the meeting on 15 March 2017 on 17 March 2017. In subsequent correspondence, Mr Burnell challenged some

aspects of the minutes and asked for some amendments to be made, but he did not challenge the statement that he had resigned “as CEO”. An amended version of the minutes prepared by Mr Burnell, Mr Lucien Gover and Mr Clark in advance of the meeting on 29 March 2017 (see below) recorded that Mr Burnell stated that “as Mr Aird had accused him of conspiracy along with all other people involved with TTL, that Mr Aird had made his position as CEO untenable and that he was resigning with immediate effect”.

### **Communications with TTS regarding the TTS invoices (16-18 March 2017)**

216. Mr Aird’s email to Mr Laul, to which I referred at [208] above, prompted an angry response from Mr Laul on 16 March 2017. Mr Laul demanded the immediate payment of his invoices. He also referred to the payment which TTL had made for the PCBs on behalf of TTS and suggested that Mr Aird should deduct the bill for the PCBs from the amounts which were owed to TTS. He threatened to take legal action if his invoices were not paid.
217. Mr Aird immediately sent an email to Mr Burnell and Mr Kriisk pointing out that Mr Laul’s email referred to matters discussed at the board meeting (i.e. the payments for the PCBs) intimating that this was evidence of collusion with Mr Laul.
218. On 17 March 2017 Mr Burnell wrote to Mr Aird suggesting that he take a more conciliatory approach with Mr Laul and that he should take legal advice from Mr Pfister regarding the interpretation of the Licence Agreement before responding to him.
219. On 18 March 2017, without speaking to Mr Pfister, Mr Aird responded to Mr Laul asserting that the conditions for the payment of the option fee under the Licence Agreement had not been satisfied.
220. At this point, I should again address Mr Aird’s claim that this process was coordinated by Mr Burnell. Mr Aird says that the timing of the issue of the invoices is not a coincidence and that the issue of the TTS invoices was orchestrated by Mr Burnell. I agree with him that the timing of the invoices was not a coincidence, but not for the reasons that Mr Aird gives. There is no evidence of collusion between Mr Burnell and Mr Laul regarding the issue of the invoices. I make no finding on this matter, but it is far more likely that the issue of the invoices by TTS was triggered by the resignation of Mr Kriisk, who remained in regular contact with Mr Laul. Mr Kriisk and Mr Clark were also in communication regularly at this time, so there is good reason to believe that Mr Laul acquired his knowledge of the events at the meeting on 15 March 2017 from Mr Kriisk, having spoken to Mr Clark.

**The service of Mr Burnell's statutory demand (16 March 2017)**

221. Mr Burnell served his statutory demand by sending it to Mr Aird on 16 March 2017.
222. On 24 March 2017, Downs, the company's solicitors wrote to Mr Burnell on the instructions of Mr Aird. They asked Mr Burnell to withdraw his statutory demand and informed him that if no response was received, the company would seek an injunction to restrain Mr Burnell from issuing a winding up petition against the company. Downs also asserted that the service by Mr Burnell of his statutory demand against TTL whilst he remained a director was inconsistent with his duties as a director to TTL and asked Mr Burnell to resign as a director with immediate effect.
223. Mr Burnell responded on 28 March 2017. He asserted that his loans were immediately repayable and asked for any correspondence relating to any possible injunction to be addressed to his solicitors. He did not respond to the request that he resign as a director.

**The meeting on 29 March 2017**

224. On 21 March 2017 Mr Clark had circulated an email seeking to call a board meeting on 29 March 2017. There followed an exchange of correspondence between Ms Currie, Mr Clark and Mr Burnell regarding whether or not the meeting had to be called under the provisions of the Articles of Association of TTL or under the Joint Venture Agreement, which would have required an agenda to be circulated to all parties. Ms Currie sought advice from Mr Pfister which was provided in an email to Mr Burnell, in essence, stating that Mr Clark was bound by the terms of the Joint Venture Agreement.
225. Mr Lucien Gover assisted Mr Burnell with preparations for the meeting. For example, he prepared an outline agenda, which was not circulated to Mr Aird, Ms Currie or Mr Christian Aird and advised Mr Burnell on the duties of the directors under the Companies Act 2006 regarding the solvency of the company. In preparation for the meeting, Mr Burnell, Mr Clark and Mr Kriisk also put together a timeline of the emails leading up to Mr Kriisk's resignation on 8 March 2017.
226. The meeting was held on 29 March 2017. Ms Currie, Mr Burnell, Mr Clark and Mr Christian Aird all attended the meeting. Mr Aird did not attend. The meeting was relatively short. Ms Currie contested the validity of the meeting. Mr Burnell and Mr Clark raised questions concerning directors' responsibility for the financial affairs of the company and asked for the advice from Downs to be circulated to all the directors of the company. The meeting concluded without making any material decisions.

227. In the aftermath of this meeting, Mr Clark spoke to Ms Currie. He suggested to her that Mr Burnell had shown him private emails between Mr Burnell and Mr Aird, which demonstrated Mr Aird's plans to dilute his and Mr Kriisk's shareholdings. (In his evidence, Mr Clark acknowledged that this was not true, but rather that he had been aware of these plans from copies of printed out emails that he had seen whilst working at the Farm.) Ms Currie contacted Mr Burnell about these revelations. Mr Burnell and Mr Clark agreed a form of email which was sent by Mr Clark to Mr Burnell, but which was intended for Mr Burnell to forward to Ms Currie in response to her accusations in which Mr Clark denied that Mr Burnell had disclosed the private emails to him.

### **The commencement of the Chancery Division proceedings (April 2017)**

228. On 3 April 2017, Mr Laul wrote to Mr Aird asserting that TTL was in breach of the Licence Agreement by failing to pay the invoice of £30,000 due in respect of the option fee. He gave TTL "official notification" of the breach.
229. On 4 April 2017, Mr Aird spoke to ALLPCB, the Chinese manufacturer of the PCBs which had been ordered by Mr Kriisk for the benefit of TTS, but had been paid for by TTL on the authorization of Mr Burnell. Mr Aird asked ALLPCB to deliver the PCBs to TTL. ALLPCB contacted Mr Kriisk as the order had been made through his personal account. Mr Kriisk, who was clearly aware of the dispute concerning the invoices between TTS and TTL, refused to sanction the delivery of the PCBs to TTL. He told ALLPCB that TTS owned the intellectual property on the design of the PCBs and that they should not be supplied to TTL. Mr Kriisk took advice from Mr Burnell on the drafting of his emails.
230. Following Mr Kriisk's intervention, ALLPCB refused to deal further with TTL notwithstanding threats of legal action from Mr Aird and from Downs on behalf of TTL.
231. Mr Kriisk told Mr Laul about the exchange of correspondence with ALLPCB and assisted Mr Laul in drafting an email to Mr Aird. In this email, which was also sent on 4 April 2017, Mr Laul accused TTL of seeking to appropriate the intellectual property in the design of the PCBs. Mr Laul stated that TTL had "breached our agreement in multiple cases" and had "no right to any IP which is created by us" and that he could not see any future between the companies.
232. Mr Aird responded by email on 5 April 2017. He asserted that TTS was not entitled to terminate the Licence Agreement and demanding that the PCBs be returned to TTL. He remarked that Mr Kriisk was "in very serious legal trouble" and that Mr Laul's intervention was "just making matters worse for him".

233. Mr Aird also instructed Downs to commence proceedings against TTS. On 10 April 2017, TTL issued a claim against TTS in the Chancery Division of the High Court (claim number HC-2017-001055) (the “Chancery Division proceedings”) for a declaration that TTS was not entitled to terminate the Licence Agreement, an injunction and/or damages.

#### **The commencement of the Companies Court proceedings (April 2017)**

234. On 6 April 2017, TTL made an application to the Companies Court (claim number CR-2017-2770) (the “Companies Court proceedings”) for an injunction to restrain Mr Burnell from presenting a petition for the winding up of TTL. The application was supported by a witness statement given by Mr Aird. An order was agreed recording a voluntary undertaking by Mr Burnell not to present a winding up petition pending further order and giving directions for exchange of evidence.

#### **Payments to Mr Kriisk and Mr Clark (March to May 2017)**

235. After Mr Clark and Mr Kriisk had ceased to be engaged by TTL, they entered into an arrangement with the Gover brothers to undertake consultancy work on a project which would appear to be similar to the Tags project. The evidence suggests that there were conversations between the Gover brothers and Mr Kriisk as early as 19 March 2017 and that Mr Kriisk subsequently involved Mr Clark and Mr Ploompuu. Details are set out in an exchange of emails between Mr Kriisk and Mr Lucien Gover of 27 March 2017.
236. In accordance with these arrangements, Lucien Gover arranged for payments to be made to Mr Kriisk and Mr Clark after they had ceased to be engaged by TTL. Payments were made to Mr Clark and Mr Kriisk on 31 March 2017 and 28 April 2017 in each case in the amount of £3,500. A further payment of £3,500 was made to Mr Kriisk in May 2017.
237. On 13 April 2017, Mr Lucien Gover arranged for the payment of an invoice for “consultancy services” from an Estonian company, Elven Tarkvara OU, addressed to AnywhereIO. These payments were made for the services of Mr Ploompuu. The invoice was in the amount of €4,200. AnywhereIO is a company controlled by the Gover brothers. Further payments were made to Elven by AnywhereIO on 12 May 2017 and 12 June 2017 in each case in the amount of €3,000.
238. There is little evidence surrounding these arrangements. I was invited by the Defendants to infer that Mr Burnell was aware of them and that they formed part of his plan to acquire control of the TTL business. Mr Burnell was adamant that he was unaware of the arrangements between the Govers, Mr Kriisk and Mr Clark and Mr Ploompuu at the time. There is no evidence that Mr Burnell



was a party to any of these arrangements and I am not willing to attribute all actions of the Govers to Mr Burnell, as this suggestion invites me to do.

### **Return of company property and information (April 2017)**

239. In the period following the meeting on 15 March 2017, Mr Aird and Ms Currie made various requests to Mr Burnell, Mr Clark and Mr Kriisk for the return of company property. They sought assistance from Downs in this process.
240. On 14 April 2017, Downs, acting on behalf of TTL, sent a letter by email and post to Mr Kriisk. In the letter, Downs demanded the return of certain company property including a Vauxhall Insignia car which had been used for testing the Restore software, prototypes for MicroTags and Restore OneBox, a mobile 'phone, a computer and various other items of equipment; reminded Mr Kriisk of his on-going duties to the company as a director and the covenants contained in his service agreement; and alleged that Mr Kriisk had acted in breach of his duties of confidentiality to TTL by disclosing confidential information to TTS. In addition, Downs addressed the question of the order of PCBs from ALLPCB. Downs asserted that Mr Kriisk was acting on behalf of TTL when he made the order, that he acted in breach of duties to the company by diverting the PCBs to TTS, and demanded that Mr Kriisk contact ALLPCB to correct the position and to identify Mr Aird as the representative of TTL who was authorized to deal with them. Mr Kriisk sought Mr Burnell's advice in relation to the letter.
241. Mr Kriisk said in his witness statement that he did not receive this letter until 24 April 2017 when it was resent by Downs, but this is not true. The email evidence shows that Mr Kriisk forwarded the email to Mr Burnell on 14 April 2017 and asked for his comments on it.
242. Mr Aird also contacted Mr Burnell on 20 April 2017 asking him to identify any company property that he held and to confirm whether or not he had received any company property from Mr Kriisk or Mr Clark.
243. Downs also sent a letter to Mr Clark on 23 April 2017 in similar form and similar tone to that sent to Mr Kriisk on 14 April 2017, reminding him of his duties as a director, demanding the return of company property and access to the company's website, emails and other information.
244. Mr Burnell met with Mr Clark and Mr Kriisk on 25 April 2017. They made arrangements for relevant company property which they owned to be collected and delivered to the Farm so that it could be collected by Mr Aird and Ms Currie. Mr Clark returned his mobile phone and laptop computer to the Farm. Mr Kriisk put together an inventory of company property that he held and sent a copy of his inventory to Mr Burnell (to be forwarded to Mr Aird) and Mr Pfister at

Downs. Mr Burnell arranged for Mr Thomas, an employee of Kona, to transfer relevant emails and information onto a server owned by TTL.

245. Mr Burnell also liaised with Mr Aird and Ms Currie to arrange for the company property to be collected from the Farm. The provisional date for Mr Aird and Ms Currie to collect the company property was on 26 April 2017. However, Mr Aird and Ms Currie did not attend on that date. On that date Mr Burnell signed the inventory list that Mr Kriisk had prepared to confirm that he had delivered the property and that the Restore software which had been loaded on the server was functioning. The property was left in the car for Mr Aird and Ms Currie to collect. Mr Aird and Ms Currie collected the vehicle and the relevant property on 3 May 2017. Mr Aird, and subsequently Downs, questioned the capacity in which Mr Burnell had signed the inventory for Mr Kriisk.
246. Mr Aird has contended that the information and emails on the server were selectively sifted when they were transferred to the server by Mr Thomas on the instruction of Mr Burnell. Although there was clearly an opportunity for Mr Thomas to do so, there is no evidence that this occurred, and I reject it. Mr Aird also asserted that Mr Kriisk and Mr Clark had their ‘phones and computers reset to the factory settings at Mr Burnell’s instigation. Once again, there is no evidence for this and I reject it. The evidence is that Mr Clark and Mr Kriisk reset their mobile ‘phones and computers to the factory settings of their own accord because the mobile ‘phones and computers had been used both for personal and work use and they were concerned not to provide access to personal information to Mr Aird.
247. Both Mr Clark and Mr Kriisk had some disputes with Mr Aird concerning payments for expenses which remained outstanding at the time of the collection of the company property and information. On the advice of Mr Burnell, Mr Clark and Mr Kriisk complied with the requests to return the company property notwithstanding the outstanding claims for expenses against TTL.
248. Discussions continued between Mr Aird and Ms Currie, and Mr Clark and Mr Kriisk regarding the transfer of emails, access to the Dropbox account and access to the company’s websites. Mr Clark and to an extent Mr Kriisk cooperated with this process.

#### **Settlement negotiations between TTL and Mr Clark and Mr Kriisk (May 2017)**

249. During the process of transferring emails, Ms Currie spoke to Mr Clark. She informed him that TTL was preparing a case against him, Mr Kriisk and Mr Burnell, but that TTL would be prepared to compromise the proceedings against Mr Clark and Mr Kriisk on the terms of a settlement agreement. She provided an outline of the terms to Mr Clark. Mr Clark discussed the proposal with Mr Kriisk.

250. On 11 May 2017 Mr Aird, Ms Currie, Mr Clark and Mr Kriisk met at Mr Aird's home to discuss the potential settlement of the threatened proceedings by TTL against Mr Kriisk and Mr Clark. There was some discussion of terms of a possible settlement at the meeting, but no agreement was reached. Mr Kriisk indicated to Mr Aird and Ms Currie at this meeting that Mr Laul may be prepared to sell his shares in TTS. He suggested that the price would be several hundred thousand pounds. Mr Aird expressed some interest in the possibility. Ms Currie was less interested.
251. On 16 May 2017, Mr Aird wrote to Mr Laul asking him to agree that the Licence Agreement remained in place and to withdraw the invoices that had previously been issued. Following a discussion with Mr Kriisk, Mr Laul responded on 18 May 2017. He agreed to withdraw the invoices and to work to negotiate a revised payment schedule for the delivery of the products, but raised questions about why payment was not due in respect of Restore.
252. Mr Aird responded on 19 May 2017 welcoming Mr Laul's confirmation that the Licence Agreement remained in force, but avoiding addressing Mr Laul's question about Restore. Mr Laul replied, after agreeing his response with Mr Kriisk, expressing some disappointment that Mr Aird had not addressed his questions and asking for confirmation that the Chancery Division proceedings would be withdrawn.
253. On 17 May 2017, Mr Kriisk had attended a meeting at Mr Aird's home to demonstrate the Restore software to IGBG Consulting, a firm of IT consultants that had been engaged by TTL. Following that meeting, IGBG produced a report on the current status of the Restore OneBox product, which concluded that the test documentation and data was not sufficient to permit the system to be "signed-off".
254. The main conclusions from that report are as follows:
- "This report details the status of delivering licenced products for manufacturing and has concluded that the system cannot currently be manufactured. A body of work remains on all system elements to complete the design and validate the requirements before manufacturing can be considered"
- "This report details the status of test and requirements/standards acceptance and has concluded all of the following:
- System acceptance by the market cannot be determined due to lack of marketing requirement specifications to validate against.
  - Stated standards, certification bodies, and conformity to Home Office standards that documentation identifies may be incomplete and/or non-conforming.

- Functional test has been performed but system stress-testing/limits, software testing, and hardware testing has not been performed. Before this testing can be performed a large body of test procedures have to be developed for the system that adheres to marketing requirements and certification/standards requirements.

As such, this report concludes that current test documentation/data are insufficient and the system requirements/standards acceptance cannot be validated/signed off.”

“This report details the status of delivery of all manufacturing and test data including manufacturing files and knowhow necessary to enable licensor to manufacture the first licence products and has concluded that the system currently lacks sufficient manufacturing files and test data to prove the system is ready for manufacturing. Certain elements of the design, chiefly the [hardware], require further design work. A list of documents required for each element of the system has been detailed herein and is required in full to achieve manufacturing readiness.”

255. The discussions surrounding a settlement of the potential claims by TTL against Mr Clark and Mr Kriisk continued. On 19 May 2017, Ms Currie met Mr Clark and Mr Kriisk and allowed them to review a set of documents, a settlement deed with Monogram, a termination deed relating to the Joint Venture Agreement and documents relating to the transfer of their shares in TTL to Monogram. She did not provide Mr Clark or Mr Kriisk with copies.
256. On 23 May 2017, meetings were arranged at Mr Aird’s home. Mr Clark and Mr Kriisk were asked to attend separately. Mr Aird, Ms Currie and Mr Pfister attended each meeting.
257. In the meeting with Mr Kriisk, Mr Kriisk was presented with a draft of a settlement deed. Mr Pfister explained in outline the terms of the settlement deed. Mr Kriisk was then asked to sign it. Mr Kriisk raised various concerns about the draft deed and asked for time to consider it. He was not permitted to take a copy of the settlement deed with him in order to consult an adviser. Mr Kriisk left the meeting without signing the deed.
258. Mr Clark attended a similar meeting on the same day. He said that he felt under considerable pressure to sign the settlement deed and the related documents. He asked for time to review the agreements, but was told that would not be possible. He signed the documents.
259. In summary, the settlement deed provided for:

- (a) TTL to stay all proceedings against Mr Clark for breach of the Joint Venture Agreement, his service agreement and related documents;
- (b) TTL to pay 10% of the value of any revenue received from completed sales contracts for the first 12 months from the date of the agreement to Mr Clark;
- (c) Monogram to pay to Mr Clark 10% of all dividends received by Monogram during the first 5 years following the date of the agreement and 10% of all proceeds of the sale of shares in TTL in that period up to a maximum aggregate amount of £1 million;
- (d) Monogram to pay to Mr Clark 10% of the value of Monogram's shareholding in TTL on the fifth anniversary of the agreement up to a maximum value of £1 million (less any amounts paid in respect of dividends or sales proceeds as described at (c) above);
- (e) Mr Clark to transfer all of his shares in TTL to Monogram for £1;
- (f) Mr Clark to give various undertakings, which were set out in clause 3.3(b) to (g) of the deed, and pursuant to which Mr Clark undertook to:
  - “(b) disclose any payments received from and all current or past agreements (whether written or oral), interests or arrangements relating to the Business whether directly or indirectly with:
    - (i) Alan Burnell;
    - (ii) Julian Gover and Lucien Gover;
    - (iii) Trans-Tag Systems Oü;
    - (iv) Kona Partners LLP, including any of its members or affiliates from time to time including (but not limited to) Robert Thomas, Kona Capital Management Limited and Kona Capital Corporate Member Limited;
  - (c) (as soon as practicable, but no later than four days after [the date of the agreement]) supply copies of all correspondence between [Mr Clark] and the parties listed at 3.3(b)(i)-(iv);
  - (d) disclose to TTL all proposals or matters relating to Alan Burnell's attempts (directly or indirectly) to take control of and/or damage the business of TTL including, but not limited to, misappropriation of the technology, intellectual property or cleaning/deletion of emails;

- (e) (as soon as practicable, but no later than four days after [the date of the agreement]) supply copies of all correspondence or documentation relating to 3.3(d) above that is not otherwise disclosed under 3.3(c);
  - (f) resign as a director of TTL with immediate effect;
  - (g) execute the Deed of Termination relating to the [Joint Venture Agreement], Side Agreement and Service Contract as set out in Appendix 1 of this Deed”
- (g) Mr Clark to undertake for a period of five years: not to be engaged or interested in any business competing with TTL; not to solicit customers or prospective customers of TTL for the purposes of offering goods or services directly or indirectly competing with TTL; not to solicit or entice away any director or employee of TTL or any subsidiary of TTL; and not to divulge or communicate to any person any of the trade secrets or confidential information relating to Monogram or TTL;
- (h) Mr Clark for a period of five years: to provide reasonable assistance to TTL to enable TTL to manufacture saleable products; to provide product, market and client related assistance and support to TTL; but not to liaise directly with clients or suppliers of TTL or hold himself out as acting on TTL’s behalf;
- (i) Mr Clark to have no further contact (whether directly or indirectly) in respect of any business with Mr Burnell, Mr Julian Gover and Mr Lucien Gover; Kona and any of its members or affiliates.
260. Mr Pfister sought to contact Mr Kriisk by email on 25 May 2017 suggesting some revised drafting for one clause of his draft settlement deed. Mr Kriisk replied stating that he intended to take independent legal advice. Thereafter, he did not revert to Mr Aird, Ms Currie or Mr Pfister about it.
261. On 8 June 2017, Mr Aird sent an email to Mr Clark expressing disappointment that Mr Clark was not complying with the terms of the settlement deed and advised him that he had instructed a “City law firm” to commence proceedings against him unless he complied with the terms of the deed within 7 days.

### **Mr Burnell acquires the shares in TTS (June 2017)**

262. Following his meeting with Mr Aird, Ms Currie and Mr Clark on 11 May 2017, Mr Kriisk contacted Mr Burnell via the Gover brothers. He relayed to Mr Burnell the negotiations which he and Mr Clark had had with Mr Aird and Ms Currie, and the fact that he and Mr Clark were under pressure to assist Mr Aird in building a case against Mr Burnell. At this point, Mr Kriisk also mentioned

- to Mr Burnell that Mr Laul was interested in selling his shares in TTS or otherwise winding up the company.
263. Mr Burnell decided to pursue the possibility of acquiring the shares in TTS from the then shareholders. He instructed Mishcon de Reya LLP (“Mishcon”) to advise him on whether or not it would be possible to terminate the Licence Agreement in connection with a purchase of the shares in TTS.
  264. On 25 May 2017, TTS instructed Mishcon to represent it in the Chancery Division proceedings. The following day, Kona paid Mishcon £15,000 on account of legal costs. I infer that, from this point, Mr Burnell through Kona was funding TTS’s defence to the Chancery Division proceedings.
  265. On 31 May 2017, Mr Aird informed Mr Laul that he did not consider that any payments were due from TTL to TTS under the Licence Agreement.
  266. On 1 June 2017, Mr Aird sent an email to Mr Burnell asking Mr Burnell if he was funding Mr Clark’s, Mr Kriisk’s and TTS’s legal costs. Mr Burnell did not respond.
  267. Mr Burnell engaged Mr Kriisk, with the assistance of the Gover brothers, to investigate the possibility of Mr Burnell acquiring the shares in TTS. Mr Kriisk negotiated a deal under which Mr Burnell would acquire the shares for a nominal consideration and undertook to discharge the liabilities of TTS (of approximately €5,000). A condition of the purchase was that all of the intellectual property in relation to Tags and Restore was transferred to TTS as the work on the development of the various products had been undertaken for TTS by Mr Laul and Mr Ploompuu and others as independent contractors. Other than the intellectual property, TTS had no material assets and no employees.
  268. At some point in the process, Mr Burnell became aware that he remained on the register of directors of TTL at Companies House. On 8 June 2017, he sent a letter to TTL copied by email to Mr Pfister, in his capacity as solicitor to TTL, resigning as a director of TTL “with immediate effect”. In that letter, Mr Burnell stated that he had “not been involved in the company’s business since mid-March 2017”. He asked for the Companies House records to be amended to reflect that he was appointed as a director “in March 2017, not July 2016” and stated that his appointment was “not in accordance with the Articles of Association of the company”.
  269. Mr Burnell completed his purchase of the shares in TTS on 10 June 2017.
  270. On 13 June 2017, TTS engaged Mr Kriisk as a consultant to determine whether or not the intellectual property held by TTS could be developed into marketable products.

271. Mr Burnell became a director of TTS on 19 June 2017. All the other directors of TTS resigned at this time.

***Attempts by TTS to create marketable products***

272. Following Mr Burnell's acquisition of the shares in TTS, Mr Kriisk worked with the Gover brothers on the development of the Tags and Restore products. The Gover brothers operated through a company which they owned called Visible Earth Technologies Limited.
273. Notwithstanding material efforts to develop a marketable Tags product, any product which could be developed was not commercially viable as by this time, competitive products had been introduced to the market.
274. Some attempts were also made to revive the Restore product. In particular, a meeting was held with CAST on 9 November 2017 to determine whether or not there would be further interest in the development of the Restore system. Following meetings with officials at CAST, the project was not pursued. TTS has not produced a marketable product with the intellectual property for Restore.

**Further steps in the legal proceedings**

***The Chancery Division proceedings***

275. Following Mr Burnell's acquisition of the shares in TTS, TTS continued to defend the Chancery Division proceedings. On 19 June 2017, TTS wrote to TTL to withdraw the assurance previously given (by Mr Laul) on 18 May 2017 that the company would not terminate the Licence Agreement. On that day, Mishcon, acting on behalf of TTS, also served notice on TTL of the termination of the Licence Agreement.
276. On 23 June 2017, TTS served its defence and counterclaim in the Chancery Division proceedings. The counterclaim sought payment of sums due and a declaration that the Licence Agreement had been validly terminated.
277. On 4 April 2018, the Chancery Division proceedings were compromised by agreement and a Tomlin Order. The agreement acknowledges that the intellectual property rights vest solely in TTS and that TTL will cease exploitation of the intellectual property rights, destroy any products and cancel any orders it may have placed for products.



### ***The Companies Court proceedings***

278. On 7 November 2017, the Companies Court proceedings were settled on terms that Mr Burnell undertook not to present a winding up petition unless and until his alleged debt was admitted or determined to exist by the court.

### ***The current proceedings***

279. On 21 May 2018, Mr Burnell issued the current proceedings.

### **THE CLAIM**

280. I will turn first to the Claim. Mr Burnell claims against TTL for repayment of the Loan. He also claims against Mr Aird for breach of contract in failing to procure the issue or transfer of shares in TTL to Mr Burnell.

### **The claim against TTL**

#### ***Mr Burnell's case***

281. As regards the claim against TTL, Mr Burnell's case is put in various alternative ways:

- (a) His primary case is that there was no binding agreement between Mr Burnell and TTL in relation to the Loan on the basis that Mr Aird was acting in his personal capacity and/or on behalf of Monogram, but was not acting on behalf of TTL. In those circumstances, Mr Burnell says that he is entitled to repayment of the Loan on demand.
- (b) In the alternative, Mr Burnell says that, even if Mr Aird was able to bind TTL, on the facts, there was no binding agreement reached between Mr Burnell and TTL as to the terms of the Loan because significant matters remained unresolved. Once again, in the circumstances, Mr Burnell says that he is entitled to repayment of the Loan on demand (see *Chapman v. Jaume* [2012] EWCA Civ 476 at [21] and *Kowalishin v. Roberts* [2015] EWHC 133 (Ch)).
- (c) In the further alternative, Mr Burnell says that even if Mr Aird was able to bind TTL and a binding agreement was reached in relation to the terms of the Loan, that agreement included obligations on TTL to grant security in respect of the Loan and to issue shares to Mr Burnell upon the advance of the Loan. TTL has breached the agreement by failing to grant security and failing to issue shares and Mr Burnell is therefore entitled to damages in the amount of the Loan or restitution of such sum on the grounds of total failure of consideration (see *Stocznia Gdanska SA v. Latvian S.S. Co* [1998] 1 WLR 574 at page 588).

- (d) In the final alternative Mr Burnell says that, if he and TTL did reach a binding agreement in relation to the terms of the loan, it was an implied term of such agreement that if TTL did not proceed to issue shares to him such as to make him an equal shareholder with Monogram, then the Loan would become repayable on demand (see *Marks & Spencer Plc v. BNP Paribas Securities Services Trust Co Jersey Limited* [2016] AC742).

***In what capacity was Mr Aird acting in his negotiations with Mr Burnell?***

282. The starting point is to determine the capacity in which Mr Aird was acting in his negotiations with Mr Burnell which took place in June 2016 and February 2017.
283. In June 2016, there is no clear statement of the capacity in which Mr Aird was acting. The communications between Mr Aird and Mr Burnell are relatively informal. As can be seen from the email exchanges between them, which I have described above, Mr Aird makes no distinction between himself and Monogram, for example he attributes to himself assets (such as the loans to TTL) which are held by Monogram and actions and obligations which can only be carried out by Monogram. It is unclear whether the intention is that Mr Aird should be regarded as acting for and on behalf of Monogram or whether he is acting in a personal capacity and undertaking to procure that Monogram will take the relevant actions or both.
284. I will not, however, focus on the negotiations in May and June 2016. The parties proceeded on the basis that any agreement reached in February 2017 must have superseded any arrangements reached in June 2016. For that reason, I will focus on the position reached following the February 2017 negotiations, although my conclusions are informed by the negotiations in May and June 2016.
285. In February 2017, there is a statement in the written agreement that it is made between Mr Burnell and Mr Aird. At the end of the document there is a further statement that Mr Aird is acting for and on behalf of Monogram.
286. Mr Leiper submits that it is clear that Mr Aird was not acting in a personal capacity in his negotiations with Mr Burnell. He refers to the statements made by Mr Aird in cross-examination to the effect that he was acting on behalf of Monogram or TTL and to the fact that Mr Burnell in cross-examination stated that he had assumed that, at this time, Mr Aird was acting for Monogram and did not refer to Mr Aird's acting in a personal capacity.
287. For my own part, I do not regard Mr Burnell's oral evidence as decisive on this point. His answer was given in the context of questioning on whether Mr Burnell considered that Mr Aird was acting for Monogram or TTL (without

being given the option that he was acting in a personal capacity). Although it is clear that, by the time of the February 2017 negotiations, Mr Burnell was aware that Mr Aird had not made loans to TTL personally and the loans had been made by Monogram, the agreement refers to obligations placed on Mr Aird. Indeed the agreement refers separately to obligations which are placed on Mr Aird and others which are placed on Monogram. The agreement bears all the hallmarks of an agreement between Mr Aird and Mr Burnell to which Monogram has been made a party so that its obligations can be enforced directly against it. For that reason, in my view, Mr Aird should be regarded as having negotiated the February 2017 agreement in his personal capacity as well as acting for and on behalf of Monogram.

288. The important point is, however, whether or not any such agreement is binding upon TTL. In support of his submission that Mr Aird must also be regarded as acting on behalf of TTL and so the agreement must be regarded as binding on TTL, Mr Leiper notes that the agreements in June 2016 and February 2017 contain obligations which relate directly to the operation of the business of TTL, for example, the appointment of Mr Burnell as CEO and Mr Aird as chairman. He says that it would be surprising for such provisions to be included in a document to which TTL was not regarded as a party. This point is at best equivocal; it would not be uncommon for such provisions to be included in a shareholders' agreement without the need for the company to be a party.
289. Mr Leiper also relies on the fact that Monogram, and so Mr Aird acting on behalf of Monogram, was entitled under the terms of the Joint Venture Agreement, to which TTL was a party, to "determine the terms on which investors acquire shares in the company" at any time prior to the repayment of loans made by Mr Aird and his associated companies (see clause 4 of the Joint Venture Agreement). He therefore says that Monogram, acting through Mr Aird, was authorized to agree terms with new investors, such as Mr Burnell, and that those terms would be binding on TTL.
290. Mr Davies challenges this latter point. He submitted, and put to Mr Aird in cross-examination, that clause 4 did not extend to the determination of the terms on which loan capital was invested in the company and so Mr Aird was not authorized (whether acting through Monogram or otherwise) to bind TTL to a loan.
291. I do not read clause 4 of the Joint Venture Agreement as narrowly as Mr Davies. Mr Burnell was an "investor" in the company for the purpose of clause 4. The transaction which he and Mr Aird were negotiating was, in economic substance, an equity transaction; Mr Burnell did not receive any interest on his loans, the proportion of the share capital of TTL which Mr Burnell was to acquire was tied proportionately to the amounts that he advanced, and the repayment of his investment was dependent upon the results of the company. Although for

reasons of commercial flexibility the bulk of Mr Burnell's investment took the form of a loan, the terms of the loans were all part of the terms on which Mr Burnell acquired shares in TTL. Accordingly, in my view, the negotiation of the terms of Mr Burnell's investment fell within the terms of clause 4 of the Joint Venture Agreement. Mr Clark, Mr Kriisk and TTL were all parties to the Joint Venture Agreement and would be bound to accept the terms negotiated by Monogram (acting through Mr Aird) pursuant to it.

292. That leaves the separate question as to whether or not Mr Aird should also be regarded as acting on behalf of TTL in entering into the agreement with Mr Burnell or whether he should be regarded as simply acting for Monogram in agreeing the terms under which shares in TTL might be acquired by a potential investor (Mr Burnell), which terms might be enforced by Monogram (but not Mr Burnell) against TTL under the terms of clause 4 of the Joint Venture Agreement.
293. Mr Davies says that Mr Aird was not acting for TTL in his negotiations with Mr Burnell. He pointed to the following factors:
- (a) The agreement refers expressly to Mr Aird and to Monogram. There is no reference to TTL.
  - (b) At no point in the exchange of the emails does Mr Aird state that he is acting for or on behalf of TTL.
  - (c) The other directors of TTL, Mr Clark and Mr Kriisk, were unaware of the negotiations.
  - (d) On various occasions in the course of Mr Aird's discussions with Mr Kriisk and Mr Clark, Mr Aird threatens that Mr Burnell and Mr Aird may withdraw funding or refers to their commitments to fund the company being conditional. Mr Davies says this makes it clear that there was no binding agreement between TTL and Mr Burnell in respect of the Loan at any time.
294. I acknowledge Mr Davies's points. However, from the evidence of Mr Aird and Mr Burnell, it is clear that they made no practical distinction between the capacities in which Mr Aird was acting. From Mr Burnell's point of view the important matter was that Mr Aird was in a position to ensure that the entire agreement was put into effect. In cross-examination, he could not identify the capacity in which he thought Mr Aird was acting other than, at least in part, that he must have been acting for Monogram as Monogram made loans to the company and held the relevant shares in TTL. Neither party suggested that any further action would have been expected on the part of the company for it to become a party in relation to the Loan. Monogram (and so Mr Aird acting on

behalf of Monogram) was authorized by the Joint Venture Agreement to act in a manner which could bind the company and Mr Aird was accustomed to acting, and permitted by the other directors to act, in a manner which bound TTL. For these reasons, I find that Mr Aird was so acting in relation to his negotiations with Mr Burnell in February 2017.

***Was there a completed agreement which was binding on TTL?***

295. I must now turn to the next question which is whether any completed agreement was reached, as a result of the negotiations in June 2016 and February 2017, which was binding on TTL. There is no dispute between the parties that any agreement in February 2017 must have superseded the arrangements which were discussed in June 2016 and so I will, as before, focus on the position in February 2017.

296. Mr Davies submits that there was no final agreement reached on behalf of the company in relation to the Loan from Mr Burnell. He says that there were material matters that were not resolved in the discussions between Mr Burnell and Mr Aird, in particular in relation to the priority between the Series I and Series II loans and the application of distributable profits towards the repayments of the loans.

297. I disagree. In my view, all material matters governing the terms of the Loan were resolved by Mr Burnell and Mr Aird in their discussions between 11 February and 13 February 2017. The main terms that were agreed were as follows:

- (a) Monogram would transfer 18 ordinary shares in TTL to Mr Burnell in recognition of the advance of £100,000 made by Mr Burnell to TTL, “with immediate effect”.
- (b) Mr Aird would advance (or procure that Monogram would advance) a further £250,000 to TTL and Mr Burnell would advance a further £150,000 to TTL “upon which” Monogram would transfer to Mr Burnell a further 27 ordinary shares in TTL.

The loans made pursuant to the advances in this subparagraph (b) and the loan made by Mr Burnell pursuant to the advance in subparagraph (a) above are referred to collectively as the “Series II Loans”. As a result of these transactions, Mr Burnell and Monogram were to become “equal equity partners”.

- (c) As a consequence of the email exchanges between Mr Burnell and Mr Aird between 11 February 2017 and 13 February 2017, the terms of the agreement to which I refer in subparagraphs (a) and (b) above were effectively varied. It was agreed that the obligations on Monogram to

transfer 45 ordinary shares in TTL to Mr Burnell should be replaced by an obligation on TTL to issue 90 shares to Mr Burnell. This share issue would take place upon receipt of the further advance of £150,000 by Mr Burnell to TTL.

- (d) Monogram's existing loans to TTL (which are referred to as the "Series I Loans") would be coupon free and with no fixed repayment date. The Series I Loans would be repaid if a liquidity event valued TTL at greater than £10 million. If TTL generated distributable profits before a liquidity event, one-third of those profits would be allocated to the repayment of all the loans i.e. the Series I Loans and the Series II Loans.
  - (e) The Series II Loans would rank equally with each other for repayment. The Series II Loans would be coupon free with no fixed repayment date. As set out above, one-third of any distributable profits of TTL would be allocated to the repayment of both Series I Loans and Series II Loans.
  - (f) The Series II Loans would rank ahead of the Series I Loans for repayment (with the exception of the case where distributable profits were being used to repay loans).
298. Mr Davies refers to Mr Aird's email of 24 February 2017 in which he questioned the priority of the Series I and Series II Loans. However, as I have described above, Mr Burnell referred Mr Aird to the previous email exchange in which they had agreed the relevant priority. He also refers to a later email, on 8 March 2017, in which Mr Aird refers to the terms of the arrangements with Mr Burnell as "still to be finalized and formalized". This was a misrepresentation by Mr Aird. The terms had been agreed before Mr Burnell advanced the further tranche of £150,000 of his loan on 24 February 2017.
299. In my view therefore, there was a completed agreement between Mr Burnell and TTL on 13 February 2017. I refer to that agreement in the remainder of this judgment as the "February 2017 agreement". It follows that I reject Mr Davies's submissions that the Loan was repayable on demand either on the basis that Mr Aird was not acting on behalf of TTL (and so there was no agreement which was binding on TTL) or on the basis that, even if Mr Aird was acting on behalf of TTL, there was no completed agreement to which TTL could be regarded as a party.

***Was there a breach of the agreement relating to the Loan?***

300. I therefore move on to Mr Davies's other basis of the claim. Mr Davies's alternative basis of claim is that it was an express term of the agreement that, upon receipt of the advances from Mr Burnell, TTL would issue 90 shares to him and would grant security over its assets in respect of the amount due under

the Loan. (Mr Leiper objected to the reference to the grant of security on the grounds that it did not form part of Mr Burnell's pleaded case. However, I shall, in any event, deal with this issue on the basis of the obligation to issue shares to Mr Burnell.)

301. Mr Leiper says that, while the February 2017 agreement included an obligation on TTL to issue 90 new ordinary shares to Mr Burnell, it also included a commitment (in clause 18) that there would have to be a commercial discussion with Mr Clark and Mr Kriisk "to propose a new deal that could work for all parties moving forwards". Mr Leiper submits that the intended effect of this provision was to ensure that any potential conflicts between the Joint Venture Agreement and the agreement to issue shares to Mr Burnell were resolved before any new shares were issued.
302. I agree with Mr Davies that it was an express term of the agreement that TTL would issue 90 shares to Mr Burnell at the time of the advance. As I have described, although the agreement initially provided for the transfer of 45 shares in TTL by Monogram to Mr Burnell, this obligation was replaced by an obligation on TTL to issue 90 shares to Mr Burnell to reflect the agreement between Mr Burnell and Mr Aird that they would be equal partners in the venture. However, there was no change to the timing. Mr Aird agreed in his response to the email from Mr Burnell on 11 February 2017 that the new shares would be issued when Mr Burnell had advanced his further £150,000. It was therefore in my view a term of this agreement that TTL would issue the 90 shares to Mr Burnell upon the advance of his further funds.
303. In any event, I disagree with the basic premise of Mr Leiper's submission. Mr Burnell did not agree to Mr Aird's original draft of clause 18. The replacement language to which Mr Leiper refers was more of a comment by Mr Burnell on the previous wording than a contractual commitment. At most it represented a commitment at some point in the future to discuss the issues concerning the Joint Venture Agreement with Mr Clark and Mr Kriisk. It was not intended to be a precondition to the issue of shares to Mr Burnell or to defer the obligation to make the issue of shares to Mr Burnell. Although Mr Burnell subsequently acceded to Mr Aird's suggestion that Mr Clark and Mr Kriisk should be offered an opportunity to match the funding provided by Mr Aird and Mr Burnell to avoid a dilution of their holdings, it did not affect the obligation under the terms of the agreement to issue shares to Mr Burnell. As I have described, the agreement was, in all economic substance, an agreement for Mr Burnell to make an equity contribution to the company. The issue of the shares to Mr Burnell was inextricably linked to his advance of the funds to TTL, it was not subject to other conditions.

304. It follows that I agree with Mr Davies that the failure of TTL to issue shares to Mr Burnell following the advance of his funds was a breach of the February 2017 agreement.

***Is Mr Burnell entitled to repayment of the Loan on the grounds of failure of basis?***

305. Mr Davies says that as a result of the failure of TTL to issue the shares Mr Burnell is entitled to repayment of the amounts that he has advanced by way of restitution on the grounds of a “failure of basis” or a “total failure of consideration” or in the alternative that he is entitled to damages for breach by TTL of the February 2017 agreement.
306. A failure of basis occurs where there is a complete failure of the performance for which the payer of the contractual sum has bargained. The test is directed not at whether the payor of the sum has received a particular benefit but whether the payee has performed an obligation for which the payor bargained. On this point, I was referred by Mr Davies to the decision of the House of Lords in *Stocznia Gdanska* and to the words of Lord Goff (at p588):

“the test is not whether the promisee has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due.”

307. I was not referred by the parties to many other authorities. Most of the cases of which I am aware relate to the payment of a contractual sum in circumstances where the performance of the contract becomes ineffective. I was not referred by the parties to any case in which the contractual payment was in the form of a loan with its own agreed repayment terms. That having been said, I can see no reason why the basic principles should not be applicable in this case. When Mr Burnell made the advances to TTL, the principal benefit for which he bargained was the transfer or issue of the shares to him so that he would become an equal partner in the business. The fact that the loan terms included provisions on which his advances may at some future point in time become repayable by TTL was not Mr Burnell’s main concern. Mr Burnell’s main objective was to become an equal partner with Monogram in the business. Without the issue of the shares, Mr Burnell did not receive the main benefit for which he bargained. In the circumstances of this case, I agree with Mr Davies that Mr Burnell should be entitled to repayment of the Loan by way of restitution.
308. It follows that I do not need to decide upon Mr Burnell’s alternative basis of claim – that it was an implied term of agreement that the Loan would be repayable on demand if the shares were not issued within a reasonable period following the advance of Mr Burnell’s funds – and I do not do so.

**The claim against Mr Aird**



309. In addition to the claim against the company, Mr Burnell makes a claim for breach of contract against Mr Aird personally.
310. Mr Davies submits that it was an implied term of any agreement relating to the Loan that Mr Aird undertook to procure the transfer or issue of shares in TTL to Mr Burnell. Mr Aird was in breach of that contract by failing to procure the transfer or issue of shares to Mr Burnell and by seeking to conflate the transfer or issue of shares to Mr Burnell with the issues surrounding Mr Aird's dispute with Mr Kriisk and Mr Clark concerning their remuneration.

*Was there a breach of an implied term?*

311. I have set out the main terms of the February 2017 agreement at [297]. Those terms included a provision to the effect that Monogram would transfer 18 ordinary shares in TTL to Mr Burnell "with immediate effect" and a further 27 ordinary shares following the advance of the second tranche of the Loan so that Monogram and Mr Burnell would become "equal equity partners". Mr Aird and Mr Burnell subsequently agreed to vary these provisions so that TTL would issue 90 ordinary shares directly to Mr Burnell.
312. As I have mentioned above, in my view, Mr Aird was negotiating in his personal capacity as well as on behalf of Monogram and TTL in relation to the terms agreed in February 2017.
313. Furthermore, and as I have described, Mr Aird, as the holder (through Monogram) of 90% of the shares in TTL, as Chairman of TTL, and by virtue of the provisions of the Joint Venture Agreement, which permitted the dilution of the shareholdings of Mr Kriisk and Mr Clark to accommodate further investors, had complete control of the processes required for the issue of the shares in TTL to Mr Burnell.
314. In the circumstances, I agree with Mr Davies that it was implied that Mr Aird undertook to procure that the shares would be issued to Mr Burnell. Mr Aird negotiated the agreement in his personal capacity (as well as on behalf of Monogram and TTL) on the basis that he was the one person who was able to procure that all of their obligations would be met. It was implicit that he would procure the issue of the shares by TTL. Furthermore, on various occasions, Mr Aird confirmed that he would procure the issue of the shares to Mr Burnell most notably immediately following Mr Burnell's confirmation that he had made the advance of the second tranche of the Loan on 24 February 2017.
315. Mr Burnell made the advance of the further £150,000 on 24 February 2017. Notwithstanding his assurances, Mr Aird failed to procure the transfer or issue of any shares to Mr Burnell in breach of the agreement.

*Mr Aird's arguments*

316. I should deal briefly with arguments put by Mr Leiper on behalf of Mr Aird in defence to this claim, although I have, for the most part, addressed these issues in the context of the claim against TTL.
- (a) First, Mr Leiper says that Mr Aird was not negotiating in his personal capacity in relation to the agreement in February 2017. For the reasons that I have given, I do not regard this submission as supported by the evidence before me.
- (b) Second, Mr Leiper says that the agreement for TTL to issue shares (and so any agreement that Mr Aird would procure that issue) was, in effect, conditional on an agreement being reached with Mr Clark and Mr Kriisk as to the effect of the proposed share issue to Mr Burnell on the arrangements under the Joint Venture Agreement. As I have mentioned in the context of the claim by TTL, in my view, Mr Burnell's contractual right to receive an issue of shares was not subject to any such condition.

*The measure of damages*

317. I will need to consider the measure of damages in the light of the issues (if any) raised by the Counterclaim, but, at least in principle, Mr Burnell is entitled to recover damages for breach of contract against Mr Aird.
318. I understand that TTL is likely to be insolvent and accordingly that Mr Burnell's claim against TTL for recovery of the Loan is likely to be irrecoverable. In the circumstances, Mr Burnell claims the entire amount of the Loan (i.e. £250,000) should be treated as lost and that damages should properly be assessed in that sum. This would be on the basis that £250,000 was the amount which Mr Burnell incurred in reliance on his expectation that Mr Aird would perform his undertaking to procure the issue of the shares in TTL.
319. I do not agree with that analysis. When Mr Burnell advanced his funds, he did so on the basis that he would receive a right to repayment of the Loan and an issue of shares in the company. Mr Burnell has his claim against the company for the repayment of the Loan. There was always a risk that the company would not be in a position to repay it. Mr Burnell's loss as a result of Mr Aird's breach of his agreement to procure the issue of the shares is simply that, the value of the shares.
320. I will address the question of the value of the shares when I address the valuation issues later in this judgment. However, if Mr Burnell seeks to be put back in the position that he would have been in if he had not made his investment (as he does), his recovery against Mr Aird for this breach should be limited to the lower of (i) the amount of the value of the TTL shares which he would have

received and (ii) the amount which Mr Burnell is unable to recover directly from the company in respect of the repayment of the Loan.

## **THE COUNTERCLAIM**

321. In summary, TTL's Counterclaim is that:

- (a) Mr Burnell was a director of TTL, whether de jure or de facto and as such owed duties to TTL during and after the termination of his directorship.
- (b) Mr Burnell engaged in various acts (including the acquisition of TTS after he resigned as director) aimed at destabilising TTL so that Mr Burnell could obtain control of the valuable right to develop, manufacture and sell the Tags and Restore which were in breach of those duties.
- (c) The acquisition of TTS also involved a breach of his equitable duty of confidence.
- (d) Mr Burnell's actions damaged TTL's business and resulted in a loss to the value of its assets of up to £9,895,000.
- (e) TTL claims damages and or equitable compensation, interest, an account of profits and/or a declaration of trust.

322. TTL's Counterclaim therefore has two main aspects:

- (a) a claim for breach of directors' duties; and
- (b) a claim for breach of confidence.

I will deal with each of these two aspects in turn.

### **Breach of directors' duties**

#### ***Was Mr Burnell a director of TTL?***

323. The first issue that I need to address is whether Mr Burnell became a director of TTL and, if so, when, and when did he cease to be a director of TTL.

#### *TTL's case*

324. TTL says that Mr Burnell was appointed as a director of TTL either on 1 July 2016 or at some point between 28 February 2017 and 7 March 2017. TTL says

this on various alternative bases, which I will deal with in turn, but before doing so I should deal with an issue which relates to TTL's pleaded case.

325. Following receipt of the Defendants' skeleton argument in advance of the hearing, the Claimant raised an issue about the manner in which the Defendants intended to run their case. It appeared from the skeleton argument that TTL intended to rely on two particular arguments, which the Claimant asserted were not reflected in TTL's pleaded case which the Claimant asserted was limited to whether or not Mr Burnell was a statutory director.
326. Those two arguments were:
- (a) first that, if Mr Burnell was not duly appointed as a director, he was nonetheless a de facto director of TTL; and
  - (b) second, that if Mr Burnell was not appointed by a resolution of the board or the shareholders of TTL, the members of the company gave their unanimous informal consent to his appointment such that he should be regarded as duly appointed in accordance with the principle established in *Re Duomatic Limited* [1969] 2 Ch 365 (as preserved by s281(4) Companies Act 2006) (the "*Duomatic* principle").
327. At the beginning of the hearing, I heard an application from the Claimant for a direction that the Defendants could not rely on these two arguments. Having heard the arguments of counsel for both parties, I refused the application for the direction. I directed that the Defendants should amend their pleadings clearly to identify the facts relied upon in relation to each argument.
328. TTL's case is therefore that Mr Burnell became a director of TTL either on 1 July 2016 or at some point between 28 February 2017 and 7 March 2017 on the basis that:
- (a) he was properly appointed as a director under the terms of the Articles of Association and/or the Joint Venture Agreement; or
  - (b) he became a de facto director of TTL at the relevant times; or
  - (c) the members of the company gave their unanimous informal consent to his appointment so that he should be regarded as duly appointed in accordance with the *Duomatic* principle.

### ***Appointment under the terms of the Articles of Association or the Joint Venture Agreement***

#### ***Background***

329. I should first set out some of the background.

330. The relevant provision of the Articles of Association of TTL governing the appointment of directors is Article 17. Article 17(2) provides:
- (2) Any person 16 years of age or more and who is willing to act a director, and is permitted by law to do so, may be appointed to be a director:
    - (a) by ordinary resolution; or
    - (b) by a decision of the directors.
331. Article 17(3) provides for the appointment of directors where all the shareholders in the company and all of its directors have died. It is not relevant for present purposes.
332. It is common ground that there was no ordinary resolution of the members to appoint Mr Burnell. So in determining whether or not Mr Burnell was validly appointed under the Articles of Association, the only question is whether Mr Burnell was appointed by a decision of the directors.
333. The Articles contained further provisions regarding the decisions of directors. Article 7(1) provides:
- (1) The general rule about decision making by directors is that any decision of the directors must be either a majority decision at a meeting or a decision taken in accordance with article 8.
334. Article 7(2) contains provisions which apply if the company has only one director. It is not relevant in this case.
335. Article 8 provides:
- (1) A decision of the directors is taken in accordance with this article when all eligible directors indicate to each other by any means that they share a common view on a matter.
  - (2) Such a decision may take the form of a resolution in writing, copies of which have been signed by each eligible director or to which each eligible director has otherwise indicated agreement in writing.
  - (3) References in this article to eligible directors are to directors who would have been entitled to vote on the matter had it been proposed as a resolution at a directors' meeting.
  - (4) A decision may not be taken in accordance with this article if the eligible directors would not have formed a quorum at such a meeting.
336. Terms governing the appointment of directors are also found in the Joint Venture Agreement. It provides in clause 5.1:

5.1 Forthwith as soon as practicable after executing this Agreement, each of the Shareholders shall take or cause to be taken the following steps at Directors' and Shareholders' meetings of the Company (as appropriate):

5.1.1 the appointment of Mr Robert Frederick Aird as Chairman and CEO of the Company; and the appointment of two non-executive directors to be nominated by [Mr Aird];

5.1.2 ...

337. In accordance with clause 26.1 of the Joint Venture Agreement, the provisions of the Joint Venture Agreement are to prevail as between the parties to that agreement in the event of any ambiguity or conflict arising between the terms of the Joint Venture Agreement and the terms of the Articles of Association.

*TTL's case*

338. TTL says that Mr Burnell was validly appointed as a director as a result of a decision of the other directors, namely Mr Aird, Mr Clark and Mr Kriisk, who "indicated to each other" through their conduct that they shared a common view that Mr Burnell was appointed as a director.
339. In support of this submission, Mr Leiper refers to the various events that led to Mr Burnell taking over day-to-day control of the business of the Company from 1 July 2016 or alternatively the conduct of the other directors between 28 February 2017 and the meeting on 7 March 2017 which, in both cases, he says, demonstrate that Mr Aird, Mr Clark and Mr Kriisk shared a common view that Mr Burnell had been appointed as a director of TTL.
340. Mr Davies submits that there was no decision by the directors to appoint Mr Burnell as a director under article 17 of the Articles of Association at any time. Mr Burnell could not be appointed under clause 5.1.1 of the Joint Venture Agreement: the provision permits the appointment of only non-executive directors and also requires a formal resolution of the directors or shareholders. In any event, Mr Aird denied that Mr Burnell was appointed under clause 5.1.1 of the Joint Venture Agreement and subsequently arranged for Ms Currie and Mr Christian Aird to be appointed as the two directors under that provision.

*Discussion*

341. Under Article 17(2) of the company's Articles of Association, with the exception of circumstances in which all of the directors and shareholders have died, a director can only be appointed by ordinary resolution of the members, or by a decision of the directors.
342. It is common ground that there was no resolution of the members of TTL (i.e. Monogram, Mr Clark and Mr Kriisk) appointing Mr Burnell as a director of the

Company. The question is whether there was a decision of the directors (Mr Aird, Mr Clark and Mr Kriisk) to appoint Mr Burnell as a director.

343. Article 7(1) permits a decision of the directors to be taken either by a majority decision at a meeting or by unanimous agreement under the provisions of Article 8.
344. There was no decision of the directors taken at a meeting to appoint Mr Burnell as a director. Mr Aird made reference in his evidence to meetings in advance of Mr Burnell joining the company in July 2016 in which he says “it was agreed” that Mr Burnell would become CEO and would join the board. But these were not meetings in which Mr Clark and/or Mr Kriisk were involved. Mr Clark and Mr Kriisk were not involved in the negotiations leading to Mr Burnell advancing the first tranche of the Loan (i.e. £100,000) in July 2016.
345. Indeed, there is no evidence of any board meetings taking place at any point between 1 July 2016 and the meeting on 7 March 2017, which the Defendants assert was not validly called. After 7 March 2017, there was also no decision taken by the directors at a meeting to appoint Mr Burnell, although the directors may have assumed that Mr Burnell was a director – a point to which I return below.
346. Mr Leiper says, however, that the directors made a “decision” which met the requirements of Article 8 of the Articles of Association in that they indicated to each other by their conduct that they shared a common view that Mr Burnell had been appointed as a director.
347. I will comment first on the facts on which Mr Leiper relies in support of this submission, before turning to the interpretation of Article 8 itself.
348. Mr Leiper points to the process of negotiations which led to Mr Burnell’s appointment as CEO. As I have mentioned above, in his evidence Mr Aird referred to his assumption that Mr Burnell would become a director. However, Mr Clark and Mr Kriisk were not party to the negotiations. Mr Clark confirmed in his oral evidence that, although he assumed that Mr Burnell would become a director, it was not mentioned when Mr Burnell was introduced as a potential investor. This is perhaps not surprising, given that Mr Burnell’s role as CEO was initially seen as, in effect, an interim appointment in order to allow him to conduct some due diligence on the company over the first three months of his involvement with the company.
349. Mr Leiper also refers to Mr Burnell’s appointment as CEO, the implication being that Mr Burnell’s role as CEO required the status of a director. I agree that Mr Burnell’s role was intended to involve the active management of the business on a day-to-day basis. However, that management role did not require

him to be a statutory director. It is clear that the parties understood the distinction between Mr Burnell's executive role and appointment as a director. Mr Clark was also clear in cross-examination that he understood that for Mr Burnell to become a statutory director he would have had to be formally appointed.

350. Furthermore, as I have mentioned above, Mr Burnell's initial appointment was subject to his due diligence into the company and its business. The intention of the parties appears to have been that Mr Burnell would become a director when he had advanced all of his funds. For example, following the renegotiation of the terms of his investment in February 2017 and the advance of the second tranche of the Loan, Mr Burnell immediately asked Mr Aird to progress the issue of his shares and his appointment as a director. This understanding appears to be shared by Mr Clark and Mr Kriisk: Mr Kriisk questioned Mr Burnell about his status at the beginning of the 7 March meeting including whether and how he had been appointed i.e. after Mr Clark and Mr Kriisk became aware that Mr Burnell had advanced all of his funds.
351. On 28 February 2017, in the course of the meeting attended by Mr Aird and Mr Burnell at the offices of Downs, Mr Pfister made an electronic filing of a Form AP01 (Appointment of Director) stating that Mr Burnell had been appointed as a director of TTL with effect from 1 July 2016. Mr Burnell was aware of the filing, requested it and, as I have mentioned, it is not credible that he was not aware of the date on the form. But, this meeting was part of the discussion between Mr Burnell and Mr Aird. The filing of the form did not reflect a common understanding of the directors. Mr Clark and Mr Kriisk had not participated in the negotiations which led to the February 2017 agreement between Mr Aird and Mr Burnell, they were not present at the meeting with Mr Pfister, nor were they aware that the form had been filed.
352. Mr Leiper also refers to the exchanges which occurred when Mr Clark and Mr Kriisk learned of the filing of the AP01 form. In particular, he notes that in his email to Mr Burnell of 2 March 2017, Mr Clark refers to the filing as "confirming" Mr Burnell's appointment as a director. Mr Leiper says this shows that Mr Clark and Mr Kriisk were already aware that Mr Burnell was a director of TTL. I disagree. In my view, the evidence shows that until this date Mr Clark and Mr Kriisk were not aware of any appointment. As I have mentioned, whether or not Mr Burnell was a director did not form part of the discussion which took place with Mr Clark and Mr Kriisk in advance of Mr Burnell's appointment as CEO in July 2016. After that time, for the most part, whether or not Mr Burnell was also a director had not been relevant; no board meetings had been called since that date. The minutes of the meeting on 7 March 2017 record that Mr Kriisk questioned Mr Burnell on whether, how, and when he had been appointed, which suggests that, until that time, Mr Kriisk – and, in my



view, also Mr Clark – had not assumed that Mr Burnell had been appointed as a director. Mr Clark’s evidence in cross-examination confirmed that neither he nor Mr Kriisk has been involved in a decision to appoint Mr Burnell before this time.

353. I agree with Mr Leiper that, from this time onwards – and possibly from 2 March 2017 when Mr Clark and Mr Kriisk asked Mr Burnell to call a board meeting – the other directors (Mr Aird, Mr Clark and Mr Kriisk) treated Mr Burnell, to an extent, as if he was a director. I will return to the extent to which they did so later in this judgment. For now, I note that this was the case even though it must have been apparent to Mr Clark and Mr Kriisk that the basis on which Mr Burnell had been appointed was unclear. At the meeting on 7 March 2017, Mr Burnell was asked by Mr Kriisk whether he had been appointed by Mr Aird in the exercise of his power under the Joint Venture Agreement. Mr Burnell was unable to confirm the position. The minutes record that it was then accepted by Mr Clark and Mr Kriisk that Mr Burnell must have been appointed by Mr Aird under the Joint Venture Agreement provisions as no board meetings had been held. The matter was left on the basis that Mr Aird would “advise on this”. At this stage, therefore, Mr Clark and Mr Kriisk assumed that Mr Burnell had been appointed under the Joint Venture Agreement. They also assumed, incorrectly, that their approval was not required for the appointment. Yet even when Mr Aird confirmed by email the following day that Mr Burnell was “not one of my 2 directors” and so had not been appointed under the Joint Venture Agreement, Mr Clark and Mr Kriisk did nothing. They simply continued in their assumption that Mr Burnell was a director.
354. There was therefore no common view of the basis on which Mr Burnell had been appointed as a director before the 7 March 2017 meeting. So the question is whether the continued treatment of Mr Burnell as a director by the other directors on or after 7 March 2017 (or possibly on or after 2 March 2017) was an “indication” that they shared a common view, and can be regarded as a “decision” under Article 8(1).
355. In my view, it cannot. Article 8(1) is broadly drafted. It refers to circumstances in which the directors “indicate to each other by any means” (my emphasis) that they share a common view. However, the provision must be read in its context. The following provision, Article 8(2) provides an example of the circumstances in which the directors will be regarded as having made a decision which meets the requirements of Article 8(1); namely, a resolution in writing signed by each director or to which each director has indicated his or her agreement in writing. Article 8(2) is only an example of the circumstances in which the requirements of Article 8(1) might be fulfilled. It is not exclusive. However, it does to my mind demonstrate the scope of Article 8(1). In my view, without wishing to restrict the means by which this might be done, Article 8(1) does require a

positive communication by each director to the other directors of his or her assent to a common view on a particular matter. There is no such communication in this case between Mr Aird, Mr Clark and Mr Kriisk. Any communication that there is demonstrates that they do not share a common view: Mr Clark and Mr Kriisk assumed that Mr Burnell had been appointed as a director under the terms of the Joint Venture Agreement and Mr Aird quickly rejected that proposition. The subsequent acquiescence of each of the directors in Mr Burnell's attendance at meetings does not in my view amount to an indication to the other directors that they share a common view for the purposes of Article 8(1).

### *Conclusions*

356. For this reason, I agree with Mr Davies. Subject to the possible application of the *Duomatic* principle to which I shall return later in this judgment, Mr Burnell was not validly appointed as a director under the terms of the Articles of Association of TTL at any time.
357. Mr Leiper did not press this point. However, for the sake of completeness, I should also record that I agree with Mr Davies that Mr Burnell was not appointed as a director under the provisions of the Joint Venture Agreement. As I have mentioned, at the meeting on 7 March 2017, Mr Clark and Mr Kriisk assumed that Mr Burnell had been appointed by Mr Aird under clause 5.1.1. of that agreement. However, Mr Aird denied this, and subsequently appointed Ms Currie and Mr Christian Aird as the two directors he was entitled to appoint under clause 5.1.1. In any event, as Mr Davies points out, Mr Burnell was not a non-executive director, as required by clause 5.1.1, nor was he appointed with the support of a resolution of the members or a decision of the directors as required by clause 5.1.1.

### ***Appointment by the informal assent of the members (the Duomatic principle)?***

358. Mr Leiper's second argument is that Mr Burnell was appointed as a director as a result of an informal decision by the members (i.e. Monogram, Mr Clark and Mr Kriisk) in accordance with the *Duomatic* principle.

### *Background*

359. That principle takes its name from the decision of Buckley J in *Re Duomatic Ltd* [1969] 2 Ch 365 ("*Duomatic*"). In that case, Buckley J said (at page 373):

“[W]here it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.”

360. Mr Leiper also referred me to a more recent summary of the principle by Neuberger J in *EIC Services Ltd v Phipps* [2004] 2 BCLC 589 (“*EIC*”) at [122]:

“The essence of the *Duomatic* principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter.”

*The parties’ submissions*

361. He submits that the shareholders, Mr Aird, Mr Clark and Mr Kriisk, had the power under the Articles of Association to appoint Mr Burnell as a director by ordinary resolution. As early as 1 July 2016, but no later than 2 March 2017, each of the existing shareholders in TTL believed that Mr Burnell was a director of TTL and each of them conducted themselves in such a manner as to make it inequitable for them to deny that they had given their approval to his appointment. As Neuberger J stated in *EIC* (at [122], as set out above), it is irrelevant how Monogram, Mr Clark and Mr Kriisk’s approval is characterized or whether they gave their approval in different ways and at different times.
362. In response, Mr Davies also relies on the *EIC* case. He submits that for the *Duomatic* principle to apply, there must be unqualified unanimous agreement between the shareholders and that agreement must be fully informed. The shareholders must be aware that their consent is required (*EIC* [133]). In the present case, Mr Clark and Mr Kriisk acquiesced in the purported appointment of Mr Burnell. They appear to have been unaware that a shareholders’ resolution would have been required for the shareholders to appoint a director under the Articles of Association or under the terms of the Joint Venture Agreement or that Mr Burnell could not be appointed under the terms of the Joint Venture Agreement because he was not a non-executive director. Their consent was not requested.

*Discussion*

363. Both Mr Davies and Mr Leiper have referred me to the decision of Neuberger J in *EIC*. That case concerned three preliminary issues relating to the validity of a bonus issue paid up by capitalizing a sum in the company’s share premium account. Neuberger J’s decision in the case was overturned on appeal, but his decision on one of the issues – whether the capitalization of reserves and the issue of the bonus shares were approved by or authorized by the shareholders, in which he considered the application of the *Duomatic* principle – remains

good law. The passage to which Mr Davies refers is at [133], where Neuberger J says this:

“133. If a director of a company informs shareholders of an intended action (or a past action) on the part of the directors, in circumstances in which neither the directors nor the shareholders are aware that the consent of the shareholders is required to that action, I do not think it is right, at least without more, to conclude that the shareholders have assented to that action for *Duomatic* purposes. As a matter of both ordinary language and legal concept, it does not seem to me that, in such circumstances, it could be said that the shareholders have “assent[ed]” to that action. The shareholders have simply been told about the action or intended action, on the basis that it is something which can be, and has been or will be, left to the directors to decide on, and no question of “assent” arises.”

364. Neuberger J then goes on to compare expressions of the principle in cases such as *Duomatic* itself, where a shareholder can be treated as giving his or her “assent” to a particular course of action, and cases in which the principle is expressed in terms of a “waiver” of formalities by shareholders acting in concert (see Meagher JA in *Herman v Simon* (1990) 8 ACLC 1094 (“*Herman*”) at 1096). He notes (at [134]) that those cases require a person who waives a right to have knowledge of the legal right which he or she is waiving (referring to *Peyman v Lanjani* [1985] Ch 457) and the addition of the requirement that a shareholder must act with “full knowledge and consent” in the restatement of the *Duomatic* principle by Meagher JA in *Herman*. He then continued at [135]:

“135. The words I have emphasised [i.e. with “full knowledge and consent”] were added by Meagher JA to what is otherwise almost a word-for-word repetition of the principle as defined in *Duomatic* itself. Before the *Duomatic* principle can be satisfied, the shareholders who are said to have assented or waived must have the appropriate or “full” knowledge. If a shareholder is not even aware that his “assent” is being sought to the matter, let alone that the obtaining of his consent is at least a significant factor in relation to the matter, he cannot, in my view, have the necessary “full knowledge” to enable him to “assent”, quite apart from the fact that I do not think he can be said to “assent” to the matter if he is merely told of it.”

365. In the present case, the shareholders in general meeting had power to appoint Mr Burnell by ordinary resolution (under Article 17(2) of the Articles of Association). In principle, the *Duomatic* principle might therefore apply if it could be said that they had assented to Mr Burnell’s appointment in a manner which met the requirements of that principle. (Article 17(2) was the only power under which the shareholders could have acted. As I have mentioned, and as Mr Davies pointed out, the provisions of clause 5.1.1 of the Joint Venture Agreement were not relevant: Mr Aird could only appoint non-executive directors under the provisions of clause 5.1.1 and, in any event, such an

appointment would have required the sanction of a board resolution or a resolution of the shareholders.)

366. In my view, whatever the position in relation to Mr Aird, it cannot be said that Mr Clark and Mr Kriisk assented to the appointment of Mr Burnell in a manner such as to satisfy the requirements of the *Duomatic* principle. Unanimous assent is required for the principle to apply.
367. As I have mentioned above, in the period before the filing of the AP01 on 28 February 2017, Mr Burnell's appointment as a director was not an issue. His role as CEO was sufficiently broad in its scope to enable Mr Burnell to conduct the day-to-day management of the business. There were no board meetings. The question of his appointment did not arise. It was not raised with Mr Clark or Mr Kriisk, who were not party to the discussions between Mr Aird and Mr Burnell prior to his initial investment in July 2016 or the February 2017 agreement.
368. When Mr Clark and Mr Kriisk became aware of the purported appointment of Mr Burnell following the filing of the AP01 on 28 February 2017, as demonstrated by the minutes of the meeting on 7 March 2017, Mr Clark and Mr Kriisk proceeded on the incorrect assumption that Mr Burnell had been appointed by Mr Aird under the terms of clause 5.1.1 of the Joint Venture Agreement. Mr Clark confirmed in cross-examination that he had assumed incorrectly that Mr Aird could unilaterally appoint Mr Burnell under that provision. He failed to recall that the provision was limited to the appointment of non-executive directors or that a further resolution of the directors or the shareholders would be required. I infer that Mr Kriisk was proceeding on the same false premise at the time.
369. When Mr Aird confirmed on 8 March 2017 that Mr Burnell was not appointed under the provisions of the Joint Venture Agreement, Mr Clark and Mr Kriisk did not challenge Mr Burnell's assertion that he had been appointed as a director any further (whether with Mr Burnell or Mr Aird). They simply acquiesced in the purported appointment in that they did not challenge Mr Burnell's right to attend meetings. There is no evidence of the reasons why Mr Clark and Mr Kriisk adopted this course of action. They simply went along with it. Given Mr Aird's autocratic style of management and his control of the company more generally, that is perhaps understandable. However, they were not at any stage requested to give their consent to the appointment and remained unaware that their assent may have been necessary.
370. For these reasons, in my view, Mr Clark and Mr Kriisk cannot be said to have assented to the appointment of Mr Burnell with full knowledge of the matter: their assent was not sought and they were not aware that it was significant. The

*Duomatic* principle therefore does not apply to treat Mr Burnell as having been validly appointed as a director at any time.

***Was Mr Burnell a de facto director?***

371. Mr Leiper’s final argument is that Mr Burnell was a de facto director.

*Background*

372. A de facto director is a person who assumes to act as a director. He or she is “held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such” (*In re Hydrodam (Corby) Limited* [1994] 2 BCLC 180 per Millett J at page 183).

373. I was referred by both parties to the judgment of Arden LJ, as she then was, in *Smithton Limited v Naggar and others* [2014] EWCA Civ 939, [2015] 1 WLR 189 for guidance on the principles that should be taken into account in determining whether a person should be regarded as a de facto director. She said this at [31] to [44]:

“31. The Companies Act definition does not elucidate that matter. Provisionally it seems to me that that term is to be tested against the usual split of powers between shareholders and directors under Table A i.e. on the basis that the powers of management of the company’s business are delegated to the directors and the shareholders cannot intervene except by special resolution. On that basis it means a person who either alone or with others has ultimate control of the management of any part of the company’s business. In the usual case, in my judgment, it would not include a purely negative role of giving or receiving permission for some business activity.

32. The role of a de facto or shadow director need not extend over the whole range of a company’s activities (see *Re Mea Corporation Ltd* [2003] 1 BCLC 618 ; *Secretary of State v Deverell* [2001] Ch 340 ). A person may be both a shadow director and a de facto director at the same time (*Re Mea Corporation*).

Practical points: what makes a person a de facto director?

33. Lord Collins sensibly held that there was no one definitive test for a de facto director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. However, a number of points arise out of *Holland* and the previous cases which are of general practical importance in determining who is a de facto director. I note these points in the following paragraphs.

34. The concepts of shadow director and de facto are different but there is some overlap.

35. A person may be de facto director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.

36. To answer that question, the court may have to determine in what capacity the director was acting (as in *Holland* ).

37. The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.

38. The court is required to look at what the director actually did and not any job title actually given to him.

39. A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.

40. The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances "in the round" (per Jonathan Parker J in *Secretary of State v Jones*).

41. It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.

42. Relevant factors include:

i) whether the company considered him to be a director and held him out as such;

ii) whether third parties considered that he was a director;

43. The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.

44. Acts outside the period when he is said to have been a de facto director may throw light on whether he was a de facto director in the relevant period."

374. The main test therefore has two parts: (i) whether the relevant person was part of the corporate governance system of the company and (ii) whether he or she assumed the status and function of a director so as to make himself or herself responsible as if he or she were a director. It is focussed on the key strategic decisions of the company and the relevant individual's role in making them. The approach that I intend to take, in line with Arden LJ's approach, is to review the actions of Mr Burnell on which the Defendants rely and seek to determine whether, given the context of the governance structure of the company, those actions should be regarded as directorial in nature.

*The parties' submissions*

375. Mr Leiper submits that Mr Burnell was a de facto director of TTL from 1 July 2016. He relies on the following as evidence that Mr Burnell assumed the status and functions of a director: Mr Burnell's role as CEO of TTL from 1 July 2016, which he says gave Mr Burnell executive control of TTL; Mr Burnell's actions in calling for, attending and participating in board meetings; Mr Burnell's consent to the filing of the form AP01 at Companies House; Mr Burnell's seeking legal advice on behalf of TTL from its solicitors; the fact that other directors and third parties treated Mr Burnell as a director, in particular with effect from 28 February 2017; and Mr Burnell's resignation as a director of TTL on 8 June 2017.
376. Mr Davies submits that Mr Aird was the person who was controlling TTL throughout the process, not the board. Any strategic matters regarding the business were decided by Mr Aird: he approved the accounts without reference to Mr Clark, Mr Kriisk, or for that matter Mr Burnell; he took the decisions to terminate Mr Clark's consulting arrangements and to activate Mr Kriisk's service agreement. Although Mr Burnell referred to himself as a "director" in the period after 28 February 2017, his own viewpoint is not relevant. It is an objective test. Mr Burnell did not undertake any "directorial" acts. He attended a meeting on 7 March which the Defendants say was not a valid board meeting. His attendance at and participation in a meeting cannot of itself amount to a directorial activity. Mr Davies challenges the Defendants' reliance on Mr Burnell's resignation as director on 8 June 2017. He says that resignation is irrelevant to the concept of a de facto directorship. It all depends on the facts. Resignation itself is not a directorial act.

*Discussion*

377. The governance structure of TTL changed over time. Prior to Mr Burnell's initial investment in TTL, Mr Aird was accustomed to taking all the key decisions of the company. There was little reference to the other directors, Mr Clark and Mr Kriisk. Mr Aird co-ordinated the activities of Mr Clark and Mr Kriisk. He dealt with the finances of the company on his own. There were few if any board meetings.
378. Following the appointment of Mr Burnell as CEO, Mr Burnell took on day-to-day management of the business. However, the governance structure operated in much the same manner as before. All financial decisions were taken by Mr Aird. The company's accounts were drawn up and filed without the knowledge of Mr Clark, Mr Kriisk or Mr Burnell. There were no board meetings although from time to time Mr Burnell did suggest that a board meeting might be



necessary (see for example his emails on 11 September 2016 and 14 October 2016).

379. Mr Leiper submitted that the performance by Mr Burnell of his role as CEO from 1 July 2016 should be seen as his acting as a de facto director. I reject that submission. It is quite possible for a person to act in an executive capacity handling the day to day management of the business without taking strategic decisions in a capacity as a director or a de facto director.
380. Mr Burnell was given a degree of autonomy in the management of the day to day business. Mr Burnell was “in charge” of Mr Kriisk and Mr Clark; he put in place the transfer of the company’s information and email systems on to new servers; he transferred the principal place of business of the company to the Farm; and he engaged the Gover brothers to work on some aspects of the company’s business. However, these actions could still be viewed as remaining within the framework set by and controlled by Mr Aird and/or under the delegated authority from Mr Aird. For that reason, in my view, in the immediate aftermath of his appointment as CEO, Mr Burnell did not undertake any directorial actions.
381. The governance position of the company changed in the first quarter of 2017. Following the rejection of the Gover brothers’ proposal Mr Burnell became more assertive in his actions. He began to exercise authority without the control or approval of Mr Aird. For example, he ordered the payment of the invoice for the shipment of PCBs from China without seeking Mr Aird’s approval and he circulated the email to TTS following the meetings in Estonia without obtaining Mr Aird’s agreement.
382. Furthermore, following the renegotiation of his arrangements with Mr Aird, in February 2017 and the completion of his investment, Mr Burnell assumed the position of a director. He asked Mr Aird to arrange his appointment as a director. He was treated by all the other directors – Mr Aird, Mr Clark and Mr Kriisk – as if he was a director, even though he had not been validly appointed. He represented to third parties, including Mr Pfister, that he was a director. He instructed the company’s solicitors to provide advice in his assumed capacity as a director.
383. Mr Burnell also attended meetings and participated in meetings with other directors on 7 March, 15 March and 29 March 2017. These meetings were called as “board meetings”. Mr Aird takes the view that they were not validly called. However, the validity of the meetings is not an issue on which I heard argument. In all of these cases, Mr Burnell participated on the basis that he was a director and was treated by those who attended on an equal footing with each of the other directors. In those meetings, Mr Burnell sought to gain access to the financial information of the company by exercising powers as a director to

compel Mr Aird to disclose financial information to the board, including himself as a member of the board.

384. Mr Burnell in his evidence sought to suggest that he did not place any particular significance on these meetings as “board meetings”. I did not regard that evidence as credible. His other evidence showed that he was well aware of the concept of the formal board meeting and from time to time he expressly requested others to call board meetings.
385. Mr Davies says that Mr Burnell took no “directorial acts”. I do not agree. He regarded himself as a director, he was treated by others as a director, and he sought to exercise the powers of a director within the confines of the governance structure of the company. To my mind, at the latest following his appointment on 28 February 2017, Mr Burnell was and acted as a de facto director of the company.
386. Mr Davies refers to the fact that Mr Burnell links his shareholding in the company to his position as a director and that Mr Burnell was not, at any point, issued any shares in the company. I agree. After the completion of his loan, Mr Burnell viewed his appointment as a director and the issue of shares to him as inextricably linked; they were both important aspects of his “equal partnership” with Mr Aird. In his negotiations with Mr Aird, Mr Burnell sought to increase the importance of his proposed shareholding and reduce the importance of the board, for example, by restricting the matters that might be referred to the board of directors and increasing the number of decisions that might be taken by him and Mr Aird as shareholders. However, he also saw his directorship as an important part of the “partnership” with Mr Aird. This can be seen from his emails following the advance of his funds on 24 February 2017 – in which Mr Burnell asks Mr Aird to arrange for the issue of his shares and his appointment as a director – and his concerns that Mr Aird should not control the board by introducing his nominees as directors. In the final analysis, however, although he was not issued any shares in the company, Mr Burnell acted as a director, was treated by others as a director and sought to exercise his powers as a purported director.

***If Mr Burnell was a de facto director, when did he cease to be a director?***

387. The next question is when did Mr Burnell’s directorship come to an end. Within the chronology, there are to my mind three key dates.
- (1) The first is 15 March 2017. This is the date of the purported board meeting at which Mr Burnell resigned from his position as CEO.

- (2) The second is 29 March 2017. This is the date of the subsequent purported board meeting, which appears to be the last date on which Mr Burnell was significantly involved in the business of the company.
- (3) The final date is 8 June 2017, when Mr Burnell sent an email to Mr Pfister in which he stated that he resigned as a director with “immediate effect”.

388. In my judgment, Mr Burnell should be regarded as having continued as a de facto director of TTL until at least the meeting on 29 March 2017, but as having ceased to be a de facto director either following that meeting or shortly thereafter. My reasons are as follows.

- (a) I have rejected 8 June 2017 as the date on which Mr Burnell ceased to be a de facto director.

Mr Burnell had not been validly appointed as a de jure director of the company. It follows that the date of his resignation as a de jure director cannot be determinative of the date on which he ceased to be a de facto director. Mr Burnell’s purported resignation on that date is part of circumstances which have to be taken into account in deciding when, as a matter of fact, Mr Burnell ceased to assume the position of a director and ceased to be treated as a director. However, in the present case, it is clear that Mr Burnell had ceased to assume the position of a director of TTL some time before it was drawn to his attention that he was still registered as a director of TTL.

Furthermore, others (principally the other directors) had ceased to treat him as a director some time before that date. This is evidenced by the process of return of company property and information initiated by Mr Aird and Ms Currie, with the assistance of Downs, in April 2017.

- (b) I have also rejected the suggestion that Mr Burnell ceased to act as a director on 15 March 2017.

There was a dispute between the parties as to whether at the meeting on that date Mr Burnell resigned solely in his capacity as CEO or whether he intended to resign from all of his roles with the company (including his position as a director).

On the evidence before me, I have concluded that Mr Burnell stated that he resigned “as CEO”. This is consistent with Mr Burnell’s statement as recorded in the draft minutes prepared by Mr Christian Aird. It was not challenged at the time by Mr Burnell – even though he sought to make other changes to the minutes.

I have taken into account the fact that Mr Burnell's statement at the meeting on 15 March and his service of the statutory demand on 16 March were clearly timed so that the demand was served after his resignation. I have also considered Mr Aird's view, in cross-examination, that Mr Burnell's position became untenable after the statutory demand was served. However, the fact remains that, after the meeting on 15 March and the service of the statutory demand on 16 March, Mr Burnell continued to be involved, in particular, in the preparation for the meeting on 29 March 2017. That meeting was again called as a board meeting (notwithstanding the challenges to its validity). Mr Burnell attended that meeting as and was treated by others as attending that meeting in his capacity as a director.

- (c) Although in circumstances in which an individual is treated as a de facto director, it may be difficult to determine with certainty the date on which that person ceases to be a director, in this case, the meeting on 29 March 2017 is the last date on which there is any evidence of Mr Burnell purporting to act in his capacity as a director of the company and being treated by others as acting in that capacity. There is no particular evidence pointing to any other date on which Mr Burnell ceased to assume the position of a director, but he took no action in his capacity as a director after that time and, as I have described, he was clearly being treated as a former director by the other directors (and the company's solicitors) by the time the process of the recovery of the company's property and information was being conducted in April 2017.

### ***The scope of Mr Burnell's duties as a director***

389. If, as I have found, Mr Burnell was a de facto director of TTL at any time, it is common ground that, as a de facto director, he owed the same fiduciary duties to the company as if he had been validly appointed as a director (*McKillen v Misland (Cyrpus) Investments Limited* [2012] EWHC 521 per David Richards J at [19]).
390. The "general duties" owed by a director to a company are set out in Chapter 2 Part 10 Companies Act 2006 ("CA 2006"). It is TTL's case that Mr Burnell acted in breach of certain of those duties, more specifically his duty to promote the success of the company, his duty to exercise reasonable care, skill and diligence and his duty to avoid conflicts of interest. I will address the various respects in which TTL asserts that Mr Burnell has breached those duties later in this decision, but it will assist my explanation if I first set out the relevant legislation and address one particular issue on which the parties are in dispute at this stage.

*The relevant legislation*

391. While Mr Burnell was a director of TTL, he owed a duty to act in the way that he considered would be most likely to promote the success of the company. This duty is set out in s172 CA 2006 as follows:

**172 Duty to promote the success of the company**

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company's employees,
- (c) the need to foster the company's business relationships with suppliers, customers and others,
- (d) the impact of the company's operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) the need to act fairly as between members of the company.

...

392. Mr Burnell was also subject to a duty to exercise reasonable care, skill and diligence in accordance with s174 CA 2006:

**174 Duty to exercise reasonable care, skill and diligence**

(1) A director of a company must exercise reasonable care, skill and diligence.

(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—

- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
- (b) the general knowledge, skill and experience that the director has.

393. Mr Burnell was also subject to a duty to avoid conflicts of interest with the company in accordance with s175 CA 2006. It provides, so far as relevant:

### 175 Duty to avoid conflicts of interest

(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).

(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.

(4) This duty is not infringed—

(a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or

(b) if the matter has been authorised by the directors.

...

394. The general rule is that a director, including a de facto director, ceases to be subject to these general duties when he ceases to be a director of the company. However, s170(2) CA 2006 provides for a person who ceases to be a director to continue in certain respects to be subject to the duty to avoid conflicts of interest in s175. Section 170(2) provides, so far as relevant:

(2) A person who ceases to be a director continues to be subject—

(a) to the duty in section 175 (duty to avoid conflicts of interest) as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director, and

(b) ...

To that extent those duties apply to a former director as to a director, subject to any necessary adaptations.

395. Subparagraphs (3) and (4) of s170 CA 2006 confirm that the “general duties” now contained in ss171 to 177 CA 2006 are based on certain common law rules and equitable principles and are to be interpreted in a manner consistent with them:

(3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.

(4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.

396. There is a difference in principle between the parties on the extent to which s170(2)(a) applies to allow a former director to be treated as being in breach of duties under s175 as a result of post-resignation acts.

*The parties' submissions*

397. Mr Leiper says that s170(2)(a) provides that a person who ceases to be a director continues to be subject to the duty in s175 to avoid conflicts of interest as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director. He described s170(2) as putting on a statutory footing the decision of Lawrence Collins J in *CMS Dolphin Limited v Simonet* [2002] BCC 600 (“*CMS*”). However, he argued that some aspects of the former common law rules and equitable principles, in particular those set out in *Hunter Kane Limited v Watkins* [2003] EWHC 186 (Ch) (“*Hunter Kane*”), on which the Claimant relies, do not survive the codification of fiduciary duties by CA 2006. In particular, he says it is clear that a fiduciary duty does continue after the termination of the directorship; and although the type of property, information or opportunity which cannot be exploited remains consistent with the pre-CA 2006 case law, it is no longer a necessary requirement of a breach of duty, as some authorities suggest, that a director’s resignation must have been prompted or influenced by his or her wish to acquire a business opportunity for him or herself.
398. Mr Davies, for Mr Burnell, says that under common law rules and equitable principles, the general principle is that a director’s fiduciary duties do not continue once he or she has ceased to be a director. The extension to that principle applied to prevent a director resigning his or her directorship simply to take advantage of an opportunity which should be regarded as the property of the company at the time of that resignation (*Canadian Aero Service Limited v O’Malley* [1973] 40 DLR (3d) 371 (“*Canaero*”).
399. Mr Davies says that the purpose of section 170(2)(a) is to preserve the extension of the duty to avoid a conflict of interest as recognized by the pre-existing case law. The effect of section 170(4) is that the extended application of the duty under section 175 has to be approached in accordance with the well-established principles of common law and equity.
400. For example, the reference in section 170(2)(a) to “property, information or opportunity” has to be read in accordance with those principles. Those principles demonstrate that it is not sufficient simply to point to a particular item

of information of which a director became aware when he or she was a director. The information or opportunity must have some quality that permits it to be treated in law in a manner akin to property of the company. The courts have employed the phrase “a maturing business opportunity” for this purpose (see Lawrence Collins J in *CMS*).

401. In addition, a former director will be under no liability under this rule if his or her resignation was not prompted or influenced by a wish to acquire the relevant opportunity or property for him or herself (*Island Export Finance Limited v Umunna* [1986] BCLC 460 (“*Island Export*”). A director is otherwise free to make use of knowledge acquired as a director once he or she leaves office (*Hunter Kane* [25], which forms part of a summary cited by Rix LJ in *Foster Bryant Surveying Limited v Bryant* [2007] EWCA Civ 200 (“*Foster Bryant*”) at [8] and referred to by him as “perceptive and useful” at [76]).

#### *Discussion*

402. As I have mentioned, Chapter 2 Part 10 CA 2006 codifies existing duties derived from common law rules and equitable principles. Section 170(3) CA 2006 provides that the statutory duties “replace” the common law rules and equitable principles from which they are derived. However, by virtue of s170(4), it is necessary for the court to have regard to the corresponding common law rules and equitable principles in interpreting and applying the general duties. The effect is that the court must give effect to the codified rules, but those rules must be interpreted in accordance with the pre-existing case law governing the common law rules and equitable principles from which they are derived.
403. The pre-existing case law therefore remains relevant to the interpretation of the statutory provisions and determining their scope and application. As the Court of Appeal explained the CA 2006 duties “extract and express the essence of the rules and principles which they have replaced” (*Towers v. Premier Waste Management Limited* [2011] EWCA Civ. 923 at [4]). In addition, CA 2006 does not seek to codify the common law rules and equitable principles governing the consequences of a breach of the general duties. Section 178 simply provides that the consequences of a breach are the same as would apply if the corresponding common law rule or equitable principle applied and that the general duties (with the exception of the duty to exercise reasonable care, skill and diligence) are, accordingly, enforceable in the same way as any other fiduciary duty owed to a company by its directors. So the equitable and common law principles therefore also remain relevant to determine the consequences of a breach of the general duties.
404. As I have mentioned above, although the general principle is that a director ceases to be subject to fiduciary duties associated with his or her position as a



director when the relationship ceases, s170(2)(a) extends the application of the duty to avoid conflicts (in s175) to former directors in certain circumstances (i.e. those involving the exploitation of any property, information or opportunity of which the director was aware when he or she was a director). My starting point for determining the scope of this provision in accordance with s170(4) is therefore the pre-existing case law governing the circumstances in which a former director might be regarded as being in breach of duty by reference to acts which took place after he or she ceased to be a director.

405. On this subject, I have been referred by the parties to a number of cases. These include *Boardman v Phipps* [1967] 2 AC 46, *Canaero, CMS, Hunter Kane, Bhullar v Bhullar* [2003] BCLC 241, *Foster Bryant*, and *Recovery Partners GP Limited v Rukhadze* [2018] EWHC 2918 (Comm) (“*Recovery Partners*”). I do not intend to embark upon a comprehensive summary of the case law in this judgment. Extensive summaries of the case law and principles in this area can be found in the judgment of Rix LJ in *Foster Bryant* and in the judgment of Cockerill J in *Recovery Partners*.
406. The principles that I have drawn from the case law so far as relevant to this and the other issues before me are as follows.
- (a) The classic statements of the circumstances in which a former director may be found liable for a breach of duty giving rise to liability to account for profits refer to cases in which a former director has obtained for him or herself, without the informed approval of the company, a profit from the exploitation of property or a maturing business opportunity of the company where his or her resignation can be fairly said to have been prompted or influenced by a wish to acquire that opportunity for himself or herself and where it was the former director’s position with the company rather than some fresh initiative which led to the opportunity which the former director later acquired (*Hunter Kane* [25], *CMS* [96]).
  - (b) In these cases, the courts have had to balance the need to prevent the emasculatation of fiduciary duties, which might occur if a fiduciary was free to exploit opportunities which arose during the course of the fiduciary relationship by the simple expedient of resigning, with public policy issues in relation to the restraint of trade. The result is that the courts have adopted a merits-based approach and the circumstances in which a former director has been found to have breached his or her fiduciary duty are highly fact-sensitive (Rix LJ, *Foster Bryant* [76]).
  - (c) The basis of the liability imposed on a former director for breach of fiduciary duty is not that the fiduciary duty survived the termination of the relationship as director, but that a breach of fiduciary duty prior to or at the termination of the relationship resulted in a liability to account for

a profit which was realized after the termination of the relationship but causally connected to the breach (Rix LJ, *Foster Bryant* [69]; Cockerill J, *Recovery Partners* [75], [76]).

- (d) Unless other factors are involved, it will not ordinarily be a breach of duty for a director to resign with the intention of setting up in business to compete with the business of the company of which the individual was formerly a director (*Balston Limited v Headline Filters Limited* [1990] FSR 285, per Falconer J at page 412; *Foster Bryant* [60]; *Recovery Partners* [84]). There will need to have been some additional element amounting to a breach of the obligation of loyalty owed by the director before or at the time of resignation.
  - (e) The underlying basis of the liability of a former director who exploits a business opportunity of the company is that the opportunity was of such a nature as to be treated as the property of the company at the time at which he or she was a director. The courts have employed the term “maturing business opportunity” – which is derived from the judgment of Laskin J in *Canaero* – to identify an opportunity which is sufficiently developed that the subsequent exploitation of the opportunity by a director following his or her resignation can be regarded as giving rise to a breach.
  - (f) For an opportunity to be regarded as “maturing”, it is not necessary for it to have developed into a contract between the company and a third party. It may suffice that there has been contact between the company and a third party with regard to future business such that “some outlines of future contractual relations are in play” (Cockerill J, *Recovery Partners* [60]). However, the opportunity must (i) have come to the former director by reason of his position as a director and (ii) be an opportunity which the company was “actively pursuing” (*Don King Productions Inc v Warren & others* [2000] Ch 291 [40], [43]; *Queensland Mines Limited v Hudson* (1978) 18 ALR 1; *Recovery Partners* [65], [66]).
407. The fiduciary duties which form the general duties in Chapter 2 Part 10 CA 2006 are now part of a statutory code. There was broad agreement between the parties that the extension of the duty to avoid conflicts of interest in s175 CA 2006 by s170(2)(a) is intended to “extract the essence” of the principles which underlie the case law governing the circumstances in which a former director may be found to be in breach of duty by reference to post-resignation acts. However, the question remains whether the codification has had any material effect on the scope of the duty that it is intended to “replace”.

408. The extension of the duty to avoid conflicts of interest in s175 by section 170(2)(a) is limited to cases involving the exploitation of “any property, information, or opportunity” of which a director became aware whilst he or she was a director. The phrase “any property, information, or opportunity” appears in s175(2). The interpretation of that phrase in the context of a breach of the duty in s175 during the existence of the fiduciary relationship would naturally have a broader meaning than would be accommodated by the pre-existing case law governing liability for breach of duty arising from post-resignation acts. However, it was common ground between the parties that the phrase “any property, information or opportunity” in s170(2)(a) (and accordingly when applying s175 in accordance with s170(2)(a)) should be given a narrower meaning consistent with the existing case law and, in particular, the case law concerning the need for a “maturing business opportunity” (such as *Canaero* and *CMS*). To my mind, that is the correct approach; it is consistent with the interpretation of the scope of the duty in s175 as extended by s170(2)(a) in accordance with the principles of s170(4) and permitted by the application of s175 in those circumstances with “necessary adaptations” in accordance with s170(2).
409. There was however a difference between the parties on the question of whether the effect of s170(2)(a) is that the duty continues after the termination of the directorship and accordingly whether a breach of duty could be founded solely on post-resignation acts and so, for example, without a requirement to show that the resignation of the director was prompted or influenced by the director’s desire to exploit a business opportunity for his or her own benefit.
410. On this point, as I have mentioned above, the better explanation of the pre-existing case law is, in my view, that conduct of a director after he or she has left office cannot of itself amount to a breach of duty. This is on the basis that a fiduciary duty must terminate with the fiduciary relationship from which it is derived. A claim of a breach of duty must therefore be based on actions of the director before or at the time of resignation. This is the approach adopted by Rix LJ in *Foster Bryant*, where, in analysing the decision of Lawrence Collins J in *CMS*, he took the view that the rationale of Lawrence Collins J’s judgment was not that the fiduciary duty survived the end of the relationship as a director, but rather that the lack of good faith with which the further exploitation of the relevant property was planned whilst the defendant was a director constituted the breach of duty which ultimately (and with the relevant causal link) was diverted to the defendant’s future enterprise (*Foster Bryant* [69]). A similar approach was taken by Cockerill J in *Recovery Partners* at [75] to [77].
411. The difficulty with that analysis in the context of the provisions of CA 2006 is that s170(2)(a) expressly provides that the duty in s175 to avoid conflicts of interest “continues” after the relevant person ceases to be a director. The

implication is that conduct of a director after his or her resignation can give rise to a breach of that duty. Notwithstanding the instruction in s170(4) and the ability to apply s175 with “necessary adaptations”, in my view, it is not permissible as a matter of construction to ignore the plain words of the statute. Accordingly, I agree with Mr Leiper that the extended duty imposed by s170(2)(a) is a continuing duty and that it must therefore be possible for a breach of that continuing duty to be founded on acts which take place after a director has resigned his or her directorship. It follows that, following the introduction of the general duties by CA 2006, it cannot be an absolute requirement for a breach of the extended duty that a director’s resignation must have been prompted or influenced by his or her wish to acquire a business opportunity of the company.

412. Such a conclusion is of course contrary to the reasoning in some of the cases which discuss the common law rules and equitable principles on which the general duty in s175 is based, in particular, that of Rix LJ in *Foster Bryant* and Cockerill J in *Recovery Partners* to which I have just referred. However, the courts did not have to address in *Foster Bryant* or *Recovery Partners* the question of the interaction of the existing case law principles with the statutory code. My conclusion also, in theory, risks creating circumstances in which duties are extended beyond the scope of the duties imposed by common law rules and equitable principles on which the general duty is based and imposing liabilities for breach in cases where liability might not arise based on those principles. However, it is, in my view, an inevitable result of the codification.
413. It might be said that this interpretation also threatens the delicate balance which the courts (in the cases to which I have referred, and others) have sought to maintain between the protection of the fiduciary relationship (by preventing a director from resigning his or her position in order to make a profit at the expense of the company) and avoiding a regime which acts as a restraint on trade (by barring a former director from competing with a company of which he or she was formerly a director). However, I would not expect that to be the case for two reasons:
- (a) First, the circumstances in which the extended duty can apply are limited to cases involving the exploitation of “any property, information or opportunity” of which the director became aware at a time when he or she was a director. For the reasons that I have given, this phrase remains to be interpreted in accordance with the existing case law principles.
  - (b) Second, it remains necessary – and consistent with the requirements of s170(4) – to give effect to the extended duty in accordance with the case law applicable to the common law rules and equitable principles underlying the relevant general duty to the extent possible (and so far as consistent with the words of the statute). So, for example, in deciding

whether a breach of duty has occurred and the consequences of that breach, the court may take into account the nature of any pre-resignation and post-resignation conduct as part of the merits-based assessment approved by the Court of Appeal in *Foster Bryant*.

***TTL's pleaded case***

414. I must now turn to the various acts which TTL says constituted a breach of duty by Mr Burnell.
415. TTL's pleaded case is that while Mr Burnell was a director of TTL he acted in breach of his duty to promote the success of the company and/or his duty to exercise reasonable care and skill by:
- (a) failing to take reasonable steps to protect TTL's confidential information (including by failing to ensure that the Gover brothers and other individuals working for Kona had entered into non-disclosure agreements);
  - (b) using TTL's solicitors to obtain legal advice about how TTS could terminate the Licence Agreement, which he then used for the benefit of TTS and himself;
  - (c) orchestrating board meetings using unjustified issues about TTL's solvency and demanded repayment of his loans knowing that they were not yet repayable;
  - (d) failing to inform TTS that the certification received from the Home Office in January 2017 was for very limited use and the conditions for payment under the terms of the Licence Agreement were not yet satisfied;
  - (e) issuing the statutory demand against TTL and refusing to agree an undertaking not to issue a petition to wind up TTL despite knowing that the alleged debt was disputed;
  - (f) orchestrating the resignation of Mr Kriisk and engaging him to work for TTS;
  - (g) acquiring or reaching an agreement to acquire the entire shareholding of TTS;
  - (h) instructing or directing others to instruct solicitors to defend the Chancery Division proceedings;
  - (i) taking steps to conceal his actions.

416. In addition, TTL says that in breach of these duties Mr Burnell failed to inform Mr Aird of matters that were of importance and relevance to the company in breach of his duty to inform including:
- (a) Mr Burnell's intention to acquire control of the valuable rights under the Licence Agreement for his own benefit by either gaining control of TTL or TTS;
  - (b) the revenue or profit projection obtained in or around November 2016;
  - (c) the existence of any grounds upon which he subsequently relied in support of TTS's defence and counterclaim in the Chancery Division proceedings and/or of the fact that he considered TTS had grounds to terminate the Licence Agreement;
  - (d) how the invoice forwarded from Mr Burnell to Mr Aird on 14 March 2017 came to him and from whom and the existence of a second invoice relating to royalty payments under clause 10 of the Licence Agreement.
417. TTL also says that Mr Burnell acted in breach of his duty to avoid conflicts of interest which encompassed a duty not to exploit for anyone but TTL's benefit any property, opportunity or confidential information of which he became aware as a result of his directorship. The information and opportunities on which TTL relies in this respect are: certain information which I have discussed in more detail at [456] below; the grounds upon which TTS could purport to terminate the Licence Agreement; the service of the invoice from TTS; TTS's attempts to terminate the Licence Agreement; the service upon TTS of TTL's pleadings in the Chancery Division proceedings; and the opportunity to negotiate for and acquire the shares in TTS.
418. TTL says that during or after his directorship Mr Burnell exploited these opportunities and confidential information for his own benefit by using them to:
- (a) promote the deterioration in the relationship between TTL and its directors and causing Mr Kriisk to assist TTS;
  - (b) causing TTS to seek to terminate the Licence Agreement and by subsequently causing further notices of termination of the Licence Agreement to be served on TTS;
  - (c) enabling TTS to defend the Chancery Division proceedings, both by causing solicitors to be instructed by TTS and providing information to TTS;

- (d) negotiating and reaching an agreement to purchase the shares and gain control of TTS thereby gaining control and ownership of the valuable intellectual property rights.

***Were Mr Burnell's actions in breach of his fiduciary duties?***

*The period before 28 February 2017*

419. I have found that Mr Burnell was not a director (de jure or de facto) before 28 February 2017. It follows that he did not owe any of the general duties set out in Chapter 2 Part 10 CA 2006 to TTL in this period and so cannot be liable for any breach of them arising from any actions in this period.
420. In any event, as will be apparent from the facts as I have found them, many of the facts and events on which TTL relies in this period do not, in my view, amount to a breach of duty by Mr Burnell.

*28 February 2017 to 29 March 2017*

421. Mr Burnell was a director of the company in this period and so he was subject to the general duties in Chapter 2 Part 10 CA 2006.
422. Before I turn to the more specific claims made by TTL of breaches of duty in this period, I shall deal with two general points.
423. The first relates to the position of the Gover brothers. TTL asserts that during this period and for that matter in the period prior to 28 February 2017, Mr Burnell was acting in conjunction with the Gover brothers to take control of the company's assets for his own benefit. Notwithstanding the statement made by Mr Julian Gover in his witness statement that the Gover brothers ceased all material involvement with effect from 8 February 2017, the evidence shows that the Gover brothers were, to an extent, involved in matters relating to the company after that date, principally in assisting Mr Burnell, Mr Clark and Mr Kriisk in relation to some corporate matters. That having been said, the more general assertion on behalf of TTL that the Gover brothers were not acting independently or that their actions can be ascribed to Mr Burnell is not made out.
424. The second relates to Mr Burnell's motivations during this period. TTL's broad claim appears to be that, throughout this period, Mr Burnell was working, with the assistance of the Gover brothers, to engineer the collapse of TTL so as to permit him to acquire the intellectual property in the products either himself or through an acquisition of shares in TTS. This assertion does not bear much scrutiny. In particular, there is no evidence of any plan on the part of Mr Burnell to acquire TTS at this stage. The opportunity for Mr Burnell to acquire the shares in TTS had not arisen. Mr Burnell had limited, if any, contact with Mr

Laul or Mr Ploompuu. Contact between TTL and TTS was for the most part handled by Mr Kriisk. The evidence shows that Mr Burnell's primary motivation for his actions, once it had become clear that Mr Aird was not going to honour the agreement for TTL to issue shares to him, was to secure the repayment of the Loan.

425. I should now turn to the issues on which TTL relies in support of its claim that Mr Burnell acted in breach of his duties as a director.

#### Failure to keep information confidential

426. One issue on which TTL relies is a failure by Mr Burnell to keep information confidential by moving the place of business of TTL to the Farm, by allowing access to information by others (principally the Gover brothers and employees of Kona), by transferring emails and information to central servers and failing to ensure that relevant personnel (again, principally the Gover brothers and employees of Kona) had signed confidentiality and non-disclosure agreements in relation to the information.

427. If and to the extent that these actions continued in this period, I find no breach of duty arising from them. Many of these actions were identified by Mr Aird at the outset of the relationship between Mr Aird and Mr Burnell as matters which needed to be undertaken in order to promote the business of the company. Mr Aird approved the transfer of the business to the Farm and the involvement of the Gover brothers. The failure to require other parties to enter into confidentiality and non-disclosure agreements can hardly be described as a significant breach of duty and, in any event, is a matter to which Mr Aird could have attended on his own.

#### Breakdown in the relationship between Mr Aird, Mr Clark and Mr Kriisk

428. I cannot agree with TTL's attempt to characterize Mr Burnell's involvement in the negotiations with Mr Clark and Mr Kriisk regarding their service agreements as part of an elaborate attempt by Mr Burnell to engineer a breakdown in relations between Mr Aird, Mr Clark and Mr Kriisk. There was clearly a difference in approach between Mr Burnell and Mr Aird as to how to manage Mr Clark and Mr Kriisk and how the negotiations with Mr Clark and Mr Kriisk should be handled, with, for the most part, Mr Burnell taking a more conciliatory line.

429. TTL criticises Mr Burnell for, in effect, fuelling Mr Aird's hard line approach to Mr Clark and Mr Kriisk, which led to Mr Kriisk's resignation, through his comments on their performance over time. I have discounted these comments as little more than the usual discourse between managers of a business. Mr Burnell was clearly frustrated by the lack of progress in the development of



the products, an issue which had equally frustrated Mr Aird in previous periods, but that did not mean that he did not appreciate the importance of Mr Kriisk, in particular, to the business.

430. As regards the resignation of Mr Kriisk, once again, TTL relies on that resignation as evidence of a pre-planned scheme on the part of Mr Burnell to undermine the business of TTL. The suggestion is that there is no other good reason for the resignation of Mr Kriisk as he had just been given the financial security that he had been asking for in the form of his service agreement. The inference that I am invited to draw is that Mr Burnell orchestrated the resignation as a step in his plan.
431. I do not do so. Mr Kriisk's explanation for his resignation is entirely understandable. Mr Kriisk was passionate about the Tags product. He was frustrated by the treatment of himself and Mr Clark by Mr Aird (and Mr Burnell). He was angry at the failure of Mr Aird to honour the obligations to Mr Clark, whom he regarded as his co-founder of the project, to activate his service agreement and he considered the demands placed on TTS to be unreasonable.
432. In my view, the more likely reason for the breakdown in the relationship between Mr Aird, Mr Clark and Mr Kriisk, and in particular the relationship between Mr Aird and Mr Kriisk, was Mr Aird's hard-line and autocratic approach to the management of Mr Clark and Mr Kriisk. The resignation of Mr Kriisk was not orchestrated by Mr Burnell. I can find no breach of any of the general duties by Mr Burnell arising from the breakdown of the relationship and Mr Kriisk's resignation. It was principally Mr Aird's own doing. The related assertion that this breakdown caused Mr Kriisk to assist TTS was not, at this stage, the work of Mr Burnell. Once Mr Kriisk had resigned, there was always going to be a significant risk that Mr Kriisk would revive his contacts with TTS in Estonia.

#### Prevention of reconciliation between Mr Aird, Mr Clark and Mr Kriisk

433. TTL also asserts that Mr Burnell took steps which prevented the reconciliation of Mr Aird, Mr Clark and Mr Kriisk. This is not separately pleaded, but I have regarded it as an extension of the claim that Mr Burnell orchestrated the deterioration of the relationship between Mr Aird, Mr Clark and Mr Kriisk.
434. This aspect of that claim appears to be based on an assertion that rather than seek to reconcile the parties following Mr Kriisk's resignation, Mr Burnell used the breakdown in relations to advance his own proposals for a reorganization of the business in which he would obtain control of the Tags business and Mr Aird would only retain a stake in the Restore business.

435. This accusation is based primarily on the events surrounding the meeting on 9 March 2017 involving Mr Kriisk, Mr Burnell and Mr Lucien Gover. Given Mr Kriisk's evidence that he would not work with Mr Aird again – which I accept – I cannot view this attempt by Mr Burnell as anything more than an attempt to find a way of restructuring the business in order to preserve its constituent elements.

#### Destabilizing the relationship between TTL and TTS

436. TTL also asserts that Mr Burnell is in breach of his duties to promote the success of the company and to exercise reasonable care and skill as a result of various actions which destabilized the company's relationship with TTS. There are several allegations that fall within this category. They include:
- (a) Mr Burnell's investigation of potential weaknesses in the Licence Agreement and in particular whether or not the agreements made in May 2016 were inter-related in such a way that a breach of the Joint Venture Agreement might provide TTS with grounds to terminate the Licence Agreement;
  - (b) the issues surrounding the invoicing of fees under the Licence Agreement: ranging from a failure to inform TTS that its rights to payment under the Licence Agreement had not accrued to failure to disclose the source and existence of invoices issued by TTS;
  - (c) Mr Burnell's authorization of payments to ALLPCB for PCBs on behalf of TTS;
  - (d) raising concerns about the solvency of TTL at (purported) board meetings, in circumstances where Mr Burnell was aware that the insolvency of the company, was a ground on which the Licence Agreement could be terminated.
437. In its pleadings and in its submissions, TTL describes most of these issues as part of a predetermined plan on the part of Mr Burnell together with the Gover brothers to acquire the shares in TTS and thereby acquire the rights to the Tags and the Restore products. However, the opportunity for Mr Burnell to acquire the TTS shares arose at a later stage, after he had ceased to be a de facto director of TTL and there is no evidence of any contact direct or indirect (for example, through Mr Kriisk) with Mr Laul and Mr Ploompuu at this stage. Once he had come to the view that it was unlikely that Mr Aird was going to permit TTL to issue shares to him, Mr Burnell's primary motivation was to secure the return of his investment. In this respect, I take into account the Gover brothers' arrangements with Mr Clark, Mr Kriisk and Mr Ploompuu, but as I have said I cannot attribute those actions to Mr Burnell.

438. Once Mr Burnell's actions are viewed in isolation from the assertion that they formed part of such a plan, I cannot regard them, in themselves, as amounting to breaches of Mr Burnell's general duties to the company as a director. Mr Burnell's investigation of the potential weaknesses in the licensing arrangements – including seeking advice from the company's solicitors – is the action of a director seeking to understand the potential threats to the company's business. This was particularly the case given TTL's reliance on development work being undertaken by TTS for which TTL was under no obligation to make any financial contribution until a marketable product had been produced. Mr Burnell was also concerned about the potential impact of Mr Aird's hard-line approach to the negotiation of the service agreements with Mr Clark and Mr Kriisk given the risks that would be posed to the business if Mr Kriisk were to leave. These were legitimate concerns. Mr Burnell took a different approach to these matters, but a difference in approach is not a breach of duty.
439. The same can be said of Mr Burnell's concerns about the solvency of the company in particular in the light of Mr Aird's proposals to withdraw funds from the company.

#### The issue of the statutory demand

440. The issue of the statutory demand is complicated by the fact that at the time at which the demand was served Mr Burnell was in the process of leaving the company. He had resigned as CEO at the meeting on 15 March 2017 and I have no doubt that the service of the statutory demand was timed to take place immediately after that resignation.
441. I have found that Mr Burnell ceased to be a de facto director a few weeks later. He therefore remained subject to the general duties in Chapter 2 Part 10 CA 2006 at the time at which the demand was served. In the ordinary course, the duty to act in good faith to promote the success of the company cannot of itself require a director to refrain from demanding payment of an amount which is lawfully due. I am satisfied that Mr Burnell believed that the Loan was repayable as a result of the failure of the company to issue shares to him and Mr Aird's failure to procure that issue and was not acting in bad faith when he served the demand. At the time, Mr Burnell's primary motivation was the return of his investment which he considered to be due.
442. In the circumstances – namely that Mr Burnell was in the process of leaving the company and that he was demanding an amount which he considered in good faith to be due – I do not regard Mr Burnell as being in breach of duty in relation to the service of the statutory demand.

*The period after 29 March 2017*

443. In the period after 29 March 2017, Mr Burnell was no longer a de facto (or de jure) director of TTL and was no longer in a fiduciary relationship with the company. With the exception of the duties extended by s170(2) CA 2006 to periods after a person has ceased to be a director, the general duties in Chapter 2 Part 10 CA 2006 no longer applied to him. The only one of those duties that is relevant in this case is the extension by s170(2)(a) of the duty to avoid conflicts of interest in s175 CA 2006.
444. There are various events in the period after 29 March 2017, which TTL claim involved a breach of fiduciary duty by Mr Burnell. These are: (i) the return of information to the company in April 2017; (ii) the termination of the Licence Agreement; (iii) Mr Burnell's acquisition of shares in TTS; and (iv) the conduct of the Chancery Division proceedings on behalf of TTS following Mr Burnell's acquisition of the TTS shares. In the case of the termination of the Licence Agreement, Mr Burnell's acquisition of shares in TTS, and the prosecution of the Chancery Division proceedings, TTL claims that Mr Burnell exploited information acquired by him whilst he was a director to assist for the purpose. I will deal with each of these in turn.

*The return of company information*

445. TTL claims that when returning the company's information following his resignation as CEO, Mr Burnell arranged for data to be manipulated or deleted from the server which was returned to Mr Aird in order to retain the deleted and missing data for his future use. In his evidence, Mr Clark referred to his being aware that there was some "filtration" of the data. Mr Clark was not able to point to any specific way in which the data was manipulated and there is no independent evidence that Mr Burnell orchestrated the process in order to deny TTL or Mr Aird access to information or to retain information for his own use. I cannot find any basis for a claim for breach of duty in this process.

*Termination of the Licence Agreement by Mr Laul*

446. As I have described above, following an exchange of emails between Mr Laul and Mr Aird, Mr Aird instructed Downs to commence proceedings on behalf of TTL seeking a declaration that TTS was not entitled to terminate the Licence Agreement, which TTL alleged that TTS had sought to do in an email of 4 April 2017 sent by Mr Laul to Mr Aird. Those proceedings began on 10 April 2017.
447. If and to the extent that the email of Mr Laul is properly regarded as a termination of the Licence Agreement, there is no basis for a claim against Mr Burnell in relation to that termination (or purported termination) alone. This

termination (if any) was instigated by Mr Laul, following his dispute with Mr Aird. Mr Laul relied on advice from Mr Kriisk.

448. There are several points in the conduct of the Chancery Division proceedings following the acquisition of TTS by Mr Burnell at which TTS purports to terminate the Licence Agreement before it is agreed between TTL and TTS that the Licence Agreement is terminated as part of the settlement of those proceedings in April 2018. I will address those issues in the context of the conduct of the Chancery Division proceedings.

#### Mr Burnell's acquisition of shares in TTS

449. TTL makes various claims in relation to Mr Burnell's acquisition of the shares in TTS.

- (a) First, TTL asserts that Mr Burnell acted in breach of his duty (in s172 CA 2006) to act in good faith to promote the success of TTL by failing to inform TTL of the opportunity to acquire TTS.

As I have found, Mr Burnell first became aware of the opportunity to acquire the shares in TTS on or around 11 May 2017. At that time, Mr Burnell was not a director of TTL. He was under no duty to inform TTL or any director of TTL of the opportunity.

- (b) Second, TTL claims that Mr Burnell acted in breach of his continuing duty under s175 CA 2006 in exploiting the opportunity to acquire the shares in TTS.

TTL first became aware of the opportunity to acquire shares in TTS on 11 May 2017 when Mr Kriisk informed Mr Aird and Ms Currie that the shareholders in TTS may be prepared to sell their shares. I have found that Mr Burnell must have become aware of the opportunity at about the same time. The opportunity therefore first arose after Mr Burnell ceased to be a director. The extension of the duty in s175 by 170(2)(a) only applies to the exploitation of an opportunity of which a director became aware at a time when he or she was a director. Mr Burnell was not therefore subject to any duty under s175 which would prevent him from exploiting the opportunity to acquire TTS shares alone.

- (c) Third, TTL claims that Mr Burnell acted in breach of his continuing duty under s175 CA 2006 in connection with the acquisition of the shares in TTS because it involved the exploitation of information confidential to TTL and of which he had become aware during his directorship.

This claim requires further consideration and I have addressed the issues in the following paragraphs.

Use of TTL's property, information in the acquisition of TTS and the termination of the Licence Agreement

450. TTL's claim is that Mr Burnell exploited information of which he became aware whilst he was a director of TTL to inform his acquisition of shares in TTS and the use of that information was a breach of Mr Burnell's duty to avoid conflicts of interest under s175 CA 2006 (as extended by s170(2)(a)).
451. TTL also claims that Mr Burnell acted in breach of his continuing duty under s175 CA 2006 in connection with the termination of the Licence Agreement by TTS and the defence of the Chancery Proceedings (which ultimately led to the termination of the Licence Agreement) after Mr Burnell obtained control of TTS because they involved the exploitation of information confidential to TTL and of which he had become aware during his directorship.
452. These claims are the crux of TTL's counterclaim and so I will consider them together.
453. Mr Burnell was not a director of TTL at the time that any of the events that underlie these claims took place. He was therefore not subject to any of the general duties in Chapter 2 Part 10 CA 2006 other than the continuing duties imposed by s170(2). The only such duty that is relevant for present purposes is the extended duty under s175 to avoid conflicts of interest. This was a continuing duty. As a result, Mr Burnell remained under a positive duty to avoid a situation in which he had, or could have, a direct or indirect interest that conflicted with TTL albeit only as regards the exploitation of "any property information or opportunity" of which he became aware at a time when he was a director. As I have explained above, this duty is subject to interpretation in accordance with s170(4).
454. Mr Burnell ceased to be a director as a result of his disputes with Mr Aird concerning the failure of Mr Aird to procure the issue of shares in TTL to him and Mr Aird's approach to the management of key aspects of the business of TTL, in particular the relationship with TTS and the relationship with Mr Kriisk. His actions were also motivated by his desire to secure the return of his investment, which he regarded as having been undermined by the failure of the company to issue the shares to which he was entitled. Mr Burnell's resignation was not, at the time, prompted or influenced by a desire to acquire the company's information or to exploit it for himself.
455. Several weeks after Mr Burnell ceased to act as a director of TTL, the opportunity for him to acquire the shares in TTS emerged. This was not an opportunity which had arisen whilst Mr Burnell was a director of TTL. It could not be described as a "maturing business opportunity" of TTL at the time at

which Mr Burnell ceased to be a director in the sense described by Laskin J in *Canaero*. Mr Burnell availed himself of that opportunity.

456. The information to which TTL refers in support of its claims includes: (i) the design concepts relating to Tags and Restore; (ii) details of TTL's target customers for the products and the state of negotiations with them; (iii) the relative importance of individuals working for TTL, in particular Mr Kriisk's importance to the commercial success of the business; (iv) TTL's financial position, in particular TTL's likely profitability from its exploitation of rights to Tags and Restore; (v) information relating to the relationship between TTL and TTS (including the terms of the Licence Agreement, Downs' legal advice to TTL concerning the efficacy of the Licence Agreement and the details of the dispute between TTS and TTL concerning payments due under the Licence Agreement).
457. Mr Burnell was a de facto director. There is no doubt that whilst he was a director he was aware of the information to which TTL refers in respect of this aspect of its counter-claim.
458. Much of the information to which TTL refers is of a nature which TTL might regard as commercially sensitive in broad terms. However, as I have described above, not all information is the subject of the extended duty under s175. The reference in s170(2)(a) to "any property, information or opportunity" has to be read in the light of the common law rules and equitable principles which govern the underlying duty and accordingly the relevant case law. Any "information" or "opportunity" must be akin to property of the company for the duty to apply (*CMS* [96]). And it is well-established that, after ceasing to be a director, a former director is in general not prohibited from using the "general fund of skill and knowledge, the 'stock in trade' of knowledge," he or she has acquired as a director even including "business contacts and personal connections" made as a result of the directorship (*Hunter Kane* [25(6)]).
459. In the present case, any interest TTL might have in the design concepts for Tags and Restore could meet this test. However, the only interests TTL had in the intellectual property relating to the products at the time were its rights to use the intellectual property under the terms of the Licence Agreement and its option to acquire the rights under the Licence Agreement (which it had not exercised). The Chancery Division proceedings were ultimately settled on the basis that all the intellectual property rights accrued to TTS.
460. Some aspects of the relationship between TTL and TTS may also meet the test – in particular, the terms of the Licence Agreement and the advice which TTL had obtained from Downs regarding the enforceability of the Licence Agreement. Mr Burnell was also party to some commercially sensitive financial information relating to TTL – in particular, the financial forecasts – although

much of the financial information relating to TTL remained solely the preserve of Mr Aird.

461. Of the remainder of the information to which TTL refers, I accept that information in relation to customers of TTL may, in appropriate circumstances, fall within this category, but TTL had no customers. As regards, potential customers, the case law shows that the relevant contacts would need to be sufficiently developed so as to amount to a “maturing business opportunity”. However, I have not seen any evidence to this effect and as I have mentioned above, it is accepted that business contacts and personal connections ordinarily form part of the general fund of knowledge and skill which a former director is entitled to exploit for his or her own account. The relative importance of individuals working for TTL (i.e. the importance of Mr Kriisk to the business) could not, to my mind, constitute information which should be regarded as akin to property for these purposes. It is generalized knowledge about the business and not information which is subject to the duty in s175.
462. In order to sustain its claim, TTL must also show that the breach of duty arose from the exploitation of information which fell to be treated as “property, information or opportunity” of TTL.
463. There is no documentary evidence that, for the purpose of the acquisition, Mr Burnell made direct use of any of the information to which TTL refers in its submissions and in its pleaded case. However, it is a reasonable inference that Mr Burnell took into account what he knew from his previous association with TTL in deciding whether or not to acquire the shares in TTS and the price which he was willing to pay. How much advantage Mr Burnell gained from that information in relation to the acquisition of the shares in TTS needs to be considered. He did not exploit the intellectual property rights of TTL in the products for this purpose. Much of the information that Mr Burnell had regarding the relationship between TTL and TTS was also available to TTS – and arguably would have been made available to a third party purchaser who did any due diligence on the company.
464. Furthermore, even if Mr Burnell did consciously or unconsciously, make use of any of the information to which TTL refers for the purpose of the acquisition of TTS, his use of the information was at one step removed from an exploitation of the property or information itself. The opportunity which Mr Burnell exploited was the opportunity to acquire shares in TTS. That opportunity was not a maturing business opportunity of the company at a time at which Mr Burnell was a director. It derived from contacts that he had made whilst he was a director (Mr Laul and Mr Kriisk). The information he possessed concerning the business of TTL was no doubt helpful to him in making the acquisition. His possession of the information would have put Mr Burnell in a better position



than a third party purchaser to assess the opportunity to purchase the TTS shares and to do so quickly.

465. There is a sense in which it might be said that the information was only 'exploited' by Mr Burnell in the acquisition of the TTS shares in the very broadest sense. Mr Burnell did not realize a profit from the information by acquiring the TTS shares and he did not deprive TTL of a profit which was derived from its property or information. They remained undiminished by his acquisition of the TTS shares when viewed in isolation. I cannot, however, view the acquisition of the TTS shares in isolation. I must also take into account Mr Burnell's subsequent actions, through his control of TTS, to defend the Chancery Division proceedings and ultimately to terminate the Licence Agreement and his motivations for acquiring the TTS shares.
466. As I have described, the evidence suggests that Mr Burnell was financing the defence of the Chancery Division proceedings by TTS from around the time that he began to investigate the possibility of acquiring the shares in TTS. Once he had completed that acquisition, Mr Burnell took immediate steps to defend the proceedings and to terminate the Licence Agreement. It is a reasonable inference that those steps, in particular the termination of the Licence Agreement, must have involved the use of information regarding the terms of the Licence Agreement and the concerns surrounding its enforceability of which Mr Burnell became aware when he was a director of TTL. Furthermore, the purpose of those steps was to terminate the Licence Agreement and to secure for TTS the unfettered rights to exploit the intellectual property in the licensed products (and so deprive TTL of its rights under the Licence Agreement). By acquiring shares in TTS and then taking action to terminate the Licence Agreement whether pursuant to the Chancery Division Proceedings or otherwise, Mr Burnell put himself in a position in which his personal interests conflicted with the interests of TTL as regards the exploitation of property of TTL – its rights under the Licence Agreement – of which he was aware when he was a director. In my view, Mr Burnell acted in breach of his continuing duty under s175 CA 2006 in doing so.
467. In reaching that conclusion, I have taken into account as part of the merits-based assessment, that Mr Burnell knowingly put himself in a position of conflict with TTL by acquiring the shares in TTS with the aim of acquiring the rights to the products within weeks of his ceasing to be a director of TTL; that following the acquisition he took immediate steps to terminate the Licence Agreement; and that he immediately engaged Mr Kriisk to further develop the products, knowing that TTS could only exercise those rights if it was successful in the Chancery Division Proceedings and in terminating the Licence Agreement and depriving TTL of its rights.

468. For all of these reasons, in my view, Mr Burnell acted in breach of his continuing duty to avoid conflicts of interest under s175 as extended by s170(2)(a) CA 2006.

### **Breach of confidence**

469. The counterclaim was also put in terms of a claim that, irrespective of whether Mr Burnell was a director, he acted in breach of his equitable duty of confidence to TTL by using TTL's confidential information for his own benefit.
470. This claim was based on the same facts and circumstances as the claim for breach of fiduciary duty in relation to the acquisition of shares in TTS and the subsequent actions to terminate the Licence Agreement with TTL. As it is an alternative basis claim and I have already found that Mr Burnell acted in breach of duty in relation to these circumstances, I will deal with it briefly.

### ***The main elements of a claim for breach of confidence***

471. There are three main elements for a claim for breach of confidence. They are identified by Megarry J in *Coco v. A.N. Clark (Engineers) Limited* [1969] RPC 41 at page 47:

“First the information itself... must “have the necessary quality of confidence about it”. Secondly, that information must have been communicated in circumstances importing an obligation of confidence. Thirdly, there must have been an unauthorised use of the information to the detriment of the party communicating it.”

472. This statement of the law has been cited with approval by the Supreme Court in *Vestergaard Frandsen A/S v. Bestnet Europe Limited* [2013] 1 WLR1556 and by the Court of Appeal in *The Racing Partnership Limited and Others v. Sports Information Services Limited* [2020] EWCA Civ. 1300 (“*Racing Partnership*”). In the *Racing Partnership* case, Arnold LJ adds a further requirement, namely “that the unauthorized use of the information was without lawful excuse” (at [45]).
473. The parties did not dispute these basic requirements.

### ***TTL's pleaded case***

474. The starting point is the information which TTL has pleaded as being subject to the duty of confidence. The information which TTL claims was subject to this duty is:
- (a) TTL's design concepts and ideas in relation to Tags and Restore;

- (b) TTL's target customers for Tags and Restore and the extent and progress of any contact and/or negotiations with such customers;
  - (c) the relative importance of the individuals working for TTL, in particular Mr Kriisk's importance to the commercial success of TTL in the light of his technical knowledge and relationship with the individuals with control of TTS;
  - (d) TTL's financial position including its likely profitability and the sums to be earned by exploiting its rights under the Licence Agreement and/or the value of the products to TTS in the event of TTS's insolvency and/or the termination of the Licence Agreement;
  - (e) the relationship between TTS and TTL.
475. The pleaded case is that this information was used by Mr Burnell to implement his plan to obtain control of either TTL or TTS in order to acquire control of valuable commercial rights under the Licence Agreement for his own benefit.

***Was the information confidential in nature?***

476. The first requirement is that the relevant information must be "confidential in nature". In relation to this requirement, Mr Davies directed me to the decision of the Court of Appeal in *Faccenda Chicken Limited v. Fowler* [1987] Ch.117, a case concerning the duty of confidentiality posed on an employee by virtue of an implied term in his contract. In considering the matters to be taken into account in order to determine whether a particular item of information fell within the implied term so as to prevent its disclosure or use by an employee after employment, Neill LJ said this at page 137:

"In our judgment, the information will only be protected if it can properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret *eo nomine*."

477. In the *Racing Partnership* case, Arnold LJ expresses the view that the fundamental feature of confidential information is not secrecy but "inaccessibility" (at [48] and [67]). The doctrine of misuse of confidential information is about control of that information (Arnold LJ, *Racing Partnership* [46]).
478. TTL has pleaded that various categories of information are confidential. It is appropriate to consider each of them in turn.
- (a) TTL says that the design concepts in the Tags and Restore products were confidential information of TTL. Mr Davies accepts that the design

concepts were potentially confidential information. Further, he says that information belonged to TTS, not TTL, albeit subject to the rights of TTL under the Licence Agreement. Mr Davies says that, in any event, this information was not used to acquire TTS. I have addressed this issue below.

- (b) As regards the target customers of TTL, once again this category is broadly pleaded. Mr Burnell was clearly aware of the progress of discussions with the Home Office regarding the certification of Restore and some contacts (for example, with the Road Haulage Association) with potential customers. Mr Burnell was also aware of the potential target customers for the Tags product. From the evidence before me, it is not clear to me that any of this information had developed materially beyond the stage of initial contacts. There had been some interest in the products from various parties but, given the stage of development of the products, there were no contacts that would be regarded as likely to lead to contractual relations, to my mind, this information had not developed beyond the bounds of generalized knowledge of the market and was not capable of protection as confidential information.
- (c) The relative importance of individuals working for TTL could not, to my mind, constitute confidential information. It is generalized knowledge about the business which cannot have the “necessary quality of confidence about it”. It is not information which TTL controlled. Furthermore, to the extent that this information related to the position of Mr Kriisk, Mr Kriisk was not an employee of TTL after 8 March 2017, after which his relationship with TTS and the implications of it for the purposes of the relationship between TTS and TTL was not information which TTL controlled.
- (d) TTL also refers to financial information relating to TTL as having been used for the purpose of the acquisition of TTS shares. As much of the financial information regarding TTL was in the hands of Mr Aird and not Mr Burnell, TTL’s main claim in this respect relates to the information relating to the financial forecasts, which had been prepared by the Gover brothers and which, TTL asserts, showed the potential in TTL’s business. Once again, the information was confidential.
- (e) TTL also says that information regarding the relationship between TTL and TTS is confidential information which was used by Mr Burnell. This category of information is again broadly pleaded, but in submissions, it was narrowed by Mr Leiper to information regarding TTL’s rights under the Licence Agreement and Downs’ advice in respect of those rights. This information is clearly not in the public domain and to my mind should be regarded as confidential in nature. The

information relating to the terms of the Licence Agreement was not, of course, confidential as between TTL and TTS and Mr Davies, once again, raises questions as to how it is said that Mr Burnell misused that information as part of his acquisition of shares in TTS. I have addressed this question below.

***Was the information imparted to Mr Burnell in circumstances implying an obligation of confidence?***

479. There was no dispute between the parties. Mr Burnell obtained this information as part of his role as CEO and in circumstances in which he would have realized that the information had been imparted to him in confidence.

***Did Mr Burnell make unauthorized use of the information without a lawful excuse?***

480. Mr Davies submits that there is no evidence that Mr Burnell used any of this information as part of his acquisition of TTS.

481. I accept that there is no direct documentary evidence that Mr Burnell made use of information relating to the design of the products as part of his acquisition. The information concerning the design of the products was, in any event, also available to TTS. Indeed, all of the intellectual property rights in the products are treated under the Licence Agreement as accruing to TTS. The same is true in relation to some of the other information regarded as confidential such as the terms of the Licence Agreement and some of the financial information derived from the models. TTS may have been able to provide a third party purchaser with this information as part of any due diligence exercise for the acquisition of the TTS shares and so it is difficult to see that Mr Burnell would have obtained much advantage from it.

482. The only information that Mr Burnell is likely to have obtained material benefit from as part of his acquisition of the TTS shares was his knowledge of the circumstances in which the Licence Agreement might be terminated (in particular, the matters on which Downs had provided their advice), some of the information surrounding the target market for the products (including the details of the certification process for Restore which TTL had undertaken with the Home Office), and some of the financial modelling.

483. Mr Davies says that there is no evidence that Mr Burnell misused this information. As I have mentioned above, to my mind, the reasonable inference is that Mr Burnell must have taken into account this information in his acquisition of shares in TTS and his subsequent steps to terminate the Licence Agreement. The acquisition of the TTS shares only made commercial sense in terms of the acquisition of its intellectual property rights. The intellectual property rights could only be fully realized by terminating the rights of TTL

under the Licence Agreement. As soon as he acquired the TTS shares, Mr Burnell took steps to terminate the Licence Agreement to defend the Chancery Division proceedings and to investigate ways in which the intellectual property rights could be exploited on the assumption that the Licence Agreement would be terminated. In my view that was a breach of his duty of confidence in relation to that information.

### **Relief for breach of duty**

484. In respect Mr Burnell's breaches of duty, TTL claims damages and/or equitable compensation for:

- (a) the loss of net profits calculated on the basis that but for his breaches of duty the products would have been developed and marketed;
- (b) the loss of value of TTL's assets;
- (c) TTL's costs of bringing the Chancery Division proceedings in the amount of £65,732;
- (d) loss of management time in addressing matters related to the Chancery Division proceedings.

485. TTL also seeks an order for an account of profits that Mr Burnell has obtained from his breaches of duty.

### ***The claims for damages/equitable compensation***

#### *The effects of Mr Burnell's breaches of duty*

486. TTL says that Mr Burnell's breaches of duty resulted in Mr Kriisk's resignation, prevented the reconciliation of Mr Aird, Mr Clark and Mr Kriisk, created the circumstances in which TTS could terminate the Licence Agreement and prevented the reconciliation of TTS and TTL by his intervention, between March and May 2017, in the various attempts to reach a settlement and in his subsequent acquisition of the shares in TTS.

487. I have found that several of these events did not involve any breach of duty by Mr Burnell. Mr Kriisk resigned of his own accord, as a result of the disagreement with Mr Aird. Mr Laul decided that TTS should invoice TTL following Mr Kriisk's resignation and his discussion with Mr Kriisk. Mr Laul, of his own accord, sent the emails which led TTL to commence the Chancery Division proceedings. These events cannot be attributed to Mr Burnell.

488. I have, however, found that Mr Burnell acted in breach of duty in relation to the acquisition of TTS shares and the subsequent steps to terminate the Licence Agreement. TTL's claim for compensation for loss of profits in respect of that

breach is based on the assumption that Mr Burnell's breach of duty caused the loss of TTL's entire business and that but for his breach of duty, TTL would have been successful in developing and marketing its products. I do not accept that latter assertion.

- (a) TTL did not have any marketable products.
  - i. It had the manufacturing files for a Tag prototype. However, it had not produced an actual product or obtained CE certification for it.
  - ii. The software for Restore had been delivered and tested. However, the certification for the use of Restore was restricted and was limited to the product when used in conjunction with the OneBox hardware which had failed to obtain CE certification on three occasions. The Axiom hardware required further design work which Axiom had refused to undertake.
- (b) TTL did not have the wherewithal either in terms of funding or its own human resources to produce a commercially viable product. Its relations with those who provided its technical knowhow and development (TTS and Mr Kriisk) had broken down.
- (c) I accept Mr Kriisk's evidence that the Tags project was, with hindsight, too ambitious and that the costs of Restore were becoming uncommercial.
- (d) TTL's business model was flawed and too dependent upon Mr Kriisk's continued involvement. Once Mr Kriisk had departed – which cannot be attributed to Mr Burnell – the project was destined to fail.

489. It follows that I do not accept the case for Mr Burnell being liable to compensate TTL for a loss of net profits calculated on the basis that but for his breaches of duty the products would have been developed and marketed.

490. Nor do I accept the case for Mr Burnell being liable to compensate TTL for its costs of the Chancery Division proceedings. These proceedings were instigated by TTL on the instructions of Mr Aird. TTL chose to continue them and to settle them on the basis that it did.

491. The only breach of duty that I have found is Mr Burnell's breach of his continuing duty under s175 CA 2006 as regards the exploitation of the rights under the Licence Agreement, which he procured for the benefit of TTS through the acquisition of shares in TTS. In the circumstances, in my view, the loss that has been caused to TTL as a result of that breach is limited to the loss of its rights under the Licence Agreement.

*The valuation evidence*

492. The claim for damages is pleaded on the basis that Mr Burnell caused the loss to TTL of its business. Expert valuation evidence was obtained in support of the claim. Mr Robert Sharp of Valuation Consulting provided a report on behalf of TTL. Mr David Mitchell of BDO LLP provided a report on behalf of Mr Burnell. They were both cross-examined on their reports.
493. I have addressed the valuation evidence below. I should, however, make one initial point. The experts were instructed to provide advice on the value of the company. To my mind, this was not a helpful or accurate instruction. Even if the breach of duty had resulted in a loss of the entire business, the aim should have been to establish the loss occasioned to the company arising from any breach, not the loss accruing to the shareholders. The relevant value was the value of TTL's business at the appropriate time or, perhaps, more accurately the value of its rights under the Licence Agreement.
494. Mr Sharp provided evidence of the value of TTL on 8 March 2017 (the date of Mr Kriisk's resignation) and 13 June 2017 (the date on which TTS engaged Mr Kriisk to investigate whether or not the intellectual property rights which it held could be developed into marketable products). In summary, his methodology was as follows.
- (a) Mr Sharp's valuation was designed to produce an enterprise value of the company i.e. a debt free/cash-free value.
  - (b) He valued the company on each date on three different bases: (i) that Mr Kriisk and Mr Clark remained engaged in the business and TTL retained its rights under the Licence Agreement; (ii) that Mr Kriisk and Mr Clark were not engaged in the business and TTL retained its rights under the Licence Agreement; and (iii) that Mr Kriisk and Mr Clark were not engaged in the business and TTL lost its rights under the Licence Agreement.
  - (c) For basis (i), Mr Sharp applied a discounted cash flow basis of valuation to the cash flows generated in the three scenarios (high, medium and low) set out in the royalty model prepared by Mr Julian Gover in November 2016 adjusted to correct certain computational errors. A discount of 40% was applied to the cash flows to reflect the cost of capital.
  - (d) For basis (ii), Mr Sharp applied a discount of 30% to the enterprise value resulting from basis (i) to reflect the change in management that would be required if Mr Clark and Mr Kriisk were no longer involved in the business.



- (e) In each case, he then discarded the “low” scenario on the basis that it was the least likely outcome due to the size of the available market. He then took an average of the “high” and “medium” scenarios to produce a single valuation point for each of basis (i) and (ii).
  - (f) The value of the company on basis (iii) was always £nil.
495. This methodology produced valuations for the company of: £9.7m (on basis (i)) and £6.8m (on basis (ii)) on 8 March 2017; and £10.5m and £7.4m respectively on 13 June 2017.
496. Mr Mitchell criticised Mr Sharp’s methodology for various reasons. His main points were as follows.
- (a) The valuation should have been prepared on an equity value basis not an enterprise value basis.
  - (b) The valuation was based on a number of unsupported assumptions for example as to the size of the potential market for the products. The 30% discount applied to reflect the change in management between basis (i) and (ii) was again unsupported by evidence.
  - (c) The discounted cash flow basis of valuation was inappropriate for a company in a development phase and without any reliable cash flows.
  - (d) The valuation was based on the royalty model produced by Mr Julian Gover in November 2016. That model was merely a set of royalty calculations; it did not represent a reliable set of profit projections.
  - (e) The models produced by Mr Gover did not take into account overheads. Mr Sharp had estimated overheads at 25% of gross profits. There was no evidence to support this assumption. TTL’s own forecasts predicted overheads as between 49.5% and 72.2% of gross profit.
  - (f) The valuation failed to reflect accurately the position of the company at the relevant dates. TTL had no intellectual property, no employees, and negative net assets. Its main asset was a licence which could be terminated by the licensor in certain circumstances. The intellectual property had not been patent protected.
  - (g) It also failed to reflect the status of the products at the valuation dates, neither of which was marketable.
  - (h) The valuation took no account of the cost of funding or the requirements for future funding to complete the development of the products and “commercialize” them.

(i) The 40% discount applied for the cost of capital was too low.

497. Mr Mitchell considered four alternative methods of valuing the company: a value implied by Mr Aird and Mr Burnell's agreement in June 2016; the value implied by the option exercise price under the Licence Agreement; the cost to replicate the intellectual property; and a sensitivity analysis which took Mr Sharp's valuation and applied it to the sales figures set out in Schedule 2 to the Licence Agreement (which Mr Mitchell regarded as more realistic) and corrected it for what Mr Mitchell regarded as errors and inconsistencies.
498. Mr Mitchell concluded that equity value of TTL would not exceed the costs of replicating the intellectual property. He estimated that cost at between £0.2m and £0.6m based on the cost estimates provided by 42 Technology in January 2017. On that basis, he valued the equity value of TTL at March 2017 or June 2017 at between £nil and £0.3m on the basis of Mr Sharp's basis (i) (i.e. that Mr Clark and Mr Kriisk remained engaged by the company and the Licence Agreement remained in place) and assuming that a purchaser could be found.

*My conclusions on the valuation evidence and the measure of damages*

499. As regards the valuation evidence, I prefer the analysis of Mr Mitchell. I accept most of his criticisms of Mr Sharp's approach. In particular, to my mind, a discounted cash flow valuation seems inappropriate for a company at this stage in its development and with no reliable cash flows. The reliance of the valuation on Mr Gover's models as the basis for the valuation is in my view misplaced; the models were hypothetical and aspirational and created for a particular purpose. They were not a sound basis for valuing the company. The base levels are set by estimates from Mr Kriisk and Mr Clark as to the realistic and optimistic expectations of sales at the time. However, they assumed that the company would develop marketable products. The company had no marketable products at the time, no source of funding other than Mr Aird and Mr Burnell, and no orders for the products. The assumptions for many of the inputs are simply multiples of others and designed to be illustrative rather than based on any meaningful reality.
500. The one aspect of Mr Mitchell's analysis on which I would express some reservation is his insistence that it is an equity valuation that is appropriate in these circumstances. For the reasons that I have given, even if damages were to be assessed by reference to the value of the business as a whole, it does seem to me that an enterprise value is the more appropriate starting point for the measure of the loss to the company itself.
501. As I have found, the only actionable breach of duty by Mr Burnell was his breach of his continuing duty under s175 CA 2006 to avoid a conflict of interest as regards the exploitation of TTL's rights under the Licence Agreement. The

true measure of loss is confined to the loss of the rights under the Licence Agreement to the intellectual property.

502. Mr Sharp's valuation of the intellectual property (discarding the "low" case) produced values of £3.4m for March 2017 and £3.6m for June 2017. Mr Mitchell's valuations were £178,000 for March 2017 and £194,000 for June 2017. These values were calculated to determine whether or not, on Mr Sharp's model, the company should be assumed to exercise the option in the Licence Agreement. Mr Mitchell also estimated the cost of replicating the intellectual property as between £0.2m and £0.6m.
503. For the reasons that I have given, I prefer Mr Mitchell's analysis. It also seems to me to be consistent with facts on the ground. Mr Burnell in his evidence confirmed that he regarded the acquisition of the shares in TTS as the purchase of "several possible options". The option was, on the assumption that TTS would be successful in the litigation, in effect, to acquire the rights under the Licence Agreement for a price being the relatively nominal price for the TTS shares and the costs of defending the Chancery Division proceedings.
504. I have no other basis for determining the loss. I therefore assess the damages to TTL in respect of the Counterclaim as being in the amount of £200,000. This is the low end of Mr Mitchell's range for the cost of replicating the intellectual property but is consistent with his valuation of the intellectual property for the purpose of his analysis of Mr Sharp's valuation.

#### ***Account of profits***

505. I also grant TTL's claim for an order for an account of profits accruing to Mr Burnell (or indirectly to Mr Burnell through his ownership and control of TTS) from the exploitation of the rights acquired from TTL by virtue of the termination of the Licence Agreement.
506. I accept that, from the evidence before me, such an order may prove futile as it would appear that no profits have been made from this technology by Mr Burnell or TTS.

#### ***The claim against Mr Aird***

507. I referred at [320] above to the quantum of damages to which Mr Burnell is entitled in respect of his claim for breach of contract against Mr Aird. I will also use Mr Mitchell's valuation to determine the amount of that claim. I therefore assess the maximum amount of the damages in respect of that claim as £67,500 being 45% of the mid-point of Mr Mitchell's valuation of the equity in TTL (i.e. £150,000).

## **Disposition**

508. I have allowed Mr Burnell's claim against TTL in the amount of £250,000 and Mr Burnell's claim against Mr Aird for breach of contract for any amount which Mr Burnell is unable to recover from TTL up to the amount of £67,500.
509. I have also allowed TTL's counterclaim and awarded damages for breach of duty in the amount of £200,000. This amount should be set off against Mr Burnell's claim.
510. I also order an account of profits accruing to Mr Burnell (or indirectly to Mr Burnell through his ownership and control of TTS) from the exploitation of the rights acquired from TTL by virtue of the termination of the Licence Agreement.
511. I will ask the court to arrange a date for a hearing to deal with any consequential matters.