

IN THE HIGH COURT OF JUSTICE

neutral citation 2022] EWHC 1028 (Ch)

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF A.B. PRODUCE TRADING LIMITED
AND

Claim No: CR-2018-010377

IN THE MATTER OF BRIDGEN INVESTMENTS LIMITED
AND

Claim No: CR-2018-010376

IN THE MATTER OF A B FARMS LIMITED

Claim No: CR-2019-BHM-001027

BETWEEN

ANDREW JAMES BRIDGEN

Petitioner

-and-

(1) PAUL JULIAN BRIDGEN
(2) PETER JOHN ELLIS
(3) DEREK TOMKINSON
(4) ALAN BRIDGEN
(5) ANN BRIDGEN
(6) JLT TRUSTEES LIMITED
(7) A. B. PRODUCE TRADING LIMITED
(8) BRIDGEN INVESTMENTS LIMITED
(9) A B FARMS LIMITED

Respondents

Before His Honour Judge Rawlings sitting as a High Court Judge

Mr Zaman QC and Mr Mantle for the Petitioner

Mr Auld QC for the First 3 Respondents (the other respondents not represented)

Approved judgment handed down on 29 March 2022

INTRODUCTION

1. This judgment concerns 3 Petitions (as Amended) (“the Petitions”) issued by Andrew James Bridgen MP (“Andrew”). In the Petitions Andrew asserts that, the affairs of: (a) A.B. Produce Trading Limited (“ABPT”); (b) Bridgen Investments Limited (“BIL”); and (c) AB Farms Limited (“ABF”) are or have been conducted in a manner which is unfairly prejudicial to the interests of Andrew as a member of those companies for the purposes of Section 994 (a) of the Companies Act 2006 (“CA 2006”). The petition for ABPT relates to the manner in which the affairs of its wholly owned subsidiary, AB Produce PLC

("PLC") have been conducted. The petitions for BIL and ABF relate to the way in which their affairs have been conducted.

2. Andrew seeks relief under Section 996 of the CA 2006, in the event that the court finds that any or all of the Petitions are well founded (i.e. that the affairs of: ABPT and/or BIL; and/or ABF are being, or have been conducted in a manner which is unfairly prejudicial to the interests of Andrew as a member of those companies for the purposes of Section 994 (a) of CA 2006).
3. On 15 November 2019 Insolvency and Companies Judge Jones directed that there would be a trial to determine all issues of unfair prejudice (except for remedy). I am therefore only concerned with the question of whether the affairs of ABPT and/or BIL and/or ABF are or have been conducted in a manner which is unfairly prejudicial to the interests of Andrew as a member of those companies, for the purposes of Section 994 (a) CA 2006 and not with the question of what relief should be granted to Andrew under Section 996 CA 2006, if I find that any or all of the Petitions are well founded.
4. The shareholders of ABPT are:
 - (a) Andrew - 37,000 shares
 - (b) Paul Julian Bridgen, Andrew's brother ("Paul") (First Respondent to the ABPT Petition) - 37,000 shares;
 - (c) Peter John Ellis ("Mr Ellis") (Second Respondent to the ABPT Petition) - 500 shares;
 - (d) Derek Tomkinson ("Mr Tomkinson") (Third Respondent to the ABPT Petition) - 667 shares; and
 - (e) the Managing Trustees of AB Produce SSAS Retirement and Death Benefit Scheme ("the SSAS") - 8,185 shares. The trustees of the SSAS are: Andrew, Paul, Alan Bridgen (Andrew and Paul's father) (Fourth Respondent to the ABPT Petition) Ann Bridgen (Andrew and Paul's mother) (Fifth Respondent to the ABPT Petition) and JLT Trustees Limited ("JLT") (Sixth Respondent to the ABPT Petition)
5. The shareholders of BIL are:
 - (a) Andrew - 37,000 shares;
 - (b) Paul - 37,000 shares;
 - (c) Mr Ellis - 500 shares;
 - (d) Mr Tomkinson - 667 shares;
 - (e) the SSAS – 8,185 shares.
6. The First- Sixth Respondents to the BIL Petition are the same as for the ABPT Petition.
7. The shareholders of ABF are:
 - (a) Andrew - 49 shares;
 - (b) Paul – 49 shares;
 - (c) Mr Ellis – 1 share; and
 - (d) Mr Tomkinson – 1 share.
8. Paul, Mr Ellis and Mr Tomkinson are the first three Respondents to the ABF Petition.
9. The remaining respondents to each of the Petitions are ABPT, BIL and ABF, joined as nominal respondents to the petition presented in respect of the conduct of their affairs.
10. Whilst Alan, Ann and JLT, as trustees of the SSAS are not, unlike ABPT and BIL, nominal respondents to the petitions presented in respect of their affairs, bound to adopt a neutral stance, in reality none of them are alleged by Andrew to be in any way involved in the conduct of which Andrew complains and they have adopted a neutral position. Neither Alan, nor Ann appeared as witnesses for any party. The real respondents to all

three of the Petitions are therefore Paul, Mr Ellis and Mr Tomkinson and when I refer to “the Respondents”, I am referring collectively to Paul, Mr Ellis and Mr Tomkinson.

11. From the above it is apparent that ABPT, BIL and ABF do not own shares in each other and none of them are a “Subsidiary” of another company for the purposes of Section 1159 of the CA 2006 (PLC is a wholly owned subsidiary of ABPT and therefore a “Subsidiary” for the purposes of Section 1159) but Andrew and the Respondents often refer to ABPT, PLC, BIL and ABF as “the Group” and when referring to all four companies collectively, I will also refer to them as the Group.

BRIEF HISTORY OF THE GROUP

12. In or around 1969 Alan established a fruit and vegetable delivery business as a sole trader.
13. From in or around 1983, Alan continued that business, but in partnership with Paul, trading under the name of AW Bridgen & Sons, the business now including the growing of crops at Woolstitch Farm, the family home.
14. On 6 April 1988 PLC was incorporated under the name A.B. Produce Limited, as a private company limited by shares.
15. Initially the shareholding in PLC was: Alan 500 shares; Ann 100 shares; Andrew 200 shares and Paul 200 shares.
16. Following incorporation, PLC took over and continued the business of AW Bridgen & Sons and each of the shareholders were appointed directors.
17. Mr Ellis was appointed potato buyer for PLC, in April 1994 and subsequently purchasing director and a statutory director of PLC, on 1 May 1996.
18. On 14 February 1997, Alan and Ann resigned as directors of PLC having already retired from active involvement in the management of PLC and moved to Spain.
19. Mr Tomkinson was appointed a non-executive statutory director of PLC, on 1 September 1998.
20. On 4 November 1998 PLC was re-registered as a public limited company, its core business at this point was processing and trading potatoes and at least one of the purposes of relisting it as a PLC was, with a view to it listing on the AIM Market (which never occurred).
21. On 27 November 1998 an investment agreement was entered into, pursuant to which shares in PLC were issued to: Mr Tomkinson, 667 shares; Mr Ellis 500 shares; and Alan Parker, the then financial director of PLC, 1000 shares (“the Investment Agreement”). The terms of the Investment Agreement inter alia required Andrew and Paul to dedicate all their time to the business of PLC and a mechanism was included for the minority shareholders (Mr Tomkinson, Mr Ellis and Alan Parker) to have their shares valued and acquired by PLC at their request.
22. In 2003 the production operations of PLC moved to Enterprise House, Westminster Industrial Estate, Measham (“Enterprise House”) which were much larger premises and enabled the business of PLC to expand. The freehold to Enterprise House was acquired by a Retirement Scheme of which Andrew, Paul and their parents were the beneficiaries.
23. On 9 September 2005 PLC acquired Alan Parker's shares and Alan Parker retired as financial director of PLC.

24. Neil Sharratt ("Mr Sharratt") was appointed Financial Controller of PLC in 2005, to replace Alan Parker and Finance Director of PLC in 2006.
25. On 4 December 2006, ABPT was incorporated and all the shares in PLC were transferred to ABPT. This included shares then held by a trust of which Alan and Ann were the beneficiaries and from this point Alan and Ann ceased to have an interest in the business, other than as trustees and beneficiaries of the SSAS. Andrew became the sole director of ABPT. The shares in ABPT were issued in the proportions set out in paragraph 4 above and PLC carried on its business as before. One of the effects of this restructuring was that the Investment Agreement which related to the shares in PLC (now all held by ABPT) was rendered redundant and no replacement investment agreement was put in place for ABPT's shares, a consequence of the restructuring which Mr Ellis and Mr Tomkinson say they were unaware of, until they sought to dispose of their shares in ABPT, in 2016. It also meant that the requirement, in the Investment Agreement, for Andrew and Paul to dedicate all their time to the business of PLC fell away.
26. On 1 December 2006, broadly contemporaneously with the incorporation of ABPT and the transfer to it of PLC's shares, BIL was incorporated. Andrew became the sole director of BIL on 1 December 2006. BIL took a lease from the SSAS of Enterprise House and sub-let Enterprise House to PLC.
27. It is common ground that, from around 2008, Andrew and Paul began to take less of a day to day role in the operation of the business of PLC/BIL. Andrew started to explore the possibility of becoming a Member of Parliament for the Conservative Party and on 23 December 2008, Paul took a lease of Home Farm in Elford, Staffordshire ("Home Farm") comprising approximately 400 acres, which was carried on as a partnership business, between Paul and his wife Claire Bridgen known as PJ & CL Bridgen ("the Partnership").
28. On 10 March 2010 Mr Paul Large ("Mr Large") was appointed as statutory director of PLC, with a view to him becoming Managing Director of PLC, in place of Andrew.
29. On 6 May 2010, Andrew was elected as a Member of Parliament for North West Leicestershire. The next day Andrew resigned as statutory director of ABPT and BIL and was replaced by Mr Sharratt as sole director of both, he also resigned as Managing Director of PLC and was replaced as Managing Director by Mr Large, but remained as a statutory director of PLC and became non-executive chairman of PLC. Paul says he remained as Transport Director for PLC, but he accepts that he concentrated most of his time on the Partnership business, at this time.
30. Unfortunately the business of PLC did not flourish under the stewardship of Mr Large as Managing Director and, having been profitable before his appointment, began to incur trading losses. There is a dispute between Andrew and the Respondents as to what involvement Andrew had in the trading issues facing PLC after it became apparent that PLC's business, under Mr Large was on a downward trajectory. Andrew claims that, whilst he did not become involved in the day to day trading of PLC, from January 2012 he started attending Board Meetings and making decisions on the future trading of PLC. The Respondents say that Andrew only attended one board meeting in January 2011, after his election as an MP, in May 2010 and that whilst Andrew started to attend board meetings again in early 2012, this was only to deal with the poor performance of Mr Large, and his subsequent dismissal.
31. On 31 July 2012, Mr Large was dismissed, it is common ground that Andrew dealt with the dismissal of Mr Large, in terms of the disciplinary process, leading to Mr Large's

- dismissal and the Employment Tribunal proceedings which Mr Large commenced after he was dismissed. Paul became Managing Director of PLC in place of Mr Large. Paul says that he asked Andrew to take on this role but that Andrew refused to do so and Paul reluctantly took on the role. Andrew says that, notwithstanding that he continued as non-executive Chairman of PLC and not Managing Director, he assumed de facto control of the business and he claims credit for turning around the financial fortunes of PLC. The Respondents deny that Andrew took control of PLC, or played any material role in its management or the turning around of its fortunes following the departure of Mr Large.
32. Andrew petitioned for divorce, from his wife, Jackie, on 6 June 2013. The hearing of the financial relief aspects of the divorce took place on 9 and 10 July 2014 and judgment was handed down on 22 September 2014.
 33. By letter dated 4 August 2014 from Mr Sharratt to Andrew, Andrew's employment by PLC was terminated with immediate effect and the Respondents say that Andrew resigned as a director of PLC. The Respondents say that the termination was consensual and Andrew requested that his employment be terminated and agreed to resign as director of PLC. Andrew denies that the termination of his employment by PLC was consensual and that he resigned as a director.
 34. On 29 August 2014, form TM01 was submitted by Mr Sharratt to Companies House confirming that Andrew had ceased to be a director of PLC on 1 August 2014. On 2 September 2014, Mr Sharratt sent a letter to Andrew confirming the termination of his employment and his resignation as a director.
 35. On 14 August 2015, the Board of PLC approved the purchase of Barn Farm, Hilton ("Barn Farm") at an auction taking place the following day, provided that the price did not exceed an agreed level. Mr Ellis made the successful bids at an auction which took place the next day. ABF was incorporated on 28 August 2015 to complete the purchase of Barn Farm, in its name. The cost of the acquisition of £1,006,000 was funded by PLC from its cash reserves and treated as a debt owed to PLC by ABF.
 36. The subscriber share for ABF was held by Mr Tomkinson who was also initially its sole director. On 3 September 2015, Mr Sharratt was appointed as a director of ABF and on 13 July 2016: (a) the subscriber share was transferred by Mr Tomkinson to Paul; (b) Mr Tomkinson resigned as director of ABF; and (c) Paul was appointed as a director of ABF (Mr Tomkinson was reappointed as a director of ABF and Mr Ellis was appointed as a director of ABF, on 26 May 2017).
 37. On 8 February 2017 share certificates were issued in ABF so that: Andrew held 49 shares; Paul 49 shares; Mr Ellis 1 share; and Mr Tomkinson 1 share.
 38. In early 2017, Andrew asked Paul, Mr Ellis and Mr Tomkinson to support his reappointment as non-executive Chairman of PLC. They did not support his re-appointment.
 39. On 1 September 2017 Andrew wrote a formal letter to Paul, threatening to take proceedings under Section 994 of the CA 2006 unless Paul agreed either: (a) to Andrew's reappointment as a director of all of the Group companies; (b) to split ownership of the Group companies so that Andrew would own BIL and Paul would own the remainder of the Group companies; or (c) that there be an alternative dispute resolution process such as mediation to try to resolve the dispute. The letter was copied to Mr Ellis, Mr Tomkinson and Mr Sharratt.
 40. Paul responded on 29 September 2017 setting out the reasons why he did not accept that there was any basis for Andrew to present a petition under Section 994 CA 2016,

but indicating that he and the other shareholders and directors were willing to discuss alternative means of satisfying Andrew's requirements.

41. In October 2017 Andrew made contact with Leicestershire Police and alleged that the directors/shareholders of the Group had perpetrated a fraud of which he was a victim. He subsequently contacted the auditors of PLC, KPMG and the Group's bankers, Lloyds Bank PLC making the same allegations.
42. KPMG resigned as auditors of PLC on 7 February 2019 and on 13 February 2019, the directors of the Group instructing RSM, forensic accountants, to prepare a report on Andrew's allegations. On 8 May 2019 RSM produced a report which concluded that Andrew's allegations were not supported by the evidence that RSM had reviewed ("the RSM Report").
43. On 30 November 2018 the Petitions were issued by Andrew.

ALLEGATIONS OF UNFAIRLY PREJUDICIAL CONDUCT

44. The allegations and the Respondents' responses to them are set out in: (a) the Petitions issued by Andrew (as amended); (b) the Respondents' Amended Points of Defence; and (c) Andrew's Replies to the Points of Defence. In addition, by order dated 15 November 2019 Insolvency and Companies Judge Jones directed that Paul file and serve a witness statement providing details of his account of credits and debits applied in relation to the matters set out in Schedule 1 to that order (sums credited or debited in relation to transactions between the Partnership and PLC/BIL/ABF) and Andrew was directed to file and serve a document which identified what issues remained after service of Paul's statement with an explanation from Andrew of why those issues remained. Paul served and filed a witness statement dated 10 January 2020 and Andrew filed and served a response dated 31 January 2020.
45. In describing below the conduct complained of by Andrew and the response of the Respondents to those complaints, I do so separately for ABPT (and in particular its subsidiary PLC) BIL and ABF and by reference to the Petitions, Points of Defence and Reply for the relevant company, the witness statement of Paul dated 10 January 2020 and Response of Andrew dated 31 January 2020.

Quasi Partnerships

46. Before turning to deal with the conduct complained of by Andrew and the Respondents' responses to those complaints, I will describe the basis of Andrew's assertion that the Group companies were quasi-partnerships. Andrew relies upon his assertion that all the Group companies have been, at all relevant times, quasi partnerships ("Quasi Partnership" and "Quasi Partnerships") in support of his contention that what he says has been his exclusion from the management of the Group companies is unfairly prejudicial to him as a shareholder of the Group companies (or in the case of PLC, of its parent company, ABPT).
47. Andrew says that, at the time PLC was incorporated, its business and affairs were conducted on the clear understanding between all the shareholders, that: (a) PLC was a family business run by Alan, Ann, Andrew and Paul; (b) each of them would have a say in

how the affairs of PLC were to be run; (c) each of them would be entitled to be a director in PLC; (d) the business was to be run by consensus; and (e) the underlying basis for the association would be one of trust and confidence in each other and in consequence of that PLC was a Quasi-Partnership. Andrew says that the basis upon which the affairs of PLC were conducted did not change, when outside minority shareholders were introduced (Mr Ellis, Mr Tomkinson and Alan Parker) who he describes as “loyal advisers”.

48. Andrew says that, when the entire share capital of PLC was transferred to ABPT, PLC continued trading as before; the only change being that it was now a wholly owned subsidiary of ABPT owned by the same family members and loyal advisors. Nothing changed in the management of the business; and the affairs of both ABPT and PLC continued to be conducted on the basis of mutual trust and confidence between members, such that ABPT was a Quasi-Partnership.
49. Andrew says that BIL was incorporated on 1 December 2006 as part of the corporate restructuring that resulted in the incorporation of ABPT and there was no intention to depart from the principle of mutual trust and confidence between members that applied to ABPT and PLC, BIL was also therefore a Quasi-Partnership.
50. Andrew’s position on ABF is different, Andrew says that ABF was incorporated without his knowledge to acquire Barn Farm, which farm, Andrew says ought to have been acquired by PLC. Andrew says that once he discovered what he says was the wrongful conduct of Paul in incorporating ABF and causing it to acquire Barn Farm and the shareholding was altered to include Andrew as a shareholder (which only occurred because of Andrew’s complaint) ABF became subject to the same considerations of mutual trust and confidence as the other companies in the Group and it too is therefore a Quasi-Partnership.
51. The Respondents deny that any of the Group companies affairs were conducted on the basis of mutual trust and confidence between members or that they were Quasi-Partnerships, alternatively they all ceased to be Quasi-Partnerships well before the Respondents refused to support Andrew’s re-appointment as a director of the Group companies, in 2017

ABPT

52. In his Amended ABPT Petition, Andrew alleges that there are nine instances or categories of unfairly prejudicial conduct by the Respondents, all relating to ABPT’s subsidiary, PLC. I will summarise the nine instances first and then describe them in more detail by reference to the pleadings.
53. That conduct/those instances, are:
 - (a) The termination of Andrew’s employment with PLC and termination of his position as director, and exclusion of him from the management of PLC/ABPT;
 - (b) the purchase of Barn Farm by ABF with PLC’s money, which Andrew says was an attempt by Paul to obtain Barn Farm for his own personal benefit;
 - (c) a contract to remove lime from a site controlled by Cemex at Rugby (“The Cemex Site”);
 - (d) a contract to remove waste from a site operated by Biffa Waste Services Limited at Cannock (“Biffa” and “the Biffa Site”);

- (e) the use of PLC employees and contractors to work for the Partnership, PLC paying for the maintenance, repair and consumables (including fuel) for the Partnership's machinery/vehicles;
- (f) the growing of potatoes at Home Farm;
- (g) the incorporation of Water Purification Solutions Limited ("WPS") and advance to it of £623,000 by PLC;
- (h) the alleged failure of the Respondents to countenance changing PLC's supplier of spares in order to reduce costs; and
- (i) failure to use the back-up diesel generator owned by PLC to generate income by exporting electricity to the National Grid ("the Grid") when the electricity supply from the Grid failed.

Termination of Andrew's employment and exclusion from management

54. **[ABPT Petition]** The termination of Andrew's employment by PLC on 4 August 2014 was in breach of the mutual trust and confidence that underlay the Quasi Partnership and it is further alleged that this was done in an attempt to exclude Andrew from the business so that Paul could continue unfettered with his breaches of fiduciary duty. Andrew's continued exclusion from the management of PLC and ABPT, is also unfairly prejudicial to Andrew.
55. **[Points of Defence]** The Respondents say that, prior to a letter being sent to Andrew terminating his employment/directorship, Andrew discussed with Mr Sharratt ending his employment as non-executive Chairman of PLC and a form of agreement to facilitate that was sent to Andrew's divorce solicitors, but it was not completed before the final financial relief hearing, in Andrew's divorce, on 9 July 2014. After that hearing Andrew said that the judge at the hearing had not accepted that it was intended that Andrew would cease to be employed by PLC and Andrew wanted his employment by and position as director of PLC, to be terminated. As a consequence of that, a draft of the 4 August 2014 letter terminating Andrew's appointment by PLC was prepared and sent to Andrew to approve, he did approve it and the signed letter was sent to him on 4 August 2014, and Andrew therefore orchestrated and consented to both his removal as employee of and the termination of his position as director of PLC. Andrew's wish to return to the management of PLC is not bona fide, or in the interests of PLC/ABPT.

Barn Farm

56. **[ABPT Petition]** On or about 14 September 2015, ABF purchased Barn Farm using funds provided by PLC. Mr Tomkinson originally held the subscriber share in ABF and was its sole director. That subscriber share was transferred to Paul, on 13 July 2016, and Paul also replaced Mr Tomkinson as a director of ABF. Andrew was not consulted about the purchase of Barn Farm, the incorporation of ABF or the advance of funds to ABF by PLC. It is to be inferred that the arrangements were intended to benefit Paul personally.
57. Andrew challenged Paul about the acquisition of Barn Farm and the transactions surrounding that acquisition and it was only following that challenge and the threat of proceedings that the shareholding in ABF was altered from Paul holding the only share, to: Andrew 49 shares; Paul 49 shares, Mr Ellis 1 share; and Mr Tomkinson 1 share.

58. **[Points of Defence]** The decision to purchase Barn Farm was made by the board of PLC on 14 August 2015. Mr Ellis bid successfully at the auction of Barn Farm, on 15 August 2015 and Paul informed Andrew the following day of the purchase, that the purchase would be carried out through a new company and that the shares in the new company would be issued in line with ABPT's shares.
59. Andrew did not object to the acquisition of Barn Farm by a new company but he told Paul that he did not want to appear as a shareholder of that new company whilst he was in the process of appealing against the financial relief order made against him in his divorce proceedings.
60. The £1,006,000 advanced by PLC to ABF came out of its cash reserves and it was noted that Andrew in his petition: (a) did not take issue with the commercial rationale for the purchase of Barn Farm and should be taken therefore to have ratified the decision to purchase it; (b) does not assert that any failure to consult him regarding the purchase undermined his trust and confidence in Paul; and (c) does not allege that his financial or other interest were prejudiced.
61. Once Andrew's appeal against the financial relief order was completed, in October 2016 and the threat of proceedings by the Local Authority against PLC for emitting noxious fumes from Enterprise House receded, the agreed allocation of shares in ABF was carried out in February 2017. This was not done as a result of any challenge raised by Andrew or the threat of proceedings.
62. It is not clear if Andrew is alleging that Paul had been dishonest in relation to the acquisition of Barn Farm, or the allocation of shares in ABF, if that is alleged then the allegation should be properly pleaded.
63. **[Reply]** it was denied that Paul told Andrew that Barn Farm was to be put in the name of a new company and the shares would be issued in line with the shareholding in ABPT. The purchase of Barn Farm was presented to Andrew as a fait accompli; carrying out the purchase without consulting with Andrew was in itself a breach of the obligation to consult and obtain Andrew's agreement as a Quasi-Partner; the conduct did undermine the trust and confidence that existed in the Quasi Partnership.
64. It is noted that there is no explanation in the Points of Defence as to why the only share in ABF was transferred to Paul on 13 July 2016, and Mr Tomkinson resigned as director and was replaced by Paul.
65. Dishonesty is not a necessary ingredient for a breach of fiduciary duty but Andrew does advance the case that Paul intended to misappropriate over £1 million from PLC by acquiring sole ownership of Barn Farm which was a dishonest breach of fiduciary duty.

Cemex

66. **[Petition]** From 2010 the Partnership entered into a contract to remove lime from the Cemex Site and Paul procured the following for the advantage of the Partnership at the expense of PLC: (a) Anthony Bridgen (Andrew and Paul's brother) ("Anthony") worked at Cemex loading tipper lorries with lime, Anthony was self-employed and his invoices were paid by PLC; (b) two of the Partnership's tipper lorries were added to PLC's Operating Licence ("PLC's Operating Licence") and were maintained, repaired, taxed, insured and fuelled at PLC's expense; (c) employees of PLC operated two or three vehicles at the Cemex Site; and (d) additional vehicles supplied by Gilbert Transport

Services (Tamworth) Limited (“Gilbert”) used on the contract were invoiced to and paid by PLC.

67. If, as the Respondents assert, PLC was the contracting party for the removal of lime from the Cemex Site and the Partnership acted as sub-contractor to PLC. then: (a) Paul did not disclose his interest in the sub-contract to the PLC board; (b) Andrew was unaware of any sub-contract despite being a director of PLC at the time; (c) PLC paid for the maintenance, repair, fuel and tax of the Partnership’s vehicles; and (d) there is no evidence of the Partnership giving any credit to PLC when it used PLC’s employees or self-employed contractors, which were paid for by PLC.
68. **(Points of Defence)** In early 2010, Paul told the board of PLC about an opportunity for PLC, in conjunction with Prestons Contractors Ltd (“Prestons”) to tender for a contract, to be awarded by BI Products Recovery Ltd (“Bi-Products”) to haul away dust produced at the Cemex Site. The board agreed that PLC should bid which it did, and the bid was successful.
69. Paul made full and frank disclosure to PLC’s board of the Partnership’s involvement, Andrew was aware of the Partnership’s involvement in the contract and PLC profited from the contract. 4R later took over from Bi-Products as the contracting party with PLC (“4R”).
70. **[Paul’s Witness Statement 10/1/20]** PLC employed the Partnership and Gilbert as sub-contractors because PLC did not have suitable vehicles to carry out the work. PLC provided someone to sit in the lorries whilst they were being loaded with dust but otherwise the Partnership/Gilbert Transport provided their own vehicles and drivers.
71. Details of invoices sent by PLC to Bi-Product/4R and by the Partnership to PLC from 2010-2014 are provided.
72. PLC provided the following assistance/met the following costs connected to the Cemex contract for the benefit of the Partnership, which were recharged to the Partnership:
 - (a) some bulk tippers belonging to the Partnership were, for convenience put on PLC’s Operating Licence at no cost to PLC;
 - (b) in November 2010 PLC paid a £10,300 deposit for a tipper truck required by the Partnership, for the Cemex contract. This was credited to PLC’s purchase ledger with the Partnership;
 - (c) £1,670.18 in transport costs incurred for the benefit of the Partnership were met by PLC, this sum was credited to the Partnership’s sales ledger with PLC (“the Partnership Sales Ledger”);
 - (d) PLC paid £4,371.16 agency labour costs for the Partnership which were set off in the PLC purchase ledger with the Partnership (“the PLC Purchase Ledger”);
 - (e) PLC met Partnership labour costs of £922.33 which were invoiced by PLC to the Partnership and paid by the Partnership, by cheque;
 - (f) on 12 October 2011 PLC invoiced the Partnership for spares and tyres which it had purchased for the benefit of the Partnership, this invoice was credited to PLC’s Purchase Ledger; and
 - (g) when the Cemex’s contract was coming to an end and Cemex ceased trading at Rugby the Partnership’s Volvo lorry registration YB06 UBJ (“the Volvo”) was rented by the Partnership to PLC at £265 per week to pull PLCs’ tankers full of dust from where it was stored at Northampton. PLC met the costs of running the Volvo, as part of the arrangement, including the costs of servicing and maintaining it.

73. **[Andrew's Response 31/1/20]** The whole arrangement was not a bona fide arrangement in the interests of PLC, was not a proper purpose and placed Paul in conflict with his duties to PLC/ABPT. Andrew does not accept that all benefits provided by PLC to the Partnership in relation to the Cemex contract have been dealt with as asserted by Paul, does not accept that the credits were raised contemporaneously or that they are appropriate. Paul has not disclosed how much profit the Partnership made from the arrangements.

Biffa

74. **[Petition]** In late 2010/early 2011 Paul told Andrew that the Partnership had acquired a contract to remove digestate waste from the Biffa Site. Andrew believes that 4 articulated tractor units and tanker trailers, used by the Partnership on the Biffa contract were put on PLC's Operating Licence and were maintained, repaired, taxed and fuelled at the expense of PLC.
75. If as the Respondents assert, PLC had the contract with Biffa and the Partnership was sub-contracted by PLC to provide transport services then: (a) Paul did not disclose the nature and extent of the Partnership's interest in that sub-contract; (b) Andrew did not know of the sub-contract in spite of being a director of PLC; (c) the vehicles used were maintained, repaired, fuelled and taxed and insured at PLC's expense; and (d) there is no evidence that credit was given by the Partnership to PLC for employees of PLC and self-employed contractors paid by PLC, but used in the Biffa sub-contract, by the Partnership.
76. **[Points of Defence]** In October 2013 PLC and Prestons entered into a contract with 4R (as successor to Bi Products) to remove liquid digestate waste from the Biffa Site. Where liquid was to be used for direct spreading on land, PLC sub-contracted to the Partnership/Prestons to transport and spread the liquid, as PLC did not have the necessary equipment to do this.
77. If the use of PLC employees benefited the Partnership inadvertently then this was dealt with by way of a credit.
78. The board of PLC knew of Paul's involvement in the Biffa sub-contract and it is denied that vehicles owned by the Partnership were added to PLC's Operator's Licence or maintained, repaired or fuelled at PLC's expense.
79. **[Paul's Witness Statement 10/1/20]** In late 2011/early 2012 PLC entered into a sub-contract with Bi-Products to remove solid waste from the Biffa Site. PLC sub-contracted with the Partnership to carry out this work, but once the Environmental Agency forbade Biffa from depositing solid waste on the ground, Biffa started instead putting the waste in skips, PLC/the Partnership could no longer perform the contract after this happened.
80. In March 2012 PLC paid £19,200 of the cost of the Volvo, purchased by the Partnership. PLC invoiced the Partnership for this amount and the invoice was credited to the PLC Purchase Ledger.
81. In 2012 PLC started to remove liquid waste from the Biffa Site on a trial basis, as sub-contractor to 4R. There was a suggestion that Biffa would enter into a 5 year contract with 4R but they never did. The price paid for the removal of liquid waste was reduced over time from £12.50 per tonne at the start to £8.05 per tonne, at that point it became uneconomic for PLC to continue with the contract and it was ended.

82. The Partnership gave 3 credits to PLC in relation to this sub-contract: (a) when spreading liquid waste the Partnership used its tractor to pull PLC's tankers and reduced its charges to PLC by £1 per tonne to take the use of PLC's tankers into account; (b) in March 2014 PLC paid £2,160 for the Partnership, this was credited to the PLC Purchase Ledger; and (c) on 1 April 2015 the Partnership credited £13,840 to the Partnership Sales Ledger for machinery purchased by PLC, but used by the Partnership.
83. **[Andrew's Response 31/1/20]** Andrew can neither admit nor deny that credits were provided as asserted by the Respondents, he does not understand or admit the basis upon which invoices were calculated, that they were contemporaneous with events or that costs were paid by the Partnership. Paul has not disclosed how much profit the Partnership made from the arrangements.

Home Farm

84. **[Petition]** From around 2009, employees of PLC worked for the Partnership at Home Farm and PLC maintained and repaired vehicles and machinery used by the Partnership and also provided labour, equipment, insurance and consumables (including fuel) for the vehicles/machinery. The employees are: Anthony, Richard Whetton ("Mr Whetton"), Adam Elliott-Dickens ("Mr Elliott-Dickens"), Nigel Miller ("Mr Miller"), Stuart Ward ("Mr Ward"), Tony Emery ("Mr Emery"), Samuel Bridgen ("Sam") and William Bridgen ("William").
85. **[Points of Defence]** when PLC's employees have occasionally worked for the Partnership at Home Farm it has been done openly and has been properly accounted for.
86. **[Paul's Witness Statement 10/1/20]** from early 2012 the Group used Home Farm at no cost as an operational base and to store non-food waste (waste soil and water). Group equipment was repaired and maintained at Home Farm.
87. In September 2012 PLC recharged the Partnership for fuel, oil and tyres that PLC had paid for the Partnership's vehicles. The Partnership paid the invoices by cheque.
88. As to the employees of PLC and self-employed contractors paid by PLC who Andrew alleges have worked at Home Farm for the Partnership:
- (a) Anthony and Mr Whetton are self-employed contractors, they were paid by PLC when they worked for PLC and by the Partnership when they worked for the Partnership;
 - (b) Mr Elliott-Dickens was an employee of PLC, Paul trained him to weld and in training Mr Elliott-Dickens to weld, on occasions he did welding work for the Partnership. A credit of no more than £1,600 would be due to PLC for this;
 - (c) Mr Miller was an employee of PLC, he has driven a potato harvester, harvesting potatoes for ABF. Paul estimates that a credit of £5,880 may be due to PLC for Mr Miller's work over four years;
 - (d) Mr Ward was an employee of PLC, he drove Partnership vehicles, no credit has been given for this, an appropriate credit would be no more than £2,000;
 - (e) Mr Emery, Paul does not accept that he has carried out any work for the Partnership; and
 - (f) Sam (Paul's eldest son) and William (Paul's youngest son) were both employees of PLC, credit for the work that they have done in working for the Partnership has been given in reduced husbandry charges charged to PLC and ABF.
89. The Partnership has not benefited from any insurance taken out by PLC.

90. The only equipment of PLC used at Home Farm, for the purposes of the Partnership is a digger used to move waste soil. As PLC is benefiting from having its waste soil disposed of at Home Farm, Paul says that no credit is appropriate for this.
91. It is possible that machinery owned by the Partnership has occasionally been repaired at PLC's premises (where Partnership employees have been unable to repair it).
92. The Partnership has always paid for its own fuel.
93. **[Andrew's Response 31/1/20]** It is noted that Paul admits that the employees identified by Andrew in the ABPT petition were working for the Partnership and paid by PLC. No records of this had been kept by Paul and he has put arbitrary figures on the sums he says should be paid, which have not been paid by the Partnership to PLC. Andrew does not accept in any event that the details set out in Paul's witness statement represent the full extent of the Partnership's use of PLC's employees.

Growing Potatoes

94. **[Petition]** During the 2015/2016 growing season the Partnership started supplying potatoes to PLC either directly or indirectly through ABF. Andrew was not consulted about this arrangement.
95. The cost of labour, cultivation, husbandry and harvesting was borne by PLC alternatively ABF.
96. Even if the potatoes were supplied at market rates, this still breaches the no conflict duty of Paul and he must disgorge any profit made by the Partnership to PLC.
97. **[Points of Defence]** In 2016 ABF and the Partnership agreed that ABF would grow potatoes at Home Farm. The agreement was entered into openly and with the knowledge of Andrew and approval of the board of ABF. The agreement was:
 - (a) ABF would pay a ground rent to the Partnership for the use of land at Home Farm and the cost of cultivating/harvesting potatoes at standard rates;
 - (b) PLC would purchase the potatoes from ABF; and
 - (c) if PLC incurred costs or expenses that ought to be borne by ABF then the issue was settled between PLC and ABF.
98. **[Paul's Witness Statement 10/1/20]** between 2009 and 2011 when Andrew and then Mr Large were Managing Directors of PLC, the Partnership started supplying potatoes at market rates to PLC.
99. From 2016/2017 the Partnership carried out cultivation services for PLC and PLC set off those charges against the price it paid to ABF for the potatoes. The charges for cultivation services included the cost, for a period, of supplying sprays and fertiliser as specified by Agrovista.
100. It was agreed that the Partnership would charge at National Association of Agricultural Contractors ("NAAC") rates for its cultivation services, however the Partnership charged less than NAAC rates in light of: (a) Mr Miller and Paul's sons working for the Partnership and (b) Paul intended to provide the Group with a cost-effective source of potatoes rather than to make a profit for the Partnership.
101. The RSM Report commissioned after Andrew alleged that the arrangements amounted to a fraud concluded that the Partnership had undercharged for cultivating services in a sample of 22 of its invoices to PLC, by £133,860, against NAAC rates because it had both underestimated the acreage cultivated and charged reduced rates. In addition the Partnership did not charge for irrigation in spite of NAAC rates allowing

for this. The cost of sprays supplied by the Partnership to ABF was £169,371 but the Partnership only charged PLC £134,852.

102. **[Andrew's Response 31/1/20]** Andrew does not accept the account provided by Paul and asserts the prices were set for the benefit of the Partnership and PLC had no similar arrangement with other suppliers, effectively guaranteeing the Partnership a profit.

WPS

103. **[Petition]** WPS was incorporated on 13 November 2013 and Paul and Mr Tomkinson became its directors. £623,000 was transferred from PLC to WPS. On 3 November 2014 Paul applied to strike off WPS from the register. Even if, as asserted by the Respondents, the sum of £623,000 was repaid by WPS to PLC, in September 2014, it was still a breach of duty for that money to have been paid to WPS in the first place.
104. **[Points of Defence]** PLC wished to explore a project involving the acquisition of an anaerobic digester for the purpose of its business, but, through the use of a separate corporate vehicle. WPS was incorporated for that purpose and the arrangement was entered into with the full knowledge of Andrew and the Board of PLC. The sum of £623,000 was transfer to WPS in order to take the project forward.
105. The decision to use WPS for the project was abandoned in favour of using BIL and the sum of £623,000 was therefore returned (with accrued interest) from WPS to PLC in September 2014.

Alternate Spares Supplier

106. **[Petition]** PLC incurred costs of around £25,000 per month for mechanical and electrical parts. In around 2015, Carl Woolrich ("Mr Woolrich"), PLC's Maintenance Manager undertook a review of costs and on two occasions alternative suppliers offered identical products and better service with a cost reduction of 50%. Mr Woolrich reported this to Mr Sharratt and Paul but they rejected the alternative suppliers, without explanation. The decision to not even countenance a change in supplier was a breach of fiduciary duty and gross mismanagement.
107. **[Points of Defence]** It is denied that Paul and/or Mr Sharratt refused to countenance saving costs on the purchase of spares.

Generating Income from the back-up generator (added by the amendments carried out to the PLC Petition)

108. **[Petition]** PLC acquired a diesel generator in 2005 as a back-up power source for Enterprise House ("the Diesel Generator").
109. Since an Anaerobic Digester Plant ("AD Plant") has been in operation supplying the electricity needs for Enterprise House, the Diesel Generator has been available to supply electricity to the National Grid ("the Grid") in the event of a local power failure. There is no evidence that the Diesel Generator has ever been used for that purpose, this is a breach of fiduciary duty and serious mismanagement in failing to receive or account for that source of revenue.
110. **[Points of Defence]** The Respondents say as follows:

- (a) Andrew knew about and was involved in the matters of which he now complains which occurred, on his case, when he was actively involved in the management of PLC;
- (b) the allegations are insufficiently particularised to enable the Respondents to respond properly to them;
- (c) in December 2005, PLC bought the Diesel Generator to provide back-up electricity for Enterprise House to be used in the event of a power failure. Andrew knew of the purchase and the purpose of it;
- (d) if there was a local electricity grid failure the AD Plant would cease to produce electricity immediately and the back-up Diesel Generator would then be required to provide power for Enterprise House and to maintain basic control and safety systems for the AD Plant;
- (e) the terms of PLC's connection to the Grid do not allow PLC to export electricity to the Grid, in the event that there is a local power failure. This is to prevent electricity being fed into the Grid when remedial works are being or could be carried out to restore power to the Grid;
- (f) PLC has no contract for the supply of reserve electricity to the Grid; and
- (g) no revenue could be collected or pursued to provide electricity to the Grid in the event of a local power failure.

BIL

111. In his petition concerning BIL, Andrew alleges that there are 4 instances or categories of unfairly prejudicial conduct by the Respondents. That conduct/those instances, in summary relate to:

- (a) exclusion of Andrew from the management of BIL
- (b) taking on hire from John Bridges Construction Ltd a Telehandler at the expense of BIL which was used for the purposes of the Partnership;
- (c) management charges have been taken from BIL which bear no relation to the management services provided to it; and
- (d) BIL has invested in 3 renewable energy schemes, substantial revenues ought to have been earned from them but has not been, amounting to a breach of fiduciary duty by the Respondents and serious mismanagement (this claim was introduced by way of amendment to the BIL Petition).

Exclusion of Andrew from management of BIL

112. **[Petition]** On 7 May 2010 Andrew resigned as a director of BIL to enable him to pursue his political career, but he continued as a de facto director.

113. Andrew asked on a number of occasions to be reappointed as a director of BIL, but Paul refused.

114. **[Points of Defence]** The understanding of Paul and the other directors and shareholders of BIL was that Andrew resigned as director of BIL and ABPT, on 7 May 2010 on the basis that he no longer wished to be involved in the management of any of the Group companies.

115. It is accepted that, between February and August 2017 Andrew sought to be reappointed as a director of the companies in the Group. This request was rejected because of Andrew's abusive, contemptuous and aggressive behaviour towards fellow shareholders and the board of the Group companies.

Hire of Telehandler

116. **[Petition]** In 2010/2011 BIL started to construct a house to replace the existing farmhouse at "the Willows". Paul caused John Bridges Construction Ltd to take on hire a Telehandler which was in fact used by the Partnership at Home Farm but was paid for by BIL as part of the construction cost of the new house at the Willows. Paul's assertion that BIL was reimbursed for this cost is rejected.

117. **[Points of Defence]** The Telehandler was brought onto Home Farm by John Bridges ("Mr Bridges") so that topsoil for the Willows development could be transported to the Willows. No charge for the cost of hiring the Telehandler to BIL has been found.

118. **[Paul's Witness Statement 10/1/20]** Mr Bridges did provide a Telehandler which was used to enable top soil to be removed from Home Farm and deposited at the Willows, owned by BIL. Paul does not believe that Mr Bridges charged for the use of the Telehandler and the transport of the top soil to the Willows was for the benefit of BIL which needed the soil for earth works at the Willows.

Management Charges

119. **[Petition]** Andrew believes, following disclosure to him at a shareholders meeting in early 2017, that management charges have been applied to BIL. No information has been provided to Andrew as to the nature and extent of those charges. Any such charges bear no relationship to actual services provided and are a method of extracting value from BIL.

120. **[Points of Defence]** Andrew's beliefs have no foundation in fact and should be struck out for lack of particularity.

Renewable Energy Schemes (added by the amendments carried out to the BIL Petition)

121. **[Petition]** BIL invested in 3 renewable energy schemes:

- (a) Photovoltaic solar panels purchased in March 2015 for £307,000 ("Solar Panels");
- (b) the AD Plant, purchased in May 2017 for £3,666,000; and
- (c) two biomass boilers purchased in 2018 for £488,000 ("CHPs").

122. These three schemes were intended to reduce PLC's energy and waste costs but also to provide income streams from: (a) feed in tariff ("FIT") payments; (b) renewable heat incentive ("RHI") payments; and (c) exporting green energy to the Grid.

123. An additional 500 KWH CHP was added with the sole intention that it would provide electricity to be exported to the Grid.

124. Electricity has been exported to the Grid since 2015 : (a) May 2015 - November 2018 - 2,139,059 kWh; and (b) November 2018 - March 2021 - 5,171,950 kWh.

125. There was a contract in place between BIL and E.on for the export of electricity to the Grid for the six months up to 30 September 2018, no revenue has been received by BIL under this contract.
126. E.on reports that its export tariff (excluding FIT) is 5.5p per kWh, Ofgem suggest an average export tariff equating to approximately 21p per kWh (excluding FIT). BIL should have received between £402,105 and £1,535,311 for electricity exported to the Grid, but has not done so
127. Future revenue will be lost: (a) the AD Plant's maximum capacity is 1,000 kWh per day with the ability to export 860 kWh per day, but the AD Plant has not been operating at maximum capacity ; (b) assuming utilisation at 80% of maximum capacity lost future income would equate to £331,478 at 5.5p per kWh and £1,262,645 at 21p per kWh.
128. It is a breach of fiduciary duty and serious mismanagement to fail to collect or pursue these substantial revenues.
129. **[Points of Defence]** Andrew was involved in and knew of the matters of which he now complains.
130. The purpose of the Solar Panels was: (a) to generate electricity for use in the factory reducing energy costs (not to supply electricity to the Grid); (b) to show engagement of the Group with environmental concerns at a time when the business was under threat as a result of the environmental nuisance caused by noxious fumes from waste produced by the factory; (c) to promote the business to customers who had "green credentials"; and (d) to provide a nominal additional revenue stream from FIT electricity generation receipts. Andrew was aware of these purposes for the Solar Panels.
131. The purpose of the AD Plant was as a solution for the environmental nuisance caused by strong odours emitting from the existing waste treatment. This had resulted in the service of an abatement notice by the council (which had been appealed and the appeal was due to be heard in June 2016). The council applied for an interim injunction to abate the nuisance on 9 September 2016, there were over 400 complaints from the public about the smell and a class action had been started by 106 local residents. The directors of BIL were however aware of the potential to export electricity to the Grid and of the availability of FIT payments from Ofgem for doing so.
132. It was estimated that more biogas would be produced than had originally been calculated and a second CHP was needed to capture and utilise the additional biogas produced in excess of the capacity of the first CHP.
133. The AD Plant has been processing waste and the CHPs generating electricity since May 2017, and it is admitted that as at 17 November 2018 the electricity export meter purported to record that 2,139,059 kWh of electricity had been exported to the Grid. A contract was agreed with E.on for the export of electricity as an adjunct to a contract for the supply of electricity by E.on, but the approval of Western Power Distribution ("WPD") for the export of electricity to the Grid and approval of the export/import meters by E.on was not obtained until November 2018. It is admitted that the meter installed in November 2018 read 5,171,950 kWh as at March 2021. Discussions with E.on are ongoing about a payment for electricity exported to the Grid.
134. It is admitted that E.on reported an export tariff of 5.5p per kWh (excluding FIT payments) but denied that Ofgem identified 21p per kWh (excluding FIT payments) as an average payment made to generators of electricity by suppliers. The figure of 21p that Andrew relies on also includes FIT power generation payments and Andrew has

incorrectly assumed that all exported electricity (in accordance with meter readings) is eligible for FIT payments.

135. The maximum amount of electricity which can be exported to the Grid is capped at 860 KWH per day, but the CHPs could not achieve that maximum export capacity, even ignoring the energy needs of the factory, the fluctuations in waste product used to generate energy, reduce the amount of electricity available for export to the Grid.
136. In the 29 month period from November 2018 to March 2021 5,172,000 kWh is shown as having been exported, giving an average monthly export of 178,343 KWH or 6000 KWH a day.
137. Andrew's figure for future loss of revenue includes income already fully recovered as well as revenue which remains recoverable
138. It is denied that the Respondents failed to collect and pursue revenue or account for revenue. BIL has received £1.97m in FIT power generation payments from Ofgem up to 22 March 2021 for electricity generated by the CHPs and Solar Panels and the Group has saved approximately £1m from the in house generation of electricity.

ABF

139. In his petition concerning ABF, Andrew alleges that there are 4 instances or categories of unfairly prejudicial conduct by the Respondents. That conduct/those instances, in summary relate to:
 - (a) Andrew's exclusion from the management of ABF;
 - (b) entering into an arrangement with PLC, by which the Partnership supplied potatoes directly to PLC or through ABF;
 - (c) causing ABF to engage in growing potatoes on Barn Farm and land leased from third parties; and
 - (d) ABF paying invoices for product supplied by Agrovista UK Limited ("Agrovista") to the Partnership.

Andrew's exclusion from the management of ABF

140. **[Petition]** ABF was incorporated in secret without consulting the shareholders of PLC and in particular Andrew.
141. The subscriber share in ABF was put in the name of Mr Tomkinson and he was the only director. Mr Tomkinson subsequently resigned as director and Paul was appointed in his place and the subscriber share was transferred to Paul on 13 July 2016. It was only after Paul was challenged by Andrew about the position in respect the shareholding in ABF and proceedings were threatened, that the shareholding was altered to 49 shares for Paul, 49 shares for Andrew, 1 share for Mr Ellis and 1 share for Mr Tomkinson.
142. Barn Farm should have been acquired by PLC. Once the ABF shares were reallocated (after Paul had challenged Andrew and proceedings were threatened) in August 2017, ABF was also a Quasi-Partnership, subject to considerations of trust and confidence. Andrew should have been appointed as a director of ABF, but he was not and he has not been consulted regarding its management. Andrew has been locked into a substantial investment with ABF over which he has no control.

143. **[Points of Defence]** The decision to purchase Barn Farm was made by the directors of PLC on 14 August 2015. ABF was judged to be needed: (a) to preserve Barn Farm from enforcement action being taken against PLC in relation to statutory nuisance for noxious fumes emitting from its factory; and (b) major customers if they saw PLC making significant profits, would press PLC to reduce the prices they paid for processed potatoes, the incorporation of ABF kept profits made from Barn Farm out of PLC's accounts.
144. Andrew was informed about the purchase of Barn Farm, the day after the auction and was told that it would be purchased by a new company. Andrew raised no objection or concern about the purchase, other than that he did not want to appear as a shareholder of the new company whilst he considered the question of an appeal against the financial relief order made in his divorce.
145. If Andrew is advancing a case that Paul intended to misappropriate over £1,000,000 from PLC in order to acquire sole ownership of Barn Farm then such a case amounts to an allegation of serious fraud and dishonesty that Andrew should properly particularise. Andrew has failed to properly plead the alleged dishonesty on the part of Paul.
146. Andrew was not kept out of the management of ABF, he had no interest in being involved in its management.
147. **[Reply]** Andrew was not told that Barn Farm was to be put into the name of a new company in which shares would be issued in due course in line with the shareholding in ABPT. The purchase of Barn Farm was presented as a fait accompli to Andrew who was not consulted about it.
148. The purchase of Barn Farm without consultation with Andrew was a breach of the obligation to consult with him and obtain his agreement as a Quasi-Partner and a breach of fiduciary duties owed to PLC. The conduct did undermine the trust and confidence that existed in the Quasi-Partnership and the conduct is to be considered as part of the overall conduct of the affairs of PLC.
149. No explanation has been given for the transfer of the entire issued share capital of ABF to Paul, from Mr Tomkinson, or the resignation of Mr Tomkinson as director and his replacement by Paul. This was a dishonest breach of duty by Paul for his own purposes.

The Partnership supplying Potatoes to PLC

150. **[Petition]** From the 2015/2016 growing season, the Partnership started supplying potatoes to PLC either directly or via ABF.
151. PLC paid all the costs of labour, cultivation and harvesting.
152. Paul did not declare his interest to the boards of either PLC or ABF before entering into those arrangements.
153. Even if potatoes were supplied by the Partnership at market rates this still involved Paul (through the Partnership) making a secret profit.
154. **[Defence]** In 2016 ABF and the Partnership agreed to grow potatoes at Home Farm, the agreement was entered into openly and with the knowledge of Andrew and the board of ABF.
155. The material terms of the cropping agreement were that ABF would pay a ground rent and the cost of cultivating/harvesting at standard rates and PLC would purchase the harvested potatoes from ABF.

156. If PLC incurred any costs/expenses which ought to have been born by ABF the issue was settled between those companies.

Causing ABF to grow potatoes at Barn Farm and at third party farms

157. **[Petition]** From the 2015-2016 growing season, the Partnership started supplying potatoes to PLC directly or via ABF.

158. Paul used ABF to disguise profits made by the Partnership in two ways: (a) cultivation, husbandry and harvesting undertaken by the Partnership were charged to PLC/ABF in breach of the no conflict rule; and (b) labour, equipment, insurance and consumables were paid for by PLC or ABF.

159. Paul did not declare his interest in those arrangements to the boards of PLC or ABF before entering into those arrangements.

160. Even if potatoes supplied by the Partnership were supplied at market rates, this still amounts to a secret profit which Paul is obliged to account to PLC for.

161. **[Defence]** ABF was judged to be needed: (a) to preserve Barn Farm from the risk to PLC presented by threats made by the local authority of proceedings for statutory nuisance; and (b) because major customers of PLC, such as large supermarkets take into account the profits of their suppliers in order to push down prices paid to suppliers, it was therefore decided to keep profits from Barn Farm out of PLC.

ABF paying Agrovista invoices

162. **[Petition]** On 21 April 2018 Andrew visited PLC's offices and noticed a completed account opening form for ABF to open an account with Agrovista, signed by Paul with delivery to be made to Home Farm. No reason has been given as to why ABF should pay for services supplied to Home Farm.

163. **[Points of Defence]** Agrovista's business is the supply of technical services and chemical treatments for crops. The Agrovista account opening form was completed on behalf of ABF for technical services and chemical treatments required for ABF's crops of potatoes. The delivery address was Home Farm because it stored the deliveries for ABF. The Agrovista supplies were therefore for the benefit of ABF and not the Partnership.

REPRESENTATION

164. Before me: (a) Andrew was represented by Mr Zaman QC and Mr Philip Mantle; and (b) the Respondents were represented by Mr Auld QC (the other respondents to the Petitions, Alan, Ann, JLT, ABPT, BIL and ABF are not represented).

EXPERT WITNESSES

165. I will summarise the expert evidence relied on by Andrew and the Respondents before summarising the evidence of the witnesses of fact relied on by the parties. It is convenient to deal with the expert evidence before the evidence of the witnesses of fact, because Paul in particular responds, in his second witness statement, to the first report of Andrew's expert.
166. Both experts are experts in forensic accountancy and they have prepared reports and made joint statements upon: (a) the accountancy aspects of those matters that Andrew relies upon in saying that the affairs of the Group companies have been conducted in a manner which is unfairly prejudicial to him; and (b) separate reports upon the value of shareholdings in the Group and how they are affected by the matters of which Andrew complains. For the purpose of the issues that I need to determine the evidence of the experts as to the value of shares in Group companies is not relevant and I do not consider those reports in this judgment.
167. Andrew's expert is David Bell of Ernst & Young LLP ("Mr Bell"). The Respondent's expert is Stephen Lewis of Mazars ("Mr Lewis"). Mr Bell has prepared two expert reports on Andrew's claims dated 1 April 2021 and 7 October 2021. Mr Lewis has prepared two expert reports on Andrew's claims dated 31 March 2021 and 8 October 2021. Mr Bell and Mr Lewis have prepared two joint statements setting out the matters on which they agree and disagree dated 28 May 2021 and 18 October 2021.
168. I will at this stage set out the opinions of Mr Bell and Mr Lewis in relation to each of Andrew's claims as they appeared at trial, following the preparation of both joint reports. In so far as it is necessary to consider what the opinions of Mr Bell and Mr Lewis were before they arrived at their final positions in the second of their joint statements dated 18 October 2021, I will do so later in this judgment.

Barn Farm

169. The experts agree that Mr Tomkinson resigned as director of ABF and transferred the share that he held in ABF to Paul on 13 July 2016, and that Paul was appointed director in place of Mr Tomkinson on the same date.
170. The experts further agree that a further 99 shares were issued on 6 February 2017 so that the shareholders were, from that date Andrew - 49 shares, Paul - 49 shares, Mr Tomkinson - 1 share and Mr Ellis - 1 share.

Cemex and Biffa

171. The experts agree that it was PLC that entered into the contract with Bi-Products/4R for both Cemex and Biffa and PLC entered into sub-contracts with the Partnership and Gilbert for Cemex and with the Partnership and Prestons for Biffa;
172. Mr Bell says that, based upon a sample of 13 invoices considered by him, PLC made a profit of £20 per load or 8% on what Gilbert charged it, on Cemex, but only on two occasions did PLC charge 4R more than the Partnership charged PLC in its invoices.
173. Mr Bell says that the use, by the Partnership of PLC's drivers and fuel for the Cemex/Biffa contracts further eroded any benefit that PLC obtained from using the Partnership as a sub-contractor. Finally Mr Bell refers to the Partnership invoicing PLC

for the use of the Volvo at the rate of £285 per week, with PLC paying the tax and insurance on the Volvo.

174. Mr Lewis says that his analysis of the Cemex contract shows that the rates charged by the Partnership to PLC were either the same as or less than the rates charged by PLC to 4R and that in some cases the Partnership did not charge PLC for work which PLC charged 4R for. Mr Lewis says that the Partnership charged the same rate of £230 per load for loads carried by its 8 wheel tipper vehicle as Gilbert charged for the same type of vehicle and that Mr Bell's analysis of 13 invoices is insufficient to conclude that PLC made an 8% profit on its sub-contract with Gilbert transport. Mr Lewis says that according to his calculations, PLC made a profit of £20,889 on services provided by the Partnership to PLC in relation to the Cemex and Biffa contracts.
175. So far as the vehicle hire charges for the Volvo are concerned, Mr Lewis says that these are not pleaded and that he is instructed not to deal with this issue.

Use of PLC fuel by the Partnership

176. Mr Bell says that he discussed PLC's fuel management system with Mr Baldwin and Mr Brain (both former transport managers of PLC). Mr Bell says that they confirmed to him that PLC's fuel management system required someone wanting to draw fuel at Enterprise House to use both a key fob and a pin number. Key fobs were allotted to a particular vehicle and pin numbers to a particular driver. Mr Bell accepted the fob could be used to fill up more than one vehicle, but he understood that the pin numbers should accurately show which driver had drawn fuel from the system.
177. Mr Lewis says not only could fuel fobs be used for more than one vehicle but pin numbers could be passed, around between drivers or guessed.
178. Mr Bell has calculated the amount of PLC's fuel that he considers has been used by the Partnership. He has done so by: (a) identifying fuel used by the pin numbers allocated to Sam and Adam Marczak, from January 2015 who he understood to be employees of PLC that worked for the Partnership. He has then used those figures to calculate likely PLC fuel use by the Partnership from January 2010 to December 2014; and (b) he has identified Partnership vehicles both by reference to the Partnership fixed asset register and agricultural vehicles for which fuel has been drawn on the basis, in the latter case, that only the Partnership used agricultural vehicles. He calculates the value of PLC fuel drawn by the Partnership from January 2010 to the end of March 2020 at £391,865. Mr Bell calculates that the partnership only purchased £118,871 in fuel between 2010 and 2020.
179. Mr Lewis says that Mr Bell's analysis is extremely limited, he has significantly underestimated the amount of fuel that the Partnership paid for itself between 2010 and 2020. Mr Bell calculated this fuel use at £118,871, on the basis of two supplies of fuel to the Partnership that Mr Bell had identified. In contrast, Mr Lewis has looked at the Partnership ledger for fuel purchases which gives a figure of £763,157 for fuel purchased during this period. Mr Lewis says that Mr Bell has also assumed that all agricultural vehicles are Partnership vehicles, but he says that is not correct because PLC had agricultural vehicles of its own which are used for the purpose of its business. Finally he says that fuel taken using Sam's pin number could not be extrapolated back to 2010, because at that time Sam would have only been 12 years old, so he could not have been using PLC's fuel then.

PLC Employees

180. Mr Bell has provided a range of the cost to PLC of its employees being used for the benefit of the Partnership. The range that he has supplied depends upon the strength of the available evidence that the employee worked for the Partnership and the salary costs applying to that employee in the year in question. Mr Bell notes that, between 6 April 2013 and 5 April 2019, the Partnership had no salary costs and it was only from April 2019 onwards that Sam and William have become employees of the Partnership.
181. Mr Lewis says there is not sufficient evidence available to quantify the cost to PLC of its employees time that benefited the Partnership and that the method adopted by Mr Bell to provide a range of cost is arbitrary and inappropriate.
182. The experts agree that Anthony should not be included in the claim. They then analyse the remaining employees of PLC who are mentioned in Andrew's ABPT Petition as having spent time working for the benefit of the Partnership and set out their respective positions in relation to those employees (including, in the case of Mr Bell, setting out a range of figures (normally between 30% and 70%) of the employee's salary costs that I may decide should be paid by the Partnership).
183. Mr Bell includes in his report additional claims for Mr Woolrich, Mr Baldwin, Wojciech Gajda and time which he suggests was spent by PLC's administrative staff in carrying out administration for the Partnership. Mr Lewis does not respond to these claims, on the basis that the three additional employees and administrative costs are not pleaded.

Goods purchased by PLC for the Partnership

184. Mr Bell says that he has identified invoices addressed to PLC for goods which were delivered to, or services performed at Home Farm. Mr Lewis says that his instructions are that some of PLC's vehicles were located at Home Farm and goods and services being delivered to Home Farm is not indicative of them having been supplied for the benefit of the Partnership.

Potato costs

185. Mr Bell says that ABF has incurred significant trading losses which PLC has funded and that the Partnership has benefited by making a profit on the planting, cultivating and harvesting services that it has provided. He says that if PLC had purchased potatoes from a third party then it would not have had to fund these losses.
186. Mr Lewis says that in most cases NAAC rates or Nix pocket-book rates had been used for husbandry work carried out by the Partnership, but overall the Partnership has charged £85,211 less than these rates allow, consistent with the findings of the RSM Report, which found that the charges rendered by the Partnership for planting, cultivating and harvesting potatoes were less than NAAC rates. He says that the trading losses, to which Mr Bell refers are not part of Andrew's pleaded case.

WPS

187. The experts agree that the £623,000 originally paid by PLC to WPS was repaid, with interest to PLC (the actual amount transferred in two payments is £623,000). Mr Bell refers to professional costs incurred in setting up WPS of £6,952.

Cost control

188. The experts agree that, in addition to the price paid for goods the quality and availability of the goods and standard of service are also relevant when selecting parts suppliers. They also agree that PLC engaged expense reduction specialist to identify savings that could be made in purchasing parts and that PLC implemented their recommendations in December 2017. The experts agree, on this basis, that any losses incurred by PLC from not implementing the purchase of parts from Erik's (the alternative supplier that Mr Woolrich refers to) should be limited to the period from November 2015 to December 2017 and they agree that the savings to PLC, if Andrew's position is upheld are £6,250 per month for that period.

Telehandler

189. The experts agree that there is no evidence that the Telehandler was not appropriately accounted for.

Management charges

190. The experts agree that, as the shareholders of BIL and ABPT are the same, the re-allocation of costs between BIL and PLC has no effect on shareholders' interests.

Agrovista

191. The experts agree that there is no evidence that costs were not correctly accounted for in relation to purchases from Agrovista.

The Diesel Generator

192. The experts agree that, based on the available evidence, the diesel generator cannot export electricity to the Grid, in the event of a power failure.

AD Plant

193. The experts agree that: (a) there is no evidence of revenue being collected for the export of electricity to the Grid; (b) no power purchase agreement ("PPA") has been entered into with an electricity supplier in relation to the export of electricity to the Grid, other than an agreement for the six-month period 1 April 2018 to 30 September 2018 entered into with E.on; and (c) a maximum of only 50% of all electricity generated by the CHPs can be exported to the grid and in any event no more than 860 kWh.

194. Mr Bell calculates total electricity exported to the Grid, up to 22 March 2021 as 7, 311,009 kWh, of which 5,171,950 kWh is for the period 18 November 2018 – 22 March 2021. He calculates the loss of revenue from the export of electricity at between

£284,457 and £402,105, depending upon whether the electricity exported which it is possible to recover payment for is 5,171,950 or 7,311,009 kWh.

195. Mr Lewis calculates total electricity exported to the Grid as at 22 March 2021 as 6,856,450 kWh and that the revenue recoverable for that electricity is £338,865.
196. Mr Bell calculates revenue receivable going forward at £322,496 per annum and Mr Lewis, based upon BIL recovering export FIT payments, at between £127,095 and £132,386.
197. Mr Bell goes on to calculate the loss that he says that BIL has suffered as a result of it not running the AD Plant at 90% of its capacity in order to maximise revenues. Mr Lewis has not calculated any loss resulting from a failure to run the AD Plant at 90% of maximum capacity, because he says, this claim has not been pleaded by Andrew.

FACTUAL WITNESSES

198. I will now summarise the factual evidence that Andrew and the Respondents rely upon. My summary is not meant to be a comprehensive summary of everything that the relevant witness says in their witness statements, but rather a relatively brief summary of their evidence which deals with the grounds that Andrew relies upon in saying that the affairs of the Group companies have been conducted in a manner unfairly prejudicial to him and the Respondents' response to those grounds.

For The Petitioner

199. **Andrew** gives evidence, in summary on the following matters:
- (a) the development of the business that became the business of PLC, its expansion thereafter up to April 2010 and his part in it;
 - (b) his selection as a conservative candidate for and subsequent election as MP for North West Leicestershire on 6 May 2010. His resignation as a director of BIL and ABPT and the change of this role from full time managing director of PLC to non-executive chairman of PLC on 7 May 2010;
 - (c) the appointment of Mr Large as Managing Director of PLC in March 2010, Andrew's knowledge of the trading of PLC under Mr Large's direction and the dismissal of Mr Large in July 2012 and that Andrew persuaded Paul to then take on the role of Managing Director of PLC;
 - (d) the purchase of the Willows and then the Old Vicarage from Andrew by BIL;
 - (e) Andrew's divorce and the financial remedy proceedings in that divorce;
 - (f) Andrew's dismissal as employee and termination of his appointment as director of PLC, (which Andrew says he did not agree to) which took place in August/early September 2014, between the conclusion of the hearing of the financial remedy proceedings (10 July 2014) and delivery of the reserved judgment, in those proceedings (22 September 2014);
 - (g) Paul telling Andrew that "we" have purchased Barn Farm and that he would set up a new company to hold it;
 - (h) Andrew seeking to be re-appointed as director and employee of PLC from January 2017 and shareholder meetings in 2017/2018 at which Andrew sought re-

appointment and started to ask questions about: (i) ABF; and (ii) the arrangements for ABF to grow potatoes for PLC and for the Partnership to provide husbandry services for growing those potatoes;

- (i) that, notwithstanding that Andrew was not a director or employee of PLC in 2017/2018 he dealt with a number of matters relating to PLC's business;
 - (j) Mr Bridges told Andrew that, at Paul's request he had arranged for a telehandler to be hired which Paul wanted for removing top soil at Home Farm, but this had been paid for by BIL. Andrew had confronted Paul about this and Paul had promised to reimburse BIL;
 - (k) Andrew suggested that the Diesel Generator at Enterprise House be sold after the AD Plant had been installed but Paul refused;
 - (l) Andrew only found out about the incorporation of WPS for the first time in the Autumn of 2017;
 - (m) Paul never mentioned the Cemex/Biffa contracts to the PLC board, or Andrew. When Andrew saw old tipper lorries in the yard at Enterprise House and asked Paul about them, Paul said it was a private matter. Andrew spoke to Anthony, Richard Baldwin ("Mr Baldwin") the then PLC transport manager and others who confirmed to him that: (i) the Partnership's lorries had been put on PLC's Operator's Licence; (ii) Anthony and others employed by PLC or paid by it were working on those contracts; and (iii) the Partnership was using PLC's fuel for its vehicles/machinery;
 - (n) at Easter 2018 Andrew: (i) went to Barn Farm and saw extensive building works going on there; and (ii) went to Home Farm and saw PLC staff working and a lot of new expensive farm machinery there. He asked Mr Sharratt, PLC's Finance Director, why PLC's employees were working at Home Farm but he got no answers;
 - (o) Andrew reported his concerns about, what he saw as fraudulent activity, to the police and to KPMG (PLC's Auditors)
 - (p) Andrew visited Enterprise House and went into Paul's office where he found paperwork showing that Agrovista was delivering chemicals to Home Farm which would be charged to ABF; and
 - (q) he saw management fees charged to BIL but he did not believe that any management services were being provided to BIL.
200. **Matthew Parker** ("Mr Parker") gives evidence of the following:
- (a) he was employed by PLC between November 2014 and July 2017 as Environmental Operations Manager to manage the installation of the AD Plant;
 - (b) Paul doubled the amount of electricity to be generated by the AD Plant from 500Kw to 1000Kw by adding a second CHP, but was then unhappy at the increase in cost caused by adding the second CHP;
 - (c) the amount of electricity generated by the Solar Panels and AD Plant and used by the factory at Enterprise House;
 - (d) he did some repairs on tractors at Home Farm at Paul's request; and
 - (e) Paul told him not to answer any of Andrew's questions about the AD Plant and that they were trying to get Andrew out in 2016.
201. **Mr Bridges** gives evidence as to:
- (a) how he says the costs overruns on the building of a house, by him, at the Willows occurred;

- (b) that Paul approached him in September 2010 and asked if he could arrange to hire a telehandler for him which he understood was to be used to load top soil from Home Farm onto trucks, he did arrange to hire a telehandler through Anvil Plant and Anvil Plant delivered it to Home Farm; and
 - (c) he invoiced the telehandler to BIL and BIL paid for it.
202. **Martin Mc Quaide** (“Mr McQuaide”) gives evidence that:
- (a) he joined PLC in 2002, just after it moved to Enterprise House, as Operations Director responsible for all aspects of PLC’s operations except sales, finance and transport and left in 2011;
 - (b) it was the most unstructured business that he has ever worked for with no work instructions or training plans, he tried to bring in structure and systems;
 - (c) they should have appointed him as Managing Director when Andrew became an MP;
 - (d) he became aware of fraudulent activity, by Paul, in 2003/2004. Paul took over from him the process of disposing of broken pallets, Paul sold the broken pallets for cash, not accounting to PLC for the cash, he told Andrew but Andrew did not believe him;
 - (e) he knew that PLC labour was carrying out maintenance work at Home Farm. Mr Elliot-Dickens, Mr Miller, Mr Emery and Mr Whetton all drove tractors on the Partnership’s land and items were purchased by PLC but delivered to Home Farm;
 - (f) Paul often brought over to PLC, farm machinery to be fixed and Paul’s vehicles openly filled up with fuel at Enterprise House;
 - (g) he heard gossip in the smoking cabin at Enterprise House, that the potatoes grown by Paul were of poor quality, but Paul still got paid premium prices for them by PLC;
 - (h) He was not told about the Cemex contract at a Board Meeting, he only heard about it through the lorry drivers who were working on it. People involved were: Mr Elliot-Dickens; Mr Emery; Mr Miller, Mr Baldwin and Ian Sturgess. It was common knowledge that the transport, fuel and labour costs were paid for by PLC. He asked Paul about the profit on the Cemex contract and Paul said that Paul and Mr Sharratt would discuss this “off line”;
 - (i) He told Andrew about the costs PLC was incurring in running Paul’s farm including PLC’s fuel, labour and maintenance, with Paul’s vehicles openly filling up at PLC’s yard. Andrew did not say anything.
203. **Anthony** gives evidence that:
- (a) he was an employee of PLC for 9 months from 2009 but then he became self-employed. He did cultivation and other work at Home Farm and was generally paid by PLC when he did this, he only got 3 or 4 cheques from the Partnership. PLC employees working at Home farm were: Mr Whetton, Mr Elliot-Dickens; Mr Miller; Mr Ward; Mr Emery; Sam; and William;
 - (b) He loaded lorries at night for the Cemex contract, he believed the contract was with the Partnership because the weigh tickets in the lorries were Partnership weigh tickets. He was paid by PLC;
 - (c) Mr Whetton also worked on the Cemex contract driving Paul’s lorries to farms where Prestons spread the waste on land; and
 - (d) he told Andrew that Paul’s tankers were operating on PLC’s Operators Licence and filling up on PLC’s diesel.

204. **Mr Baldwin** says:

- (a) he started as Transport Manger at PLC in 2008, running PLC's fleet of vehicles and left in March/April 2015;
- (b) Paul told him that "we" had acquired a new contract (the Cemex contract) which he took to mean PLC. PLC did not have the rigid or tipper lorries needed for the contract but Paul arranged to acquire them, he was responsible for keeping PLC's Operator's Licence up to date and he added them to PLC's Operator's Licence on the basis that they were PLC vehicles, finance will have arranged to pay the road tax on these vehicles and he arranged for them to be included on PLC's insurance;
- (c) Mr Whetton, Mr Elliot-Dickens and a new driver, Mr Ward did the driving on the Cemex contract and it occupied 100% of their time;
- (d) Paul told him we have got a new contract (Biffa) some of the drivers involved in Cemex were then involved in Biffa and 2 new employees, Mr Emery and Robert Bagley were employed by PLC for the Biffa contract;
- (e) he thinks the Biffa contract started after the Cemex contract ended but there may have been some overlap;
- (f) 2 additional tankers and 2 additional trailers were acquired for the Biffa contract, he added the 2 tankers to PLC's Operator's Licence;
- (g) each PLC vehicle had a fuel card and a fob allocated to it and each PLC lorry driver plus Andrew and Paul had individual pin numbers. Fuel cards were used to fill up with fuel offsite. PLC vehicles filled up with fuel at Enterprise House by using the fob and the driver's personal pin number;
- (h) he did see agricultural vehicles filling up at Enterprise House, he was shown tractors pumping water into the lagoons at Enterprise House. He never thought much of it when he saw agricultural vehicles fuelling up at Enterprise House, even when it appeared they went to Home Farm, he assumed it was all part of the family business; and
- (i) Jason Redfern (an external contractor) provided maintenance services for PLC owned vehicles and maintained the Cemex/Biffa Vehicles because Mr Baldwin thought PLC owned them.

205. The witness summary for **David Brain** ("Mr Brain") says:

- (a) he was employed as transport manager by PLC between 2017 and 2020;
- (b) Mr Sharratt and Paul had numerous conversations in his presence about taking steps to bankrupt Andrew to stop his legal proceedings against them;
- (c) the transport function of PLC was not conducted along normal commercial lines: (i) work done for Prestons and ABF was done at less than commercial rates, he pointed this out to Paul but nothing was done about it; (ii) Paul was not interested in other profitable haulage work Mr Brain obtained, Prestons and ABF took priority (iii) on an almost daily basis, Sam and William and other farm hands working for the Partnership collected fuel from Enterprise House to fill up tractors and other plant and machinery at Home Farm which made managing fuel stock difficult.
- (d) fuel collected for use in the Partnerships vehicles was collected using PLC fuel fobs;
- (e) PLC's low loader was often used to move agricultural machines for the Partnership, he does not believe the Partnership was invoiced for this;
- (f) agricultural tractors and machinery operated by the Partnership were maintained and repaired by PLC employees and all invoices for parts addressed to PLC;

- (g) during planting and harvesting seasons Mr Miller worked full time for 10 weeks for Paul;
- (h) Paul often asked for seed potatoes to be collected and delivered to the farms and for harvested potatoes to be transported to storage;
- (i) maize that Paul grew was transported to other operators of AD Plants using PLC vehicles; and
- (j) all work on the Biffa contract was performed by PLC staff and vehicles, he never saw any invoices raised to the Partnership for this work.

For The Respondents

206. **Paul** has made two witness statements: (a) a witness statement dated 10 January 2020 in compliance with the order of 15 November 2019 of Insolvency and Companies Judge Jones directing Paul to file and serve a witness statement providing details of his account of credits and debits applied in relation to the matters set out in Schedule 1 to that order (sums credited or debited in relation to transactions between the Partnership and PLC/BIL/ABF); and a witness statement dated 9 September 2021.
207. In his witness statement of 10 January 2020 Paul says:
- (a) PLC initially paid the salaries of the Partnership employees, Messrs Tyson, Crosby and Harper, these payments were reimbursed initially by cheque and then offset against payments owed by PLC to the Partnership;
 - (b) Paul made the board of PLC aware of the opportunity for it to enter into the Cemex Contract, Andrew was also aware of the Cemex Contract. PLC did not have suitable tipper vehicles to transport the Cemex waste and entered into sub-contracts with Gilbert and the Partnership to transport the waste. Partnership tipper trucks as a matter of convenience, at no cost to PLC were put on PLC's Operator's Licence, Paul used Cemex weighbridge tickets to invoice Bi Product (and then 4R) and to raise Partnership invoices to PLC for the transport services it provided. Paul exhibits PLC invoices to Bi-Products and 4R and Partnership invoices to PLC;
 - (c) in November 2010 PLC paid the £10,300 deposit on a tipper truck acquired by the Partnership which was set off against sums owed by PLC to the Partnership;
 - (d) in January 2011 PLC paid agency labour charges for the Partnership which were invoiced by PLC to the Partnership;
 - (e) On 12 October 2011, PLC invoiced the Partnership for vehicle spares and tyres owned by PLC fitted to Partnership vehicles;
 - (f) Paul made the board of PLC aware of the opportunity for it to enter into the Biffa Contract. Work was sub-contracted to the Partnership and Prestons, Prestons and the Partnership spreading the waste. When the Partnership carried out the spreading, it did so by pulling a PLC tanker behind a Partnership tractor and the amount charged by the Partnership to PLC was discounted by £1 per tonne to take this into account. Paul exhibits PLC invoices to Biffa and Partnership invoices to PLC;
 - (g) in March 2012 the Partnership purchased the Volvo for £19,200 which sum was paid by PLC and set off in the PLC Purchase Ledger. The Volvo was later rented by

- the Partnership to PLC for £285 per week for use on the Cemex Contract, PLC met the running costs of the Volvo;
- (h) Home Farm was utilised by PLC at no cost for: (i) an operational base for non-food and waste activities; (ii) spreading waste from PLC; (iii) storing potatoes, equipment and machinery; and (iv) maintenance, repair and modification of PLC machinery and equipment;
 - (i) in September 2012 PLC recharged the Partnership £6,945.60 for gasoil and tyres;
 - (j) in January 2016 the board decided to start growing potatoes, it agreed that the Partnership would carry out the cultivation of the potatoes and charge standard NAAC rates for this work. Initially ABF could not afford to pay these costs so the Partnership invoiced PLC and PLC paid and re-charged these costs to ABF and set them off against the price paid by PLC to ABF for purchasing potatoes. Full NAAC rates were not in fact charged, because Mr Miller, William and Sam, employees of PLC were used to deliver part of the service. Discounts against full NAAC rates were given by: (i) not charging for all the operations carried out (eg there was no charge for irrigation); (ii) the Partnership did not charge NAAC rates for the entire rented field specified by the agronomist as it was entitled to, but only the planted area; and (c) the Partnership did not charge for all the equipment it used. In addition the Partnership initially purchased from Agrovista all the chemicals and sprays used on ABF's potatoes and recharged ABF for them, but it charged ABF £34,519 less than it had paid Agrovista;
 - (k) PLC invoiced the Partnership for haulage services it provided to the Partnership;
 - (l) when new accountancy software was introduced in September 2017, PLC stopped invoicing the Partnership and thereafter costs incurred by PLC for the Partnership were entered in a recharge account and charged to the Partnership in that way;
 - (m) Paul sets out his response to Andrew's allegation that PLC employees have been used to carry out work for the Partnership. He accepts that appropriate credits have not been given by the Partnership for work carried out by Messrs Elliott-Dickens, Ward and Miller and says that the appropriate credits are no more than: £1,600, £2,000 and £5,880 respectively. He also accepts that his sons, Sam and William were employed by PLC but did work for Partnership until 5 April 2019, when they became employees of the Partnership, but Paul says that a credit for their cost was given to PLC, by a reduction in the charges invoiced by the Partnership to PLC for cultivating potatoes;
 - (n) he agreed with Mr Bridges that Paul would supply topsoil free of charge for the Willows on the basis that Mr Bridges supplied the Telehandler to him free of charge so that he could load the top soil from Home Farm onto lorries to be transported to the Willows; and
 - (o) occasionally Partnership machinery and vehicles may have had minor repairs carried out to them at Enterprise House, if Partnership employees were unable to repair them, he was not aware of any credit that should be given that had not been given for this.

208. I will now set out in summary what Paul says in his witness statement of 9 September 2021 (save in so far as it merely repeats the content of his statement of 10 January 2020) Paul deals with:

- (a) the history of the business and the involvement of Andrew and Paul in it, the Investment Agreement and the incorporation of BIL and ABPT in and transfer of PLC's shares to ABPT, in December 2006;
- (b) the decision of Andrew to pursue his interest in politics in 2007 and the subsequent decision of Paul to pursue his interest in farming in 2008. Paul's acquisition of a lease upon Home Farm in December 2008 and Andrew's election as an MP in May 2010;
- (c) the purchase by BIL of the Willows from Andrew on 29 June 2009 and losses he says BIL has suffered as a result. That as part of the demolition of the Willows and construction of a new house there by Mr Bridges, Paul agreed to provide top soil free of charge from Home Farm, on the basis that Mr Bridges would provide him with a Telehandler at no cost to Paul to enable him to load the topsoil onto lorries;
- (d) the appointment of Mr Large as Managing Director in March 2010 to replace Andrew, losses incurred during Mr Large's tenure as Managing Director and Mr Large's subsequent dismissal;
- (e) for the Cemex contract: (i) PLC employees loaded lorries with waste overnight at Cemex; (ii) the Partnership used its own vehicles and drivers/sub-contractors to transport the waste from Cemex (save for Mr Elliott-Dickens and Mr Whetton, employees of PLC, who drove for short periods); (iii) he believes the Partnership invoiced PLC at a lower rate to take this into account in March and April 2013; and (iv) PLC made a profit on its Cemex contract including a margin on the sub-contract work carried out by Gilbert and the Partnership who both charged PLC the same price of £230 per load;
- (f) Andrew persuaded the board of BIL to agree that BIL would buy the Old Vicarage off him to "save his marriage" and enable him to complete the purchase of the Old Rectory. Andrew represented that the Old Vicarage was worth £1.5m but it was valued at less than that for mortgage purposes;
- (g) for the Biffa contract, Paul says: (i) he disagrees with Andrew's expert, Mr Bell's conclusion that PLC employees were used by the Partnership to drive on the Biffa sub-contract; (ii) he decided that the Partnership should not charge PLC some £23,000 which it was entitled to charge for the Biffa sub-contract because PLC was in financial difficulty at the time; (iii) from January 2013 to June 2017, the Partnership hired the Volvo to PLC for £285 per week, this compares favourably with the price of hiring similar vehicles at commercial rates of £380-£425 per week. As part of that arrangement PLC maintained, repaired, serviced, taxed and insured the Volvo. When the Volvo was sold in June 2017 the proceeds were paid to PLC; and (iv) the Partnership allowed PLC to use another of its vehicles, SF57 CWV for a number of weeks to move clay from Enterprise House to Home Farm and topsoil to Redfern's Farm for which it made no charge, PLC only paid the road tax on that vehicle;
- (h) the AD Plant was not installed to generate income, but to solve the severe odour problem, an additional 500 kWh CHP was added to consume the gas produced by the AD Plant because it was estimated to produce more methane than one CHP could consume;
- (i) Andrew Snipe ("Mr Snipe"), the expert PLC brought in to assist with the installation of the AD Plant advised that the Diesel Generator could not be connected to the

Grid and that it was pointless to do so anyway because there was a limit of 860 kWh on electricity that PLC could export to the Grid;

- (j) Andrew asked him to make a statement for the purposes of the financial relief hearing in Andrew's divorce, that PLC was going to make Andrew redundant, Paul refused, instead he made a witness statement confirming that Andrew may be made redundant. After the financial relief hearing Andrew wanted PLC to write a letter to him to say that he was dismissed, as employee and director of PLC, this was followed through between Mr Sharratt and Andrew;
- (k) late in 2013 he discussed with Andrew doing the AD Plant project through a separate company. Andrew agreed and did not want a lot of cash in PLC's bank as he knew he would need to disclose its bank statements to his wife in the divorce proceedings. Paul agreed with Andrew they would arrange to transfer £600,000 to WPS to reduce PLC's cash reserves. It was later decided to carry out the AD Plant project through BIL;
- (l) In August 2015 Paul became aware that Barn Farm was to be sold at auction, the PLC board agreed maximum bids on the basis that Barn Farm could be used to store potatoes in the refrigerated shed, there were good development prospects and there was the opportunity to spread waste on the land. The auction took place on a Saturday and the bid was successful. Andrew telephoned Paul on the Sunday and said he had heard that "we'd" bought a farm. Paul gave Andrew the details and Andrew was happy with the plan for Barn Farm, he believes he told Andrew that Barn Farm would be put in a new company. Andrew said he did not want shares in a new company, in his name as he would have to enter them in the parliamentary register and his then wife would get to know about them. The subscriber share in ABF was retained in Mr Tomkinson's name until Mr Sharratt said that KPMG were concerned about the share being in Mr Tomkinson's name if he died, so it was transferred to Paul. Shares were eventually allocated in January 2017 to Andrew, Paul, Mr Ellis and Mr Tomkinson;
- (m) action taken against PLC by local residents and the Council regarding the odour emanating from the waste in the lagoons at Enterprise House lead to the urgent emptying of the lagoons and spreading the waste on land, including Home Farm;
- (n) there is a continuing need to empty digestate from the AD Plant, once it was up and running. The Partnership has carried out the land spreading charging £40 per hour which is less than NAAC rates and is reasonable even if the Partnership vehicles use PLC fuel which they sometimes may have done. The Partnership does not charge for digestate taken to the Home Farm lagoon and later spread at Home Farm. The Partnership has only invoiced PLC for a small proportion of the spreading of liquid waste from Enterprise House, that it has done;
- (o) the discounts allowed by the Partnership against NAAC rates and items not charged for reflect the fact that the Partnership generally fills up with fuel at Enterprise House and some drivers doing that work are employees or contractors paid by PLC;
- (p) PLC's Transport Managers ordered gas oil for delivery to Home Farm which was paid for by PLC to be used in growing potatoes and for other work for PLC. When invoices arrived for this gas oil Paul signed them off recharging the cost to ABF or leaving the charge with PLC depending upon whether the gas oil supplied related

to the growing of potatoes (ABF) or spreading of digestate (PLC). The Partnership continued to buy fuel for its own needs.

- (q) an account was opened for ABF with Agrovista for chemicals ordered from Agrovista for the ABF potato crop. Home Farm was the delivery address for those chemicals because they were stored there. The Partnership has undercharged ABF for potato sprays bought by the Partnership for ABF's potato crop, before the ABF account with Agrovista was opened;
- (r) Home Farm has provided to PLC at no cost: (i) storage for potatoes in the refrigerated storage at Home Farm (700 tonnes in 2017 and 550 tonnes in 2018); (ii) a yard built by the Partnership at Home Farm using PLC's JCB to store PLC's empty potato boxes; (iii) disposal at Home Farm of soil and stones delivered with potatoes to Enterprise House; (iv) lagoons built at Home Farm between 2015 and 2018 to store liquid waste from Enterprise House; and (v) storage for redundant PLC machinery, spreading equipment and packaging;
- (s) Andrew has performed no real role for the Group since May 2010 other than fronting the dismissal of Mr Large in July 2012 and attending a few board meetings. The first Paul knew of Andrew wanting to come back was that Mr Sharratt told him, in early 2017, that Andrew had said he was coming back as chairman. In February 2017 Andrew emailed all the shareholders and asked to be made chairman. At the shareholders meeting, the shareholders did not vote in favour of this and the conversation then turned to Andrew selling his shares. Mr Sharratt suggested getting a valuation of Andrew's shares from KPMG which Andrew agreed to, but he then emailed Mr Sharratt to say he had had other ideas, Andrew then proposed to Paul that Andrew should have BIL and Paul should have the trading companies which Andrew said was fair. Paul said if that was fair, then would Andrew agree to the split the other way round but Andrew said Paul did not understand. There followed a series of shareholders' meetings at which Andrew was aggressive and insulting to the shareholders;
- (t) the Partnership has its own supply of fuel at Home Farm. Mr Bell has failed to identify, in his report, the Partnership fuel account with Total Fuels and take it into account in calculating what fuel the Partnership had purchased for its own use. Partnership vehicles fill up with PLC fuel when the Partnership is working for PLC, PLC is not charged for fuel or the fuel is accounted for in the price charged by the Partnership to PLC. The system for supplying fuel at Enterprise House does use a key fob for each vehicle in conjunction with a pin number allocated to each PLC driver, however these do not reliably identify the vehicle and driver filling up because: (i) any driver can pick up any fob; and (ii) pin numbers can be passed around between drivers or guessed;
- (u) Paul refers to invoices identified in Mr Bell's report for fuel and repairs addressed to PLC but for the benefit of the Partnership and explains either that they have been recharged to the Partnership, or why he says they are properly payable by PLC;
- (v) Paul explains why those assets which Mr Bell identifies in his report as purchased by PLC, for the benefit of the Partnership are assets used by or for the benefit of PLC;
- (w) Paul updates some of the information contained in his witness statement of 10 January 2020 about employees of PLC working for the benefit of the Partnership,

in order to answer points made in Mr Bell's report, but otherwise relies on the information contained in that witness statement: (i) Anthony spent his time on the Cemex contract loading lorries for PLC; (ii) Mr Whetton drove Partnership lorries for a few days in 2013; (iii) Mr Elliott-Dickens contrary to what Mr Bell says, did not work full time on the Cemex contract from the start of his employment, he started his employment in August 2007 before the Cemex contract started and did not start driving lorries until July 2012, he did some work for the Partnership for a few months at the end of the Cemex contract; (iii) Mr Baldwin only did driver planning for PLC's business, he drove on the Biffa Contract on Christmas day 2014 because he had failed to plan suitable cover; (iv) Ian Sturgess did not drive for the Partnership; (v) Sam worked solely for PLC from the start of his employment until April 2016. In April 2016 Sam started overseeing potato growing for ABF for 3-4 weeks at the start of each season and 3-4 weeks at the end of each season, with some organisational work in between; (vi) Wojciech Gajda only worked for PLC driving PLC lorries that pulled PLC road tankers for spreading, he drove on the Biffa contract for PLC; and (vii) PLC never provided administration support for the Partnership;

- (x) Paul says he does not recall Mr Woolrich making a presentation to him and Mr Sharratt about saving money on parts and that Mr Sharratt commissioned a report from ERA upon reducing costs and its recommendations were implemented; and
- (y) the finance team decided what should be recharged to BIL as management charges and what they proposed seemed fair to him.

209. **Mr Sharratt** says that:

- (a) he started as Financial Controller at PLC in 2005 and was appointed Finance Director in May 2006, he is also Finance Director of BIL/ABPT and ABF;
- (b) Andrew caused BIL to purchase the Willows from him for £630,000 with a plan to demolish the existing house and build a new state-of-the-art house. Andrew presented it as an opportunity for BIL to make a substantial profit but the project resulted in substantial losses for BIL;
- (c) Andrew appointed a head hunter to find a replacement for himself as Managing Director of PLC, in June 2009. Mr Large was appointed in March 2010 to replace Andrew regardless of the outcome of the upcoming election in May 2010;
- (d) immediately following Andrew's election as an MP in May 2010, Andrew stepped down from his executive role in PLC, becoming non-executive Chairman and he also resigned as a director of BIL and ABPT and Mr Sharratt was appointed director of both those companies, in his place;
- (e) Paul told Mr Sharratt about the opportunity for PLC to be involved in removing dust from the Cemex site and that the Partnership/Gilbert would supplement PLC's labour/vehicles to carry out the contract. He agreed because it involved little capital expenditure for PLC and some profit. He was aware of invoicing and recharging for the Cemex contract and the Cemex figures for PLC were included in the weekly statistics seen by the management. All paperwork for the Cemex contract was dealt with in accordance with PLC standard practice for invoicing and recharging;
- (f) in 2010/2011 Andrew was only present at one board meeting, in June 2011. From January 2012 Andrew attended Board meetings more frequently, because of concerns about Mr Large's performance;

- (g) Mr Sharratt did not want BIL to buy the Old Vicarage from Andrew, but Paul said it had to be done and it was purchased for £1.5 million by BIL;
- (h) Andrew fronted up the disciplinary proceedings taken against Mr Large and his dismissal on 31 July 2012. Initially the board were told that Andrew would take over responsibility for sales and Paul operations, but Andrew did very little and stopped attending board meetings from the start of 2013, Paul assumed the role of Managing Director;
- (i) Paul mentioned the Biffa opportunity at a board meeting, the contract was helpful for PLC to gain knowledge of AD plants and the disposal of liquid waste and it produced an income stream for PLC, the board were happy to proceed. Some sort of timesheet arrangement was used to keep track of PLC employees who spent time on the Biffa contract;
- (j) the substance of Mr Sharratt's evidence regarding matters leading up to the termination of Andrew's employment and his directorship of PLC is as follows: - (i) in May 2013 the Board instructed Baker Tilly to carry out a review of directors' pay, their report led to Mr Tomkinson recommending a reduction in Andrew's salary; (ii) Andrew was concerned that his continued employment and substantial salary would lead to him having to pay significant maintenance to his wife, Jackie in their divorce and Andrew suggested three options: - reduce his salary, but he remained concerned that the court may not accept that this was permanent unless he relinquished any control over PLC; - redundancy and termination of his directorship to show that he had relinquished control; or - terminate his employment and directorship, pay him a redundancy payment and then come back as a consultant; (iii) in late 2013/2014 Mr Sharratt believes he was told by Andrew that it had been concluded that his directorship and employment by PLC should be terminated. Mr Sharratt asked PLC's HR consultants to finalise the documents so that Andrew could say at the final financial remedy hearing that his employment would be terminated; and (iv) after the hearing, in July 2014, Andrew asked Mr Sharratt to write to him to terminate his employment and directorship (Andrew told him what to say in the letter in outline) Andrew would then respond in writing resisting termination of his employment and then Mr Sharratt should write to confirm the termination. Mr Sharratt prepared a termination letter which he believes he provided to Andrew in draft, this was sent to Andrew on 4 August 2014, Andrew responded to ask for his termination to be reconsidered, there was a meeting at which Andrew spoke to Mr Sharratt about the size of his tax-free termination package, but did not seek to argue that his employment should not be terminated and Mr Sharratt sent a draft of the letter to Andrew which confirmed his dismissal on 1 September 2014. Andrew approved the letter subject to a minor amendment and the letter with that amendment was sent to Andrew on 2 September 2014;
- (k) he spoke to Andrew about the proposal that a new company be set up to own and run the AD Plant. A new company was proposed, in order to avoid customers of PLC seeing an improvement in its profit margin, if the AD Plant were owned and operated by PLC. Andrew had no difficulty with there being a new company but did not want to appear as a shareholder of it until the financial settlement in his divorce had been concluded. He met Andrew in Paul's office when Andrew confirmed that he was pleased that £623,000 had been transferred by PLC to WPS

because it reduced PLC's liquidity. Mr Sharratt appeared as a witness at the financial relief hearing in Andrew's divorce, in July 2014 and answered questions about the transfer of £623,000 to WPS. It was later decided to progress the AD Plant through BIL rather than WPS;

- (l) the addition of a second CHP for the AD Plant raised the prospect of exporting electricity to the Grid. He brought in Mr Snipe to liaise with WPD who are responsible for the local grid and who needed to agree the basis upon which electricity could be exported to the Grid. It was not until November 2018 that all issues were resolved so that BIL could recover payment for exporting electricity to the Grid. No PPA was in place with E.on for the export of electricity to the Grid but BIL is entitled to recover an export FIT payment from Ofgem. He tried to pursue this but there were problems with meter readings, he employed New Stream Renewables ("New Stream") from March 2020 and then Mr Snipe to pursue recovery of the export FIT payments;
- (m) he was made aware of an opportunity to buy Barn Farm at an auction in August 2015, the main interest in Barn Farm was in its cold storage facility but it also had derelict barns that could be developed and there was land which could be used to grow crops and spread waste water from Enterprise House. A board meeting on 14 August 2015 gave authority to bid at the auction. KPMG advised that Barn Farm should be acquired in the name of a new company. Funding for the purchase was through a formal loan agreement between PLC and ABF. In September 2015 Andrew hosted him and Paul at the Houses of Parliament and he believes that Barn Farm will have come up during that meeting. The only reason why shares in ABF were not issued at the outset was that Andrew did not want shares in ABF in his name. All directors understood that the shareholding in ABF would reflect the shareholdings in ABPT/BIL. The nominee share held by Mr Tomkinson in ABF was transferred to Paul because KPMG expressed concern that there could be problems if Mr Tomkinson died holding the subscriber share. To the best of his recollection he was asked to issue the shares in ABF in late 2016 but he did not treat it as a priority. Andrew agreed that the shares in ABF should be issued in the same proportions as in ABPT save that no shares would be issued to the SASS (the shares that would have gone to the SASS were split equally between Paul and Andrew). The shares were issued in January 2017;
- (n) in late 2015/early 2016 Paul/Mr Ellis proposed to the board that the Group should grow potatoes, the board agreed. It was decided that ABF should grow the potatoes in order to isolate PLC from the volatility of the potato market. Paul offered to buy the equipment needed to grow the potatoes through personal borrowings for the first season, he left it to Paul/Mr Ellis to make it happen. ABF had no cash so PLC funded operations against the future supply of potatoes by ABF to PLC and Paul organised the labour. He understood the Partnership would charge standard rates for its work on the potato crop, he saw some invoices addressed to PLC, which Paul authorised the recharging of to either ABF or the Partnership;
- (o) the Partnership had an account with Agrovista. Initially chemicals for the potatoes were ordered by the Partnership from Agrovista and recharged to ABF, ABF then set up its own account with Agrovista. Potato chemicals were delivered to Home Farm for storage there and use on ABF's potato crops;

- (p) he was aware, anecdotally, that from time to time employees of PLC were involved in off-site activities. He only knew that Mr Miller was involved for sure in working for the Partnership because Mr Miller told him that he drove a potato harvester. He did not see this as a problem as it benefited the Group and he felt he could rely upon Paul to give appropriate credits, for Mr Miller's cost to PLC;
- (q) he sent invoices addressed to PLC for the delivery of gas oil to Home Farm, to Paul to confirm how they should be treated. At all times transactions with the Partnership were conducted in open and transparent manner;
- (r) he denies that he refused to countenance any change of part supplier in order to save costs. He wanted PLC's preferred supplier to be approached last for a quote for the supply of parts. Service levels, reliability and expertise were important as well as price;
- (s) management was spending an increasing amount of time on ABF/BIL so a scheme was devised to recharge management time (paid for by PLC) to ABF/BIL;
- (t) in late 2016 Andrew told Mr Sharratt that he would be coming back as chairman, Mr Sharratt told Paul. At a shareholders' meeting in January 2017 Andrew told the shareholders how destitute he was, something that he repeated at subsequent meetings, then he started pleading for money and then became increasingly aggressive and confrontational when it was clear that none was available. He received an email from Andrew proposing that Andrew return as chairman, it looked as if Andrew wanted to take control of and sell the business. He and Paul agreed that the proposal did not demonstrate that Andrew had anything meaningful to contribute. Given Andrew's contemptuous attitude and conduct towards the board, the consensus was that Andrew's return as a director would be destabilising and detrimental to the business and not in the best interests of PLC, the shareholders were concerned that Andrew just wanted to come back for his own personal benefit. Andrew said at one meeting that he wanted to get out and it was agreed that Mr Sharratt would arrange a valuation by KPMG, but before he had spoken to KPMG, Andrew told him not to bother because he had an alternative proposal to make, that proposal was that Andrew should have BIL and Paul should have PLC and ABF; and
- (u) Andrew made allegations of fraud against Mr Sharratt and Paul to the auditors, police and Lloyds Bank which has been highly damaging to the Group. A report by RSM, commissioned by the board into Andrew's allegations concluded that there was no evidence to support those allegations.

210. **Mr Ellis** says that:

- (a) he joined PLC in 1994 as potato buyer and 18 months later joined the board of PLC as purchasing director;
- (b) in 1998 he was invited, together with Mr Tomkinson and Alan Parker (then financial director of PLC) to invest in PLC. The Investment Agreement was entered into which include a commitment from both Paul and Andrew to devote all their time to PLC and the Investment Agreement included a valuation mechanism for Messrs Ellis/Tomkinson/Alan Parker to sell their shares;
- (c) Andrew proposed that there be a business reorganisation and in December 2006 ABPT was incorporated and PLC's shares transferred to it and BIL was incorporated and Enterprise House transferred to it. As a result of the reorganisation the

Investment Agreement effectively became redundant, although Mr Ellis did not realise this at the time;

- (d) potatoes grown at Home Farm were supplied to PLC from 2009 until 2011, he advised on husbandry and caused PLC to buy the potatoes from the Partnership, at prices commensurate with their quality. He was aware that drivers and others employed by PLC did work from time to time at Home Farm but what they were doing, who it was for and who was paying for it he did not know, he trusted Paul to ensure that all necessary credits were given;
- (e) Andrew made it clear that, win or lose at the 2010 election he would not be continuing as Managing Director of PLC. Mr Large took up the role of Managing Director before the election but then left in 2012 after a dreadful deterioration in the business. After Mr Large was appointed Andrew had nothing to do with decision-making and stopped coming to board meetings. When it was decided that Mr Large should go, Andrew started attending board meetings again in early 2012. Andrew fronted the disciplinary process that led to the dismissal of Mr Large;
- (f) he played virtually no role in the Cemex/Biffa contracts but he was aware through conversations with Paul that the Cemex and Biffa contracts had been acquired by PLC and that some work in transporting and land spreading the waste products was being done by the Partnership. He had full trust and confidence in Paul. He does not recall formally discussing the Cemex or Biffa contracts at board level or with Andrew. He is aware the Partnership did not charge PLC for some work it did on the Biffa contract, when PLC was loss making;
- (g) he has no knowledge of Andrew's claim that BIL paid for a telehandler used by Paul;
- (h) although the primary reason for introducing the AD Plant was to provide a solution to PLC's waste problem, it was apparent that there might be some income to be derived from the export of electricity from the AD Plant. "We" felt it would be best not to show any extra income in the accounts of PLC and there was benefit in putting the AD Plant into another company. It was decided to set up WPS and he was broadly aware that because of Andrew's position in his divorce he did not want to show a further shareholding in his name, this delayed the division of the shares between the existing shareholders of the other Group companies. He was aware that a sum of money was transferred to WPS by PLC, to provide start-up funding for the AD Plant. He assumed the eventual shareholdings in WPS would mirror those in other Group companies;
- (i) he received information about Andrew's divorce from Paul and Mr Sharratt from time to time. He was told that Andrew wanted to show that he had no great wealth or role in management of the Group, no guaranteed income and that he was going to give up his directorship and salary from PLC. He is not aware of Andrew having made any complaint about his dismissal;
- (j) a board meeting of PLC on 14 August 2015 approved the purchase of Barn Farm. It had a large refrigerated shed in which to store potatoes and cottages that could be redeveloped. It was not thought necessary to involve Andrew given his lack of engagement with the Group and the short notice. It was not decided in advance which Group company should be the owner of Barn Farm, in the end it was decided to set up ABF. The initial share in ABF was issued to Mr Tomkinson and soon after transferred to Paul but he and the other directors were in no doubt that

the shareholding would in the end mirror that of other Group companies. He understood from Paul/Mr Sharratt that Andrew had made it clear that he did not want to register any further shareholdings in the House of Commons register given his involvement in divorce proceedings. The split of shares was agreed late in 2016 after the divorce was complete and implemented in February 2017;

- (k) the prospect of growing potatoes was mooted when Barn Farm was purchased. The price of potatoes spiked in 2012 and remained high thereafter, most sizeable potato packaging companies grew some of their own potatoes and the decision was made in early 2016 to grow potatoes. He was instrumental in purchasing and checking the seed and monitoring the crops alongside Agrovista, Andrew was involved in purchasing some seed. PLC had no equipment and limited cash at that time, the Partnership had some equipment and acquired potato growing equipment so that it could carry out the husbandry. The Partnership charged no more than NAAC rates and generally less than that. He is aware that PLC lorries may have been used to cart seed, Mr Miller drove the harvester, but otherwise he was not clear as to who was driving what or who was paying for their time. He relied on Paul and the finance team to ensure that costs were properly allocated and he had complete trust that that would be done. He decided what prices were paid by PLC for ABF's potato crop which were normal market rates;
- (l) ABF does not have its own approved agrochemical store, so chemicals advised by Agrovista to be used on the potato crop are stored at Home Farm;
- (m) he is not aware that Andrew ever showed any intention to take up a management role in ABF. Even in early 2017 when Andrew said he wished to come back for a salaried position with the Group he did not suggest he would carry out any work for ABF, rather it would have been project work for PLC or BIL;
- (n) in January 2017 Paul showed him text messages he had received from Andrew and told him about conversations he had with Andrew which were aggressive and abusive and brought Paul to the brink of resignation/nervous breakdown. Andrew called a meeting of directors at which he extended the abuse to all the directors calling us a "team of wankers". Andrew said that he was effectively bankrupt and could not live on an MP's salary, he asked the board to reinstate him and pay him a salary of £50-£60,000 a year for half a day to one day's project work, not management. After weeks of abuse and suspecting Andrew did not have the best interests of the Group at heart his request was refused. There were several more meetings at which Andrew was aggressive and abusive, Paul left one, Andrew accused Mr Ellis of lying and Mr Ellis left another one. At one meeting it was decided to get the Group valued and Mr Sharratt was asked to contact KPMG to do this, Andrew then contacted Mr Sharratt to tell him not to proceed as he had another idea which turned out to be an offer by Andrew to Paul that Andrew should have BIL and Paul the trading businesses. If Andrew had not been aggressive and slanderous he believes the shareholders may have agreed to him coming back;
- (o) he was aware of a proposal to split management charges between the three Group companies which he thought was sensible and he has no doubt the charges were levied appropriately; and
- (p) he understood the AD Plant to be the answer to the waste problem, he was kept informed but was not part of the decision-making process. He was aware that

once it was decided to install a second CHP, electricity produced may be available for export to the Grid but he has no idea of the amount and he was not involved in any negotiations about the export of electricity to the Grid.

211. **Mr Tomkinson** says:

- (a) he is a Chartered Accountant and former partner in Tomkinson Teal, he was appointed a non-executive director of PLC in 1998, and invited to purchase shares in PLC and enter into the Investment Agreement with the other shareholders;
- (b) from the time he joined board meetings were run by Andrew, but Andrew's involvement reduced significantly from 2008;
- (c) the purchases of the Willows and subsequently the Old Vicarage from Andrew by BIL were not discussed with him before they happened, the purchases were agreed between Andrew, Paul and possibly Mr Sharratt;
- (d) he clearly understood that Andrew was relinquishing his role in the business in March 2010 when Mr Large was appointed Managing Director of PLC, irrespective of whether Andrew was elected an MP in May 2010. Andrew stopped attending board meetings following his election, but took charge of the disciplinary process which resulted in Mr Large's removal;
- (e) Paul told him that Andrew would not return to a management role following the dismissal of Mr Large and so Paul felt that he had no choice other than to take on the role of Managing Director. Paul put the Group companies ahead of the Partnership when he came back as Managing Director;
- (f) he has no recollection of either the Cemex or the Biffa contracts being discussed at board meetings, if however everything was undertaken with the full knowledge of the executive directors it was not necessary for it to be mentioned at board meetings. The contracts could possibly have involved a conflict of interest, but Paul had always operated on the basis that he made sure that he fully took the Group companies' interests into consideration. He was of the view that what the Partnership was doing was for the benefit of PLC;
- (g) there was no discussion about what fuel was taken by the Partnership. It sometimes cropped up when Tomkinson Teal were preparing the Partnership accounts that the Partnership had not charged for everything it should, but Paul said that it was not worth the paperwork. He had no reason to suspect any intention on Paul's part to improve the Partnership's position at the expense of the Group, the whole relationship was one of trust. If the Partnership benefitted at PLC's expense, he was confident that it would have provided some recompense to PLC for that benefit;
- (h) he did know that the Partnership was cultivating potatoes for ABF, but how the price for that work was established or what charges were levied he had no input into. He does not believe that Paul used his position to benefit the Partnership at the expense of PLC but he would not expect every transaction to be covered by paperwork;
- (i) he remembers Mr Sharratt telling him that Andrew had been advised to remove himself from all involvement with PLC, that he should resign and be seen to do so and be seen to have no influence over PLC. Unless that happened Andrew's wife's legal team would argue that he could procure changes such as increasing dividends or his own remuneration. This meant he could not be a director or employee of PLC. Mr Sharratt said it was Andrew's intention to terminate all his

involvement with the Group and reach a financial settlement in his divorce. Mr Tomkinson was informed at board meetings that agreement had been reached with Andrew about his severance package;

- (j) from recollection KPMG advised that a separate company should be set up to own and run the AD Plant. Mr Sharratt said he had discussed this with Andrew who did not want his name appearing anywhere in relation to the new company and that, from Andrew's perspective it was desirable that PLC should have less liquidity which was achieved by transferring money to the new company to fund subsequent capital expenditure on the AD Plant, that was the main reason for transferring the £623,000 to WPS. KPMG then retracted its advice and said that if capital expenditure resolved the waste problem for PLC, then the acquisition of the AD Plant could be made through PLC or BIL, the £623,000 was therefore repaid to PLC and the AD Plant acquired by BIL;
- (k) there was a board meeting 2 or 3 days before the auction for the sale of Barn Farm, Barn Farm was of interest because of its cold storage facilities and the land may be of use (not necessarily for growing potatoes) and it had development potential. He does not recall it being discussed at that board meeting that Barn Farm would be purchased by a separate company. Around a week later Mr Sharratt asked him to set up a new company, which he did. There is no doubt in his mind that the new company (ABF) was set up as part of the Group, the subscriber share was held in his name on trust for what he expected to be the subsequent allocation of shares in similar proportions to the existing shareholdings in other Group companies. In July 2016 Mr Sharratt contacted him and said KPMG were concerned that if something happened to Mr Tomkinson, whilst he was holding the share in ABF, there could be complications with his estate, the share was therefore transferred to Paul, he had no doubt that Paul held the share on trust for the other shareholders in Group companies, just as he had;
- (l) he was aware that PLC vehicles were going to Home Farm for legitimate purposes, he had no knowledge that PLC employees were working at Home Farm or elsewhere for the Partnership or that items were purchased by PLC for the Partnership's benefit;
- (m) intergroup management charges were discussed but there was no specific discussion as to how much they should be;
- (n) he does not recall any discussion of the Diesel Generator being used to export electricity to the Grid;
- (o) the AD Plant was acquired primarily to deal with the odour emanating from the lagoons at Enterprise House, he does not recall discussions of it generating income. It took longer than was anticipated to install the AD Plant, he was aware of problems in getting authorization for connecting the AD Plant to the Grid. He is not aware of electricity being exported to the Grid but not paid for; and
- (p) following Andrew's election as an MP in May 2010 Andrew's involvement with the Group was next to nothing, he did not come to board meetings other than for a brief period, when it became apparent that Mr Large would need to be removed as Managing Director and so far as Mr Tomkinson is concerned Andrew's contribution to decision making was non-existent at that point. He received an email from Andrew which was sent to all other shareholders in February 2017 asking for their support for Andrew to rejoin, as non-executive chairman. He had

considerable respect for Andrew and thought his attributes may benefit the business, however because of Andrew's unacceptable behaviour and attitude towards other directors it was apparent that Paul, Mr Sharratt and Mr Ellis would not be able to work with him. He decided that it would not be in the best interests of the Group to support Andrew's request. In subsequent meetings Andrew tried to press his demand but the way that he spoke to the shareholders/directors as if they were all a piece of dirt, left Mr Tomkinson in no doubt that Andrew had changed and it was clear that there could never be a meaningful working relationship, if Andrew came back as a director, given the contempt and downright rudeness with which Andrew expressed himself.

212. **Mr Whetton** says:

- (a) he is a HGV driver and he has been employed by PLC for at least 20 years;
- (b) his evidence on the Cemex contract is that: (i) he worked for a year or so sitting at night in the cab of a lorry whilst it was filled up with dust, parking it up and sheeting it; (ii) he occasionally drove a load to a farm or a quarry in Broughton; (iii) he used a fuel card which he believes belonged to Paul at a shell garage close to Cemex, he does not recall refuelling at Enterprise House when working on Cemex; (iv) if the lorries needed repairs he took them to TY Engineering or Volvo; and he sometimes brought a lorry back from Cemex to Enterprise House; and (v) Mr Elliott-Dickens and Mr Tyson also worked on Cemex;
- (c) he drove an articulated cab pulling a road tanker on the Biffa contract; and
- (d) he has worked for a couple of days at Home Farm, one a non-working day and he has been there on a weekend to weld a piece of machinery. He has not done any work on potatoes or cereals.

213. **Mr Emery** says:

- (a) he is a transport supervisor employed by PLC since 2000, except for one year when he left the business before returning. His role is to plan lorry movements, he is mostly office based but does some driving when they are short staffed;
- (b) he did not drive on either the Cemex or the Biffa contracts, but he organised PLC lorries/drivers for the Biffa contract;
- (c) he has never worked for the Partnership whilst being paid by PLC and has never worked at Home Farm or done any farm work; and
- (d) he has taken potato boxes, scrap wood and other items not wanted at Enterprise House to Home Farm for storage.

214. **Mr Elliott-Dickens** says:

- (a) he is now again employed by PLC as a lorry driver, having re-joined PLC as an employee on 21 June 2021;
- (b) he has not done much work at Home Farm, he did one day on the potato harvester with David Gilbert and a couple of days spreading the Enterprise House lagoon dredgings at Home Farm, using the Partnership's telehandler in 2014/2015;
- (c) his evidence on the Cemex contract is that: (i) he did some work driving Partnership lorries and when he did so he used the Partnership's fuel card to fill up at the Shell garage in Rugby; (b) when the lorries needed repair or maintenance he took them to the Tom Yates workshop on the A45, he does not recall anyone coming from PLC to repair or maintain the lorries; and (c) Mr Whetton and Mr Tyson also worked on the Cemex contract; and he did a couple of nights loading at Cemex when there were staff problems;

- (d) his evidence on the Biffa contract is that: (i) Mr Whetton also worked on the Biffa contract; (ii) on a handful of occasions Mr Elliott-Dickens drove Partnership tipper lorries carrying sludge to fields, Gilberts later took over this part of the contract using skips; (iii) he spent more time driving Volvo lorries pulling road tankers loaded with liquid digestate, mostly to lagoons, he never spread the digestate from the Biffa Site; (iv) trucks rarely returned to Enterprise House and aside from those occasions on which they did so, they were filled up using Partnership fuel cards at Shell garages;
- (e) he spent a lot of time spreading waste water and helping empty lagoons at Enterprise House of solid waste, he used a long reach excavator and a JCB 13 tonne excavator which were hired and Paul's tractors, trailers, telehandler and muck spreader. He also drove the Volvo and Paul's tipper trailer to collect compost to mix with the waste;
- (f) if he used the Volvo and Paul's 8 wheel tipper to empty the lagoons at Enterprise House, they had fobs and he would fill up at Enterprise House; and
- (g) he does not recall spending a couple of days welding at Home Farm.

215. **Mr Miller** says:

- (a) he is a lorry driver employed by PLC, but he does a lot of other things as well, including loading potatoes onto lorries and some maintenance and repair work;
- (b) he has driven a potato harvester for the Partnership for each potato harvest since 2016. The time he has spent doing this depends on how much potato crop was planted, in a low season it could be as little as 4 weeks and in a high season as much as 2 months, he would harvest 12 hours a day 7 days a week. When using the harvester he would fill up at PLC and if using a tractor at night he would also fill up at PLC. He would be paid his normal hourly rate for doing this work;
- (c) he has sometimes driven a tractor to bring potatoes back to PLC once they have been harvested; and
- (d) he helped plant potatoes in the second year, spending 3-4 weeks doing so.

216. **Mr Snipe** says:

- (a) he is a qualified mechanical power generation and production engineer;
- (b) on 4 November 2014 he was instructed to review WPD's responses to PLC's request to connect the CHPs to the grid;
- (c) WPD said initially that they would not enter into a connection agreement because other generators of renewable electricity were ahead of BIL in the queue, but they changed their mind and confirmed that they were willing to enter into a connection agreement for the solar panels and the one CHP, then planned, up to an export amount of 860 kWh. That remains the export limit even after a second CHP was added to the AD Plant;
- (d) in accordance with the agreement WPD have the power to throttle back or close down power exported to the Grid by the CHPs;
- (e) he was told that the purpose of the Diesel Generator was to provide power if the mains power to the site failed. The Diesel Generator operates in "island" mode so it cannot export electricity to the Grid and cannot operate at all while mains power is provided to the site and the AD Plant is operational. This means that the Diesel Generator only operates to provide power to Enterprise House and only if the mains supply fails;

- (f) to obtain FIT and RHI payments from Ofgem, BIL has to have a connection agreement in place and Ofgem wanted to ensure that the Diesel Generator would not run in parallel with the AD Plant (so that they are not paying FIT and RHI payments for generation/export of electricity to the Grid, for electricity generated by the Diesel Generator); and
- (g) he has been instructed by Mr Sharratt to progress BIL's claim against E.on for electricity exported to the Grid but not paid for. He is gathering information and expects to submit the claim in the next 2-3 weeks and he should have resolution within six months. He can't see why E.on would not make a reasonable payment for electricity exported, as evidenced by the export meters for the period since the MPAN for connection to the Grid has been in place (18 November 2018).

THE ISSUES

217. I have set out below the list of issues "agreed" between counsel. Whilst I say that the list is an agreed list of issues there are instances where one side or the other does not agree that the issue identified is one that I need to determine. Where it is not agreed that the issue is one that I need to determine I have indicated where either Andrew or the Respondents do not agree that the relevant issue is one that I need to determine.

Quasi-Partnership

1. Were each, or any, of the following companies Quasi-Partnerships:
 - (1) ABPT
 - (2) BIL
 - (3) ABF
2. Did Andrew have a legitimate expectation (or was he otherwise entitled) to participate in the management of each of the Group companies.
3. If the answer to (1) above is yes in respect of each or any of the Companies:
 - (1) Who were the parties to the Quasi-Partnership; and
 - (2) When (if at all) did they cease to be Quasi-Partnerships?

Termination of Andrew's employment and directorship / Exclusion

4. Was the termination of Andrew's employment and directorship in August 2014 with his consent?
5. Did Andrew have a legitimate expectation of being (or was he otherwise entitled to be) re-appointed to management (as a de jure director or otherwise) after August 2014?

6. Was Andrew wrongly or unfairly excluded from management (as a de jure director or otherwise) from August 2014?
7. Did Andrew continue to participate in the management of the Companies after August 2014?
8. Did Andrew request to be re-appointed to management (whether as a de jure director or otherwise) and if so when and on what basis? (Andrew says that this issue does not arise from the Statements of Case)
9. Was Andrew's request refused (and if so on what basis) and if it was, was this wrongful or unfair? (Andrew says that this issue does not arise from the Statements of Case)
10. Have the Respondents made an offer to acquire Andrew's shares at full independent value; and if not is his exclusion (arising out of any Quasi-Partnership and legitimate expectation) wrongful or unfair.

AB Farms Limited

11. What were the reasons for and the circumstances of the incorporation of ABF ?
12. In what circumstances and on what basis did ABF acquire Barn Farm?
13. What were the financing arrangements for the acquisition of Barn Farm by ABF and were they on commercial terms as between PLC and ABF?
14. Did any of the above matters involve any breach of fiduciary duty, or duty under the Companies Act 2006 by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

Cemex

15. Was the contract for removal of lime from the Cemex site between:
 - (1) PLC and 4R; or
 - (2) the Partnership and 4R
16. What were the terms of the Sub-Contract (or arrangement) between PLC and the Partnership in respect of removal of lime from Cemex?
17. Did the Sub-Contract (or arrangement) with the Partnership involve any conflict of interest on the part of Paul and if so what conflict?
18. Did Paul disclose the nature and extent of his interest in the Sub-Contract (or arrangement) to the directors of PLC?
19. Did the Sub-Contract (or arrangement) involve any breach of fiduciary duty, or duty under the Companies Act 2006 by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

Biffa

20. Was the contract for the removal of waste and spreading from Biffa, Rugby between:
 - (1) PLC and 4R; or
 - (2) the Partnership and 4R
21. What were the terms of the Sub-Contract (or arrangement) between PLC and the Partnership in respect of removal of waste and spreading from Biffa?
22. Did the Sub-Contract (or arrangement) with the Partnership involve any conflict of interest on the part of Paul and if so what conflict?
23. Did Paul disclose the nature and extent of his interest in the Sub-Contract (or arrangement) to the directors of PLC?
24. Did the Sub-Contract (or arrangement) involve any breach of fiduciary duty, or duty under the Companies Act 2006 by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

The Partnership's use of PLC's resources

25. Did employees of PLC work for the Partnership and if so, which employees, what work and over what period?
26. Did the Partnership use equipment from PLC and/or have maintenance or repair of its own equipment undertaken by, or at the cost of PLC and if so, over what period?
27. Did the Partnership use fuel from PLC and if so, over what period?
28. If the answer to any of the above is yes, was it recharged correctly as between PLC and the Partnership?
29. Did any of the matters referred to above involve any breach of fiduciary duty, or duty under the Companies Act 2006 by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

Potatoes

30. What were the arrangements for the supply or cultivation of potatoes between PLC, ABF and the Partnership?
31. Did the arrangement with the Partnership involve any conflict of interest on the part of Paul and if so what conflict?
32. Did Paul disclose the nature and extent of his interest in the arrangement to the directors of PLC and ABF?
33. Did the arrangement involve any breach of fiduciary duty, or duty under the Companies Act 2006 by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

Water Purification Solutions Limited

34. Was the incorporation of WPS and subsequent transfer of funds from PLC to WPS in breach of fiduciary duty, or duty under the Companies Act 2006?
35. Was there any conflict of interest on the part of Paul and if so, did Paul disclose the nature and extent of his interest in the arrangement to the directors?

Controlling Costs

36. Were costs savings on monthly expenditure for mechanical and electrical maintenance identified and drawn to the attention of Paul and Mr Sharratt and not acted on?
37. If yes, does this involve any breach of fiduciary duty, or duty under the Companies Act 2006, or amount to gross mismanagement by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?
38. Did PLC in June 2017 retain analysts to undertake a costs reduction analysis which was implemented in 2018? (Andrew says that this issue does not arise from the Statements of Case).

The Willows

39. Did Paul procure the hire of the Telehandler for the use of the Partnership and paid for by BIL?
40. Were charges in relation to the Telehandler appropriately accounted for?
41. Did this involve any breach of fiduciary duty, or duty under the Companies Act 2006 by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

Management charges

42. Have management charges been applied to BIL from 2017;
43. If so, did any of the matters above involve any breach of fiduciary duty, or statutory duty by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

Agrovista

44. Did ABF pay for goods/services provided by Agrovista to the Partnership at Home Farm?
45. Were any services provided by Agrovista correctly accounted for? (The Respondents say this issue does not arise for determination)
46. Did any of the matters above involve any breach of fiduciary duty, or duty under the Companies Act 2006 by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

Diesel Generator

47. Can electricity be exported from the Diesel Generator to the Grid?
48. Were there any steps which could have been taken to pursue revenue or have it accounted for in these circumstances and if so what steps?
49. Was there a failure to collect and pursue revenue from the provision of reserve electricity supply to the National Grid? (The Respondents say that this issue does not arise for determination)
50. Did any of the matters above involve any breach of fiduciary duty or gross mismanagement by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

Renewable energy

51. Was there a failure to collect and/or to maximise revenue from the renewable energy projects and if so a failure by whom?
52. Did any of the matters in (1) above involve any breach of fiduciary duty or gross mismanagement by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

Losses

53. In respect of such findings as the court makes in respect of each of the issues set out above:
 - (1) Have the companies suffered a loss (which can be quantified now or at a remedies hearing); or
 - (2) Do the companies have a right to an account of profits in respect the arrangements with Paul (which can be quantified now or at a remedies hearing).

Unfair prejudice

54. In relation to Section 994 of the Companies Act, on the basis of the findings of fact made by the Court at the trial of liability:
 - (1) Have the affairs of (a) ABPT and/or (b) BIL and/or (c) ABF been conducted in a manner which is unfairly prejudicial to the interests of members including Andrew?
 - (2) If so, what directions are required to be made for a remedies hearing?

Petitioner's Knowledge and Conduct

55. Was any knowledge or conduct of Andrew including in relation to the matters referred to in paragraphs 1 to 52 above relevant to the issues in paragraph 54 above. (Andrew says that this issue does not arise from the Statements of Case)

HONESTY/CREDIBILITY OF FACTUAL WITNESSES

218. Before turning to consider the credibility and honesty of the factual witnesses, I will refer to the comments of Mr Justice Leggatt (as he then was) in **Gestmin SGPS S.A, v Credit Suisse UK Limited and others [2013] EWHC 3560 (comm)**.
219. Mr Justice Leggatt's comments concern oral evidence and the fallibility of witnesses memories and how their recollection can be affected by their recalling past events as part of the litigation process, particularly if they have a vested interest in the result.
220. The comments are pertinent in this case where the relevant events happened up to 13 years ago and where the principal protagonists are brothers (Andrew and Paul) so that the family dimensions of the dispute add an extra element of emotional attachment to the subject matter of the proceedings, as do the fact that Andrew accuses his brother, Paul of acting fraudulently.
221. In paragraphs 15-21 of his judgment Leggatt J said as follows:
- " 15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.*
- 16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.*
- 17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).*
- 18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.*
- 19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences*

include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

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

222. In *Painter v Hutchinson* [2007] EWHC 758 (Ch) at paragraph 3, Lewison J (as he then was) identified a number of issues in that case which made the evidence of Mr Hutchinson unsatisfactory and evidence which he said (in paragraph 6) could not be relied upon unless it was corroborated by indisputable and contemporaneous documents. Where it conflicted with the evidence of Mr Painter, in spite of there being issues about Mr Painter acting dishonestly in the past, Lewison J said he had no hesitation in preferring Mr Painter's evidence. The matters that Lewison J said indicated that Mr Hutchinson had given unsatisfactory evidence justifying his approach to Mr Hutchinson's evidence, were:

- a. evasive and argumentative answers;
- b. tangential speeches avoiding the questions he was asked;
- c. placing strained meanings on his pleadings and witness statement;
- d. blaming legal advisers for the content of documentation (statements of case and witness statements);
- d. disclosure and evidence shortcomings;
- e. self-contradiction in cross examination;
- f. internal inconsistency;
- g. shifting case; and
- h. new evidence in cross examination not contained in his witness statement;

223. Witnesses can however lie for different reasons. Lies in themselves do not necessarily mean that the entirety of the evidence of a witness should be rejected. A witness may lie in an attempt to bolster a case, but the actual case nevertheless remains good irrespective of the lie.

ANDREW

224. Andrew started off his cross examination in a combative style and in a way that avoided answering the questions that he was asked and instead involved him making the points that he wanted to make. In particular, he asked questions of Mr Auld and made his own points, rather than answering the question that he was asked by Mr Auld. I told Andrew on a number of occasions that he must answer the question that was put to him rather than taking the opportunity to make the points that he wished to make. In spite of this, Andrew continued to deal with questions that were asked of him in the same way for more or less the whole of his cross examination which lasted for two and a half days. In my judgment Andrew thereby, gave evasive and argumentative answers and tangential speeches that avoided answering the questions, the first two indicators of unsatisfactory evidence identified by Lewison J in *Painter v Hutchinson*.

225. For reasons I will explain next I do not consider that the evidence Andrew gave on the following topics was evidence that represented his true recollection of events:

- (a) the termination of Andrew's position as non-executive director and Chairman of PLC and employee of PLC in August/September 2014. In particular, for reasons I will explain I find that Andrew lied in saying that he did not agree to those terminations;
- (b) I find that Andrew did make a report to Inspector Helena Bhakta ("Inspector Bhatka") of Leicestershire Police that Paul and the other directors of the Group had committed fraud which Andrew denied doing;
- (c) on 26 February 2018, Andrew sent an email to the Group's relationship Manager at Lloyds Bank PLC ("Lloyds") in which he said he had a management team ready to take over the Group companies, but I find that was not true; and
- (d) I find that Andrew's motive for reporting fraud to KPMG, the Police and Lloyds was not as he suggested, out of some sense of duty, but rather to bring pressure to bear on the other shareholders/the directors of the Group to give him what he wanted.

226. I also consider that: (a) Andrew was too willing to assert that Fraud had been committed or that people had acted dishonestly when there was no evidence to support either of those conclusions; and (b) there are inconsistencies between the evidence that Andrew gave in the financial remedy proceedings in his divorce and the evidence that he has given in these proceedings.

Termination of Andrew as Director/employee of PLC

227. Andrew suggested that two emails that were sent to his parents' email address were not sent for his attention, for him to see, but rather for his parents' attention, both emails concerned Andrew's divorce and were sent by Mr Sharratt. The first was an email dated 13 May 2013 sent by Mr Sharratt to Andrew's parents' email address and marked "FAO Andrew". By marking the email "FAO Andrew" it is clear to me that Mr Sharratt was expecting Andrew to receive the email at that email address, otherwise he would not have marked the email in that way. The second email is dated 21 June 2013, this time it was sent by Mr Sharratt to Kim Fellows ("Ms Fellows") the solicitor acting for Andrew in his divorce and was copied to Andrew at Andrew's parents email address.

228. The email of 21 June enclosed a copy of the Baker Tilly report on directors' remuneration. Andrew did not suggest a reason why Mr Sharratt would be sending an email to his divorce solicitor but copying it to his parents, rather than copying it to Andrew's parents email address for Andrew to see. Rather than explain that, Andrew said that he had had to throw his parents out of his house when they were staying there because they were terrorising his ex-wife. He appeared to suggest this as a reason why he would not have been using his parents' email address for communications with Mr Sharratt, but it still does not explain why Mr Sharratt would be sending those emails to Andrew's parents rather than Andrew and Andrew's complaint about his parents' behaviour seemed to me to be aimed at distracting attention from the obvious conclusion that Mr Sharratt was sending the emails to Andrew's parents' email address because Andrew had asked him to do so, in order to enable Andrew to receive the emails.

229. Earlier in his evidence Andrew had said that the two options which are set out in the Baker Tilly report for Andrew, namely: (a) for him to return full time as managing director; or (b) for Andrew to remain as non-executive chairman, but directors' remuneration to be reallocated away from Andrew, was not communicated to Andrew at the time that report was issued, but the emails of 13 May and 21 June 2013 contradict that evidence and in my judgment Andrew tried to avoid that contradiction by saying that he did not receive the emails of 13 May 2013 and 21 June 2013 when, in my judgment, it is quite clear that he did.

230. Andrew was taken to: (a) an email dated 3 October 2013 from Mr Sharratt to Ms Fellows which says that proposals for Andrew's continuing association as an officer of PLC were being drafted by PLC's advisors and would refer to two options: (i) that Andrew would remain as a non-executive director and be paid £15,000 per annum plus a car; or (ii) he would lose his office and receive a payment of £80,000 in compensation; and (b) an email of 16 November 2013 from Mr Sharratt to Ms Fellows copied to Andrew at two of Andrew's email addresses which says that PLC's advisers were finalising the paperwork for the two options. Andrew said that the two options set out in the email of 3 October were not communicated to him either. It is very unlikely that Andrew's solicitor, Ms Fellows would not have forwarded to him the email of 3 October 2013 or made him aware of its contents. It is even less likely that the email of 16 November 2013 which was sent to Ms Fellows and copied to Andrew at both his personal and parliamentary email address would not be seen by Andrew and I find that Andrew did see both of them.

231. Andrew agreed that he had asked Paul on 18 January 2014 to write him a letter for the purpose of his divorce proceedings setting out the position of the board of PLC in relation to Andrew's employment. Andrew agreed that the letter of 20 January 2014 written by Paul was the letter that he had asked for and Andrew said that he had thanked Paul for writing it. Andrew was then asked if the letter was true, to which he responded that it was a version of

the truth and then that it was true that Paul had written it. These answers were evasive. It is clear that Andrew presented Paul's letter in his divorce proceedings as a true representation of the position of the board of PLC in relation to his employment by PLC, so if, as he now says there was no expectation at all that PLC would actually make him redundant and nor did he want this to happen, then he misrepresented the position to the divorce court in that Paul's witness statement said that redundancy for Andrew was being considered and Andrew's counsel, at the divorce hearing said that Andrew being made redundant was a real possibility.

232. Andrew said that once Mr Large's employment as Managing Director of PLC was terminated, he recognised that, consistent with the Baker Tilly report (which he said that he had decided should be commissioned) that it was not "fair" that he should be the highest paid director in spite of only working part time as non-executive Chairman. I do not accept Andrew's evidence that he did not think it was fair for him to be paid more than any other director given that: (a) Andrew claims that he was solely or almost solely responsible for turning the business of PLC from a small scale marginally profitable business into a large scale highly profitable business; and (b) in the years running up to Andrew's divorce and thereafter Andrew has been keen to extract as much money out of the business for his personal use in dividends, loans, compensation for loss of employment, or otherwise as possible. For example, on 10 October 2014 Andrew texted Mr Sharratt to ask about available distributable profits in PLC and the possibility of a dividend being paid and what the maximum tax free sum he could receive as compensation for his redundancy was. Further, I accept the evidence of the other shareholders, that, in 2015, Andrew suggested that due to lack of available cash/distributable reserves and Andrew's need for cash, Andrew should receive a dividend from PLC but all the other shareholders should waive their entitlement to receive a dividend in order to ensure that he could receive the maximum amount. I find it highly unlikely, in those circumstances that Andrew would regard it as unfair that he should be paid more than any other director in spite of only working part time as a non-executive Chairman. Andrew's salary and benefits were, in my judgment, merely a means by which Andrew extracted money from the business which is something he was particularly keen to do during his divorce and after the financial relief hearing and in my judgment, having heard Andrew give evidence, I consider that he felt he was entitled to receive more money from PLC than anyone else, because of what he considered to be his role in making PLC a large and profitable company.

233. Importantly, Andrew was taken to an email dated 1 September 2014 sent by Mr Sharratt to Andrew at his parliamentary email address. This email says that it is enclosing a draft letter for Andrew's attention. It was suggested to Andrew, by Mr Auld that the draft letter sent to him on 1 September 2014 was a draft of the letter which was sent in final form to him by Mr Sharratt on 2 September 2014 confirming the board's decision to terminate Andrew's employment (following the receipt of Andrew's letter of 8 August 2014 in which he asked the board to reconsider its decision communicated to Andrew in Mr Sharratt's letter of August 2014, to terminate his employment). Andrew denied ever receiving a draft of the letter of 2 September 2014. The question of whether Andrew received a draft of the letter of 2 September 2014 is important, because the covering email asked Andrew to approve it and this would strongly suggest that the termination of Andrew's employment by PLC and his office as director of PLC confirmed in the letter of 2 September 2014 was consensual, which Andrew denies.

234. I am satisfied that the email of 1 September 2014 was sent by Mr Sharratt to Andrew's parliamentary email box and received in that email box at 20:28 September 2014. I am satisfied of that, because the email is shown as having been sent to and received at that email address at that date and time.

235. I am satisfied that what was enclosed with that email was a draft of the letter which was subsequently sent to Andrew on 2 September 2014, confirming Andrew's dismissal as an employee of PLC. I am also satisfied that Andrew read the draft letter and made a minor amendment to it and that his minor amendment was taken into account in the final signed version of the letter sent to him on 2 September 2014. I have come to those conclusions for the following reasons:

(a) Mr Sharratt sent an amended version of a draft letter to Qdos, PLC's HR consultants at 18:13 on 1 September 2014, which is in the trial bundle. Mr Sharratt says that this was a draft of the letter subsequently sent to Andrew on 2 September 2014 (subject to a slight amendment suggested by Andrew), he was not challenged on that assertion. I accept that evidence, it has never been suggested that any other letter was under discussion with Qdos at that point and the proximity of the sending of a draft letter to Qdos to the sending of the signed letter of 2 September 2014 to Andrew strongly supports that conclusion;

(b) having consulted with his junior, Mr Mantle, Mr Zaman conceded that the draft letter appearing in the trial bundle, dated 1 September 2014 immediately behind the email sent by Mr Sharratt to Andrew's parliamentary email address and received by that email address at 20:28 on 1 September 2014 was attached to that email. The draft letter is identical to one sent to Andrew on 2 September 2014, save for one minor amendment which I referred to in paragraph (c) below; and I Mr Zaman's concession left Andrew arguing that even if the email and draft letter were sent to his parliamentary email address he did not see it and he was not expecting it and he did not speak to Mr Sharratt about it. Andrew said that the email of 1 September 2014 sent to his parliamentary email address would be one of hundreds of emails received at that email address that day and he suggested that he would not in any event have been accessing his parliamentary email address at 20:28 at night. However I do not accept that Andrew did not read the email on the evening of 1 September because: (i) it is unlikely that Mr Sharratt would have sent an email at 20:28 to Andrew's parliamentary email address unless Andrew had led him to believe that he would see it, if he sent it there, at that time; (ii) there is a small difference between the draft letter of 1 September 2014 (now accepted to have been received at Andrew's parliamentary email address) and the final signed version of the letter dated 2 September 2014. The difference is that the draft letter says "there is no doubt that your drive and commitment..." and the 2 September 2014 letter says "there is no doubt that your personal drive and commitment...". The difference is small but it helps to support the conclusion that Andrew commented upon the draft letter; and (iii) Mr Sharratt says, in his witness statement that he did email a draft of the 2 September letter to Andrew on 1 September 2014, he spoke to Andrew about the draft letter and Andrew suggested a minor amendment, which he incorporated in the letter that he sent to Andrew the next day. I accept Mr Sharratt's evidence which is entirely consistent with the relevant documents, whereas Andrew's evidence is not.

236. Andrew says that he did not want to be made redundant in August/September 2014, but he accepts that he did not object when it happened. Andrew says that he did not object,

because his divorce had destroyed him, he had been stopped from seeing his children, he had no home or car and he had to pay his wife more in maintenance than he received in income, for those reasons he said he had no fight left in him and that was why he did not object. I do not accept that Andrew failed to object to being made redundant for those reasons, rather I find that he did not object to being made redundant because the termination of his employment was something that he asked Mr Sharratt to organise. I come to this conclusion for the following reasons:

(a) whilst I accept that the matters that Andrew refers to may well have been traumatic for him, he is a forceful character and I think it highly unlikely that, if he objected to his employment/directorship being terminated he would not at least make that clear;

(b) Andrew's letter of 8 August 2014 which asked the board to reconsider making him redundant in accordance with Mr Sharratt's letter of 4 August 2014 suggested that he met with Mr Sharratt to discuss the matter. Andrew said that the meeting had taken place but it was an emotional meeting and there was not much discussion, Mr Sharratt had made it clear that Paul was not going to change his mind and Andrew did not press for the threat of termination of his employment/directorship to be withdrawn. Again, Andrew is a forceful character, having requested a meeting in his letter of 8 August 2014 and requested in that letter that the board reconsidered its decision, if Andrew really wanted the board to reconsider its decision (as his letter of 8 August 2014 suggested) there would not have been "not much discussion of it" at the meeting;

(c) I have accepted, contrary to Andrew's evidence, that a draft of the letter of 2 September 2014 was sent to Andrew for his approval on 1 September 2014, that he read it, discussed it with Mr Sharratt and suggested a minor amendment to it (adding the word "personal") which was carried out to the letter before it was sent to him in signed form on 2nd September 2014. I do not consider that the letter would have been sent in draft form to Andrew or that he would have suggested an amendment to it, if Andrew did not want his employment to be terminated;

(d) whilst Andrew's employment could be terminated by PLC on the authority of a resolution of its board of directors, Andrew's position as director of PLC could only be terminated with his agreement by him resigning or by a resolution of the shareholders of PLC (ABPT). There is no resolution of the Board of Directors of PLC or of ABPT approving the termination of Andrew's employment or directorship and Andrew was never notified of any meeting to approve either. Mr Sharratt's letter of 4 August 2014 refers to the termination of Andrew's employment being in accordance with their agreement, something that Andrew did not dispute when he wrote back on 8 August asking the board to reconsider its decision, Andrew has never suggested that the termination of his employment or his directorship are invalid and the only way in which the termination of his position as director of PLC would be valid, is if Andrew agreed to the termination of his employment (and resigned as director). Whilst it is possible that Andrew did not know that he could argue that he had not been validly removed as director (and Andrew suggested in cross examination, that he did not know this) the total lack of any objection by Andrew to the termination of his employment and office as director, his failure (on his case) to seek any advice about their validity, in spite of having solicitors acting for him already, in connection with his divorce (and Andrew's status as employee and director being of significant importance

in the financial remedy proceedings) all strongly indicates that Andrew did agree to his removal both as employee and director;

(e) I was taken to an email from Andrew to the Parliamentary Registrar dated 28 August 2014 in which Andrew informed the Parliamentary Registrar that he would no longer be employed by PLC. The Registrar then amended the record to show that Andrew was not an employee or director of PLC. I was also taken to a Companies House form TM01 completed by Mr Sharratt on 29 August 2014 confirming that Andrew had ceased to be a director of PLC. Both Andrew and Mr Sharratt appear therefore to have taken steps to record the termination of Andrew's employment by PLC and of his office as director of PLC, before the letter of 2nd September 2014 was written. Whilst this is consistent with Mr Sharratt's evidence that the termination of Andrew's employment and office as director was consensual (and in particular that the correspondence passing between Mr Sharratt and Andrew concerning the termination of his employment was orchestrated and carried out in accordance with Andrew's wishes) it is not consistent with Andrew's evidence that the termination of his employment and his office as director of PLC were not consensual and that the three letters making up the correspondence dealing with the termination of his employment (an initial letter of 4 August notifying Andrew of the board's decision to terminate his employment, Andrew's response of 8 August asking the board to reconsider, the meeting between him and Mr Sharratt and the final confirmation of termination contained in the letter of 2 September) were not written at Andrew's instigation. It is not consistent with Andrew's case because, although he suggested that Mr Sharratt had, at their meeting made it clear that Paul would not change his mind about the termination of Andrew's employment, I would expect Andrew to wait for the letter of 2 September 2014 (which I have found was approved by Andrew subject to a minor alteration) before confirming to the Parliamentary Registrar that his employment had been terminated, but he did not; and

(f) finally there is a text from Andrew to Mr Sharratt of 10 October 2014 in which Andrew asked for details of retained profit, the prospects of a dividend and what the maximum tax free amount that he could receive for his redundancy payment could be. The contents of this text does not suggest that Andrew had objected to or did object to the termination of his employment/directorship, rather that he was pushing to understand how he could maximise what he would receive from PLC by way of redundancy payment in consequence of the termination of his employment and by way of dividend.

237. I conclude for all those reasons that Andrew did not object to the termination of his position as employee/director of PLC, but instead that he instigated and directed the process of his being made redundant and he resigned from his position as director of PLC. He tried to make it appear to be a step that the board was taking without his consent, in the hope that this may reduce the financial settlement that he had to pay to his wife in his divorce. I make this finding, notwithstanding that the financial relief hearing took place on 9 and 10 July 2014 before Andrew's employment/directorship was terminated (judgment being handed down on 22 September 2014 after Andrew's employment/directorship was terminated). I accept the evidence of Mr Sharratt that Andrew told him that he thought that the judge at the financial remedies hearing had not believed it, when it had been submitted on Andrew's behalf that there was a real danger that his employment would be terminated by PLC (when judgment was handed down on 22 September 2014 the judge made it clear

that he did not think that this was a realistic possibility). Andrew may have hoped that the actual termination of his employment and directorship may have influenced the judgment that had not yet been handed down or that he could apply to vary any financial order made, as a result of his employment/directorship being terminated.

Andrew's report of a fraud to Inspector Bhatka

238. The context in which Andrew reported a fraud to the police, KPMG and Lloyds was that Andrew had told the other shareholders that he wanted to return as non-executive Chairman, but the directors and other shareholders of ABPT (the shareholder of PLC) had not supported his reappointment. There followed a series of meetings at which Andrew pressed for his re-appointment without success and he then started to suggest that Paul had wrongly benefitted at the expense of PLC and the other directors/shareholders had colluded with Paul. Andrew sent the letter on 1 September 2017 to Paul to which I have already referred, threatening proceedings under Section 994 of CA 2006 unless Andrew was reappointed as a director, the Group was split (with Andrew taking BIL and Paul the remainder of the Group) or that an ADR process be entered into to try to resolve the dispute.

239. Andrew was taken to an email sent by Inspector Bhatka to her colleague, Anthony Fenwick dated 16 October 2017. The email says "As NPT commander I have regular contact with Andrew Bridgen over constituent matters. Today he asked that I call him. On doing so he informed me that he suspects his brother is committing fraud and is considering making a formal allegation. He asked whether the following is a civil or criminal matter. Frankly I don't know and require your expertise to advise him accordingly." The email then goes on to refer to Andrew saying that he had learnt that his brother, without consulting him bought a farm and was going to set up a separate company. He later learned his brother had set up a company called AB Farms in his own name 18 months ago using an overdraft facility of PLC's. His brother had now made Andrew 49% shareholder of the company but has not addressed his other issues. Inspector Bhatka asked that Mr Fenwick to contact Andrew to discuss the matter.

240. Andrew said that he had not made any report of fraud to Inspector Bhatka nor had he talked to her about any fraud. Andrew said that instead, he had made his report to Leicestershire Police fraud squad. Andrew said it would not have been proper for him to make a report of fraud, of which he was the victim, to Inspector Bhatka because she was the officer in charge of the area of North Leicestershire which included his constituency. The email however makes it clear on its face that Andrew had spoken to Inspector Butkha that day and had informed her at least about something that Andrew was describing as a fraud. The email is a contemporaneous document confirming the conversation to which Inspector Bhatka refers and I prefer that contemporaneous evidence over Andrew's denials that he spoke to Inspector Bhatka about a possible fraud. I do not consider it likely that Andrew forgot that he had had the conversation with Inspector Bhatka, to which the email refers, rather I consider that Andrew realised that it was inappropriate for him to have discussed an alleged fraud of which he was the victim with the police officer covering the area of his constituency and he therefore denied making such a report to her. The email, however, is clear evidence that he did.

Andrew's report of a fraud to Lloyds

241. On 26 February 2018 Andrew wrote to the Lloyds' relationship manager for the Group. In that email Andrew alleged that the Group had been subject to a £15-£20m fraud and he said that he had a small management team of himself and former directors, Martin McQuaide and Alan Parker ready to take over, he suggested that the auditors were supportive of him doing so and he asked whether Lloyds would support him taking over. Andrew's estimate of a fraud of £15m-£20m, even on his best case is, in my judgment a gross exaggeration aimed at impressing Lloyds. Alan Parker did not provide a witness statement for either party, but Mr McQuaide did give a witness statement to Andrew and attended trial for cross examination. Mr McQuaide was asked whether Andrew had approached him to see whether he would be prepared to take part in the management of PLC/the Group in 2018. Mr McQuaide was very clear that Andrew had never asked him and had he been asked he would have refused to do so. I am satisfied that Mr McQuaide was telling the truth and that therefore, Andrew misrepresented the position to Lloyds, when he said he had a management team ready to take over, including Mr McQuaide.

Andrew's motive for reporting a fraud

242. It was put to Andrew in cross examination that, having threatened legal proceedings on 1 September 2017 and not having got what he wanted, he made reports to the police/KPMG/Lloyds to maximise the pressure on the other shareholders to get what he wanted, rather than pursuing the legal proceedings threatened in his letter of 1 September 2017 and that he ruthlessly pursued his own interests regardless of the consequences that his reports of fraud had for the financial position of the Group. Andrew asserted that he made the reports for the right reasons and he talked about having a duty to report the fraud and to his reports being in the interests of the employees of PLC.

243. I am satisfied that Andrew's motive, in reporting a fraud to the police/KPMG/Lloyds was to bring the maximum pressure to bear upon the directors/shareholders of the Group, rather than out of any sense of duty to report a fraud. I am satisfied because:

- (a) Andrew said on many occasions to the other shareholders and directors of the Group, that he had been rendered destitute by his divorce. This was confirmed by Paul, Mr Sharratt, Mr Ellis and Mr Tomkinson and I accept their evidence, it is also part of Andrew's case that this was the effect of the financial settlement in his divorce;
- (b) Andrew caused BIL (when he was sole director of BIL) and persuaded Paul/Mr Sharratt (after Mr Sharratt replaced Andrew as sole director of BIL) to cause BIL to purchase the Willows and then the Old Vicarage from him, not in my judgment to promote the interests of BIL, but to get himself out of financial difficulty, and in the latter case supposedly to try to save his marriage; and
- (c) it is clear from the correspondence that I have that Andrew has been constantly pressing to receive a salary, dividends, loans and compensation for loss of office from PLC and he has also gone back into possession of the Old Vicarage, supposedly as a tenant, but has never paid any rent, all consistent with him seeking to obtain as much money and benefits as he could from the Group.

244. Andrew is entitled to pursue his own financial interests and if he believes that a fraud has been committed, to report it to the police/KPMG/Lloyds. I merely note that, in my judgment, in cross examination I do not consider that Andrew was honest when he gave evidence as to his motives for reporting a fraud.

Andrew too willing to allege fraud

245. In my judgment Andrew has been too willing to make accusations of fraud, where there is little or no evidence to support such allegations. Instances of this are:

- (a) Andrew was taken to correspondence with KPMG about the setting up of WPS in which tax advice is sought from KPMG. Andrew said it was a blatant fraud, he was asked whether he thought KPMG would be knowingly involved in a fraud. Rather than disavow such a suggestion he said that KPMG had resigned as auditors when he reported the position to them, seeming to suggest that KPMG were thereby acknowledging that they had done something wrong. He then said that they (KPMG) had allowed it to happen and would have to answer for it, as would Jon Jefferies, the Respondent's solicitor and that KPMG and Baker Tilly would also have to answer for failing to insist on related party transactions being entered in the accounts;
- (b) when it was put to Andrew, by Mr Auld, that two payments totalling £623,500, made by PLC to WPS on 29 May 2014 were not disguised in PLC's bank statements, because they both refer to the payee as WPS, Andrew did not agree that the payments were not disguised, he suggested that making two payments rather than one was itself an attempt to disguise the payments. However, making two payments on the same day could hardly help to disguise the recipient or what they were for, because that resulted in there being two entries on PLC's bank statement rather than one, each identifying WPS as the payee; and
- (c) when I asked Andrew how, if, as he said, Paul told him on the way back from the auction at which he had just purchased Barn Farm that: (i) we have bought a farm; (ii) the money is coming from PLC; and (iii) he was going to set up a new company, that could sensibly be the prelude to a fraud by which Paul acquired Barn Farm for himself, Andrew said that what Paul intended to do was to achieve a quick sale of part of Barn Farm, repay the debt owed to PLC and pocket the profit. That suggestion forms no part of Andrew's amended ABPT petition or his witness statement and was a totally new allegation made in response to my question for which there is no evidence.

246. There were a series of concessions that Andrew ought to have made in relation WPS and the transfer of £623,500 by PLC:

- (a) Andrew was taken to a text sent to him by Paul on 13 February 2014 in which Paul asked Andrew "are you happy to give Neil the same number of shares as Derek", to which Andrew replied "yes". When it was put to Andrew that he therefore must have known about WPS because he agreed that Mr Sharratt should have the same number of shares in it as Mr Tomkinson, Andrew said: (i) Paul was always talking about setting up new companies; (ii) the text does not mention WPS; (iii) he could not remember which company Paul was referring to in the text; (iv) he could not recall the text; and (v) whilst he texted back "yes" he does not know what level of knowledge he had when he texted "yes".
- (b) Andrew then appeared to concede that, given that the shares in WPS were issued on 18 February 2014 it was likely that the texts did refer to it. It is highly unlikely that Andrew would not know which company he was agreeing that Mr Sharratt should have shares in. He may not have known its name, but I am satisfied that he knew that it was the company which was, in February 2014 intended to be the company that would own and operate the AD Plant. Andrew should have conceded that he agreed, by his text of 13 February 2014 to Mr Sharratt having the same number of shares in WPS (or the company that was then intended to own and operate the AD Plant) as Mr Tomkinson; and

(c) Andrew accepted that his wife's solicitors requested copies of up to date PLC bank statements immediately before the financial remedy hearing in July 2014. He accepted that PLC's bank statements show that on 29 May 2014 £623,500 was transferred out of PLC's bank account in two payments, the payee of which in each case is identified as WPS. Andrew was referred to Mr Sharratt's evidence (in Mr Sharratt's witness statement) that Mr Sharratt was called back from a holiday in Scotland to attend the financial remedies hearing as a witness and answered questions about PLC and that he was specifically asked questions about the two payments totalling £623,500 paid out of PLC's bank account on 29 May 2014 and told the court that they were for the AD Plant project. Andrew said he had no recollection of seeing the bank accounts referring to those payments or of his ex-wife's counsel asking questions about them. I consider it is highly unlikely that such large and recent payments would not have been the subject matter of questions at the financial relief hearing and I accept Mr Sharratt's evidence that he was asked about the transfers and told the court that they related to the AD Plant project. In my judgment Andrew should have accepted that those payments were referred to at the financial relief hearing.

Inconsistencies between Andrew's evidence in the financial remedy proceedings and in these proceedings

247. There are inconsistencies between the evidence given by Andrew in the financial remedy proceedings in his divorce and the evidence that he has given in these proceedings. These include:

(a) in the divorce proceedings (paragraph 2 of his witness statement in those proceedings) Andrew refers to having a happy though poor childhood, however in these proceedings Andrew has presented his relationship in particular with his father as a bad one. In cross examination Andrew said that the position that he presented in the divorce proceedings was incorrect, that his father was a manipulative narcissist. He said he had now come to understand the situation for what it was. I do not accept that evidence and find this to be an example of Andrew tailoring his evidence to suit his purposes. In the financial relief proceedings, in my judgment, it would not have suited Andrew to be critical of his parents, particularly as Paul was helping him by providing a witness statement which suggested that PLC may terminate Andrew's employment. In these proceedings Andrew sees his father as very much supporting Paul and therefore someone to be attacked by him;

(b) in paragraph 19 of his statement in the divorce proceedings Andrew said that he had made it clear, in 2008, that he was going to leave PLC to pursue his political career, contrast that with the evidence given in these proceedings that he was only going to resign as Managing Director of PLC if and when he was elected as an MP. Andrew tried to explain the difference by saying that he was so certain that he would be elected as an MP that there was no real difference between the two versions of his intentions;

(c) in paragraph 24 of his witness statement in the divorce proceedings Andrew said that he had not attended a board meeting since March 2011, he had only dealt with the dismissal of Mr Large and attending the employment tribunal proceedings commenced by Mr Large since then. Andrew said, in cross examination, that the process of dismissing Mr Large took up a considerable period of time and he did not agree that he had effectively walked away from the management of PLC in March

2010 when Mr Large was appointed, however that was the substance of evidence given in the witness statement he made in the divorce proceedings; and (d) in his divorce witness statement Andrew said he had persuaded BIL to purchase the Willows for £630,000 and the Old Vicarage for £1.5 million and that he accepted that, as a result of those purchases BIL had lost £1.1 million. This suited Andrew's purpose in the financial remedy proceedings because he wanted to explain that the lack of funds available to the Group companies was associated with his attempts to satisfy his ex-wife's desire for more expensive properties and that he was to blame for substantial losses incurred by BIL, which made the termination of his employment by PLC more likely. In these proceedings Andrew has sought to suggest that the Willows and the Old Vicarage were good commercial purchases for BIL to make and that BIL has in reality lost very little if anything and that any failure to realise a profit (or avoid a loss) is not his fault, contrary to the position he presented in the divorce proceedings.

248. Given my findings as to the unsatisfactory nature of Andrew's evidence and in particular what I find to be the dishonest answers that he gave to questions about: (a) the termination of his employment by and office as director of PLC; (b) his report to Inspector Bhatka of what he presented as a fraud; (c) his report to Lloyds Bank that he had a small management team in place to take over the Group; (d) his motives for reporting fraud to the police/auditors/Lloyds Bank; and (e) the propensity for Andrew to allege that a fraud has occurred, where there is little or no evidence to support such an assertion, I approach Andrew's evidence with a degree of caution. Whilst I do not say that these issues are of the same scale as the issues identified by Lewison J in *Painter v Hutchinson* with Mr Hutchinson's evidence, I will also look for Andrew's evidence, where contested to be corroborated by documents (of which, in this case there are a great number) or by other witnesses before I will easily accept the evidence, where it is disputed, that he puts forward and in particular his allegations of fraud. Having said that, in some cases, acceptance or rejection of Andrew's allegations that there has been conduct which is unfairly prejudicial to him as a member of a Group company, depends, not on the evidence of Andrew, but on the evidence to be gleaned from the documents and the evidence of other witnesses.

Mr Woolrich

249. I consider that Mr Woolrich was an honest and reliable witness seeking to provide his evidence to the best of his recollection.

250 Mr Woolrich made appropriate concessions, for example:

(a) he accepted that his belief that the board should have supported his proposal that PLC should order all its parts from Eriks was really a disagreement between him and the board as to which supplier or suppliers PLC should order from and that, ultimately it was a decision for the board as to whether or not PLC ordered all its parts from Eriks; and

(b) he accepted that he had nothing to do with the process of recharging costs from PLC to the Partnership and therefore he did not know how the maintenance and repair work that he said he and his staff performed on Partnership vehicles was accounted for, as between PLC and the Partnership.

Mr Parker

251. I consider that Mr Parker was an honest and reliable witness seeking to provide his evidence to the best of his recollection.

252. Mr Parker answered questions directly and I detected no hint of him tailoring his answers in favour of Andrew's case. He made appropriate concessions, such as that Mr Snipe (the Respondent's witness) had more expertise in electrical installations and dealing with WPD than he did, which is why he brought in Mr Snipe to provide his support to persuade WPD to enter into an agreement for the AD Plant to supply electricity to the Grid.

Mr Bridges

253. I am not satisfied with Mr Bridges' evidence that BIL paid for the hire of a telehandler that was used by Paul at Home Farm was reliable or represented his true recollection of events and I reject it:

(a) in his witness statement, Mr Bridges said that his company sent an invoice to BIL for the hire charges which it had already paid to Anvil (the hirer of the Telehandler) and this invoice was paid by BIL as part of the final account;

(b) Mr Bridges was taken, by Mr Auld, to an email exchange passing between him and Mr Sharratt on 29 February 2011 and 1 March 2011 about payment of the last £12,000 Mr Bridges was claiming for the works done by his company at the Willows. The email from Mr Bridges to Mr Sharratt includes a breakdown of the £12,000 which breakdown does not include any item for the hire of a telehandler. Mr Auld asked Mr Bridges why the hire of the Telehandler was not mentioned in the email, Mr Bridges responded that he had been told, at that stage, that the hire charges for the Telehandler would be paid by Paul, which is why it was not mentioned in that email correspondence as being part of his company's final claim against BIL for works carried out at the Willows; and

(c) when Mr Auld pointed out that Mr Bridges said in his witness statement that the Telehandler was included in the final account, Mr Bridges said that the final account was not prepared until the end of March 2011. Why then, I asked was the cost of hire of the Telehandler included in the final account for BIL, if he had been told that Paul would pay it. Mr Bridges said that he was told at a meeting with Paul and Mr Sharratt, after the email exchange, to include it in the final account.

254. Mr Bridges evidence that BIL paid for the hire of the Telehandler was unreliable and in my judgment untruthful, because: (a) he has never produced an invoice addressed to BIL for the hire of a telehandler, nor has he been able to point to any item in the final account he sent to BIL, for the hire of the Telehandler, or any mention of it in any document; (b) he does not mention in his witness statement that he was initially told that Paul would pay for the hire of the Telehandler or any meeting with Mr Sharratt and Paul when he was then told to include the costs of hire of the Telehandler in the final account submitted to BIL. This evidence is critical to Mr Bridges' evidence that BIL paid for the hire of the Telehandler, because, on his evidence given at trial for the first time, it was only because, Mr Sharratt and Paul told him at a meeting taking place shortly before he submitted his final account, to include the hire of the Telehandler in the final account, that BIL paid for the hire of the Telehandler, of which payment there is no evidence; and (c) it seemed to me that Mr Bridges, during his cross examination, was making up evidence to deal with problems arising from previous answers he had given in cross examination (why the Telehandler was not included in the email correspondence giving a breakdown of the final sums outstanding, but was then, on his evidence, included in the final account).

Mr McQuaide

255. I am satisfied that Mr McQuaide was an honest witness, albeit that he seems to have been too willing to attribute impropriety to the actions of Paul from what he was told or witnessed happening.

256. He accepted that he may have been wrong about the turnover figures he quoted for PLC's business at the date when he joined and left PLC's employment (not of any material relevance to the issues that I have to decide, but evidence of his willingness to make appropriate concessions).

257. Mr McQuaide gives evidence in his witness statement of what he presents as wrongdoing on the part of Paul, by which, he believes, Paul obtained personal financial benefit at the expense of PLC, however this comes down to what Mr McQuaide was told by others and what he could see of what was happening. Mr McQuaide accepted that if, what he considered to be benefits obtained by Paul and the Partnership at the expense of PLC, had been properly accounted for, as between PLC and Paul/the Partnership, of which he accepted he had no personal knowledge, then there was no impropriety.

Anthony

258. My impression of Anthony as a witness was that, whilst he was not deliberately dishonest in giving his evidence, his evidence was heavily tainted by his belief that he has been badly treated both by his father, Alan and by Paul and he now finds himself on the same side as Andrew in a family dispute between Andrew on the one hand and Paul, Alan and Ann on the other.

259. As to his treatment by his father, Anthony in his witness statement says:

- (a) he thought from a young age that his father was closest to Paul;
- (b) he thought his father was hard on him, getting him to do labouring jobs, while Paul sat on the tractor;
- (c) in late 2008 or 2009 his father came to see him and told him that if he would work for Paul on his farm his father would give him the BMW 330 car which he had turned up in. Anthony did go to work for Paul, but he never got the car; and
- (d) in 2007 his father promised to pay his mortgage off and when, in 2008 Anthony asked him about this, after Anthony had got divorced, his father said that he could not afford it. In 2019 his father did give him £20,000 to help reduce his mortgage but then asked Anthony for proof that he had paid the £20,000 to the mortgage company.

260. Anthony says that he was never offered a shareholding in the family business or an opportunity to earn a lot of money, but he was happy with what he earned himself, he was the only son who worked away from the family business. I do not accept that evidence, rather, for reasons I will describe shortly I consider that Anthony is resentful, understandably of the substantial sums that Alan/Ann/Paul/Andrew have earned from the family business, which financial benefits he has been excluded from.

261. As to his treatment by Paul, Anthony says:

- (a) whilst working for Paul "he made me" work for farmers who grew potatoes and he "made me" work for Prestons;
- (b) "Claire (Paul's wife) is not a nice person, she is rude to people and looks down on people..."
- (c) after around 16 weeks of working on the Cemex contract he decided he could not continue and he told Paul that the lime was burning him and he could not carry on, his

face was covered with sores and boils. Paul told him “Ant stop moaning and get on with it”;

(d) I grew tired of working for Paul and told him I was going back to PLC. Paul did not like this;

(e) Paul gave his job at PLC to an agency worker without telling him; and

(f) “he'd always go to my dad and say I was no good, my dad hasn't got a good word to say for me”

262. Whilst Anthony says in his witness statement that he is not resentful of Paul and Andrew being directors and shareholders of the family business and receiving substantial money from it, in paragraph 47 of his witness statement, he relates an incident when the then Transport Manager, James Finley said “why are your parents rich, your brothers rich and you are poor”. Anthony said that he shouted at him and thereafter Mr Finley made him drive lorries down to the London area, which Mr Finley knew Anthony would not like doing. If Anthony was as comfortable as he suggests with not receiving the financial rewards from the family business that his parents and brothers have received, then I think it unlikely that he would have shouted at Mr Finley, in a way that he says caused Mr Finley to retaliate by sending him on driving jobs in the London area.

263. That Anthony's evidence is tainted by his feelings of ill will towards his father and Paul and is more sympathetic to Andrew's position is illustrated, in my judgment by the following:

(a) in paragraph 16 of his witness statement he says that Paul would occasionally ask him to work on vehicles at the weekend “I got paid for this work but not through the books that I can recall”. I asked Anthony when this happened and he said in 1989/90. I asked him what books he was referring to and Anthony said that Paul paid him cash and it was too long ago now to remember. As Anthony's witness statement was signed only just over 2 months before he gave evidence at trial it is difficult to see how his recollection then of what happened in 1989/90 could be good enough to support his assertion that Paul had not paid him through the books so far as he could recall, but he does not know now why he said that, because it was all so long ago. In my judgment, Anthony was too willing to assert that Paul was doing something wrong in paying him in cash for working on lorries in 1989/90;

(b) on 3 July 2017 Anthony sent a text to Andrew saying that he hoped that Paul would spend the rest of his working life driving lorries (not getting rich). When the text was put to him, Anthony said that that is what he had been doing for the last 20 years, the text and Anthony's answer in cross examination revealed, in my judgment, Anthony's resentment at what he has been doing and receiving by way of recompense in the last 20 years and that he would take pleasure from seeing Paul having to do and receive the same;

(c) in cross examination Anthony said that Andrew had not “robbed off me” (in contrast presumably to Paul) although it was unclear why Anthony may consider that Paul had “robbed off” him; and

(d) Anthony says that he told Andrew about Partnership vehicles filling up with fuel at PLC and he then goes on to say that Andrew must have confronted Paul about this, because he was not paid on time at Christmas. Linking these two things seems to have been pure speculation on Anthony's part, he did not suggest that he was told there was any link to him being paid late at Christmas.

264. Anthony accepted in cross examination that he had a poor memory of a number of matters including:

(a) The payment of cash by Paul to him in 1989/90 to which I refer above, which he described as all too long ago for him to remember now; and

(b) in paragraph 41 of his witness statement, Anthony refers to Paul's tractors being fuelled and maintained at Enterprise House. Anthony was asked when this was he said he could not recall again because it was too long ago, he described it as "an age thing" he then suggested that it was probably in 2010.

265. In light of what I find to be: (a) Anthony's resentment of Paul and aligning himself with Andrew in the family dispute and the way in which I find this has tainted his evidence in favour of Andrew and against Paul; and (b) Anthony's own acceptance that he has a poor recollection of events, I approach Anthony's evidence with a degree of caution because, whilst I do not say that his evidence was deliberately dishonest his poor recollection of events is apt to have been "overwritten" (as Leggatt J put it, in *Gestmin*) by his antipathy towards Paul and his father and his resentment at the way in which he clearly considers that he has been treated by them.

Mr Baldwin

266. I accept that Mr Baldwin was an honest witness doing his best to assist the court, who made appropriate concessions.

267. Mr Baldwin accepted that he had put the tipper lorries (which turned out to be owned by the Partnership) on PLC's Operator's Licence, and had maintained and repaired them, not because he could recall specifically having been told by Paul that they were PLC's vehicles, but because, Paul not having told him otherwise, he assumed that they were PLC's vehicles.

268. Mr Baldwin, in his witness statement refers to each PLC vehicle having a fob allocated to it so that it could fill up on fuel and each PLC driver having a pin number allocated to them which they had to input with the fob for their vehicle in order to draw fuel at Enterprise House, fobs could be swapped from one vehicle to another and pin numbers might be disclosed by drivers or guessed, he conceded.

269. The main problem with Mr Baldwin's evidence as to use of PLC assets by the Partnership was that he had no idea how that use was accounted for, as between PLC and the Partnership.

Mr Brain

270. A witness summary was produced for Mr Brain because he did not sign a witness statement that had been prepared for him by Andrew's solicitor. In the event he confirmed the truth of the witness summary, which it appears was based on a draft witness statement which was prepared for him, but which he did not sign.

271. Mr Brain's evidence, in the main, concerns the Partnership using fuel from Enterprise House, but it also refers to Mr Miller working for the Partnership and the use of PLC's vehicles for the benefit of the Partnership.

272. Mr Auld challenged Mr Brain about information which he had sent from PLC's fuel management system to his home email address before he left PLC, providing information as to fuel usage by fob and pin number:

(a) Mr Brain denied giving any information to Mr Bell about the fuel management system in spite of Mr Bell saying, in his report, that he received information from Mr Brain about the fuel management system;

(b) Mr Brain tried to explain why he would have a legitimate purpose, associated with his job as PLC's Transport Manager, to send fuel records to his home email address, but in my judgment he was not able to offer such a plausible explanation; and (c) initially Mr Brain said that the only fuel records which he had sent to his home email address were those relating to Sam's pin number which he accepted he forwarded to Andrew. When copies of three further emails sent by Mr Brain to his home email address were put to him, Mr Brian was forced to accept that he had sent three additional fuel records to his home email address, he said he was unsure whether he had forwarded these Andrew.

273. It appears that Mr Sharratt contacted Mr Brain by telephone, around two weeks prior to the start of the trial and made him aware that Mr Sharratt knew that he had possession of PLC's fuel records. I will deal with this in further detail when dealing with Mr Sharratt's evidence, however for present purposes I accept, as Mr Brain said, that he felt intimidated by Mr Sharratt's reference to his having possession of PLC's fuel records. It is not surprising, in those circumstances, that Mr Brain was sensitive about questions he was asked concerning the sending of PLC's fuel records to his home email address and wanted to try to minimise the extent to which he had done this and try to suggest it was done for some legitimate purpose connected with PLC's business. In my judgment, he sent the fuel records to his home email address, because he considered that he may be able to make some use of that information following his resignation which took place shortly after he sent this information to his home email address.

274. I also consider that Mr Brain did know, before he was shown further emails sent to his home email address, with fuel records attached, that he had sent more fuel records than just those relating to Sam's pin number to his home email address and that, when he said that the fuel records relating to Sam's fuel number were the only fuel records which he sent to his home email address, he knew this to be untrue and he said it hoping that Mr Auld would not be able to show otherwise.

275. I treat Mr Brain's evidence with some caution, in light of my finding that he was not honest about the PLC fuel records that he sent to his home email address, but in general, notwithstanding that point, I consider that he gave honest evidence.

Paul

276. My overall impression of Paul, as a witness was that, at least in so far as he gave evidence at trial he generally gave honest evidence, to the best of his recollection. I say this, notwithstanding the substantial number of criticisms that I will now make regarding the credibility and reliability of his evidence in these proceedings and, in certain respects, his lack of business probity and honesty.

277. The difficulties with Paul's evidence, in summary were:

- (a) his evidence at trial was on occasions inconsistent with what is contained in the Respondents' defences to the Petitions, their further particulars of those defences, or Paul's own witness statements;
- (b) Paul has caused a substantial amount of PLC's resources of one sort or another, to be used for the benefit of the Partnership without: (i) informing his fellow directors, other than in very general terms about what was being done and what PLC/the Partnership would stand to gain out of the arrangements; and (ii) keeping any records at all of what resources of PLC were being utilised by the Partnership. Paul could not, due to the lack of records, sensibly, in my view, decide (although he purports to have

done so) what should fairly be recharged by PLC to the Partnership or what credit should otherwise be given to PLC, for the use of PLC's resources by the Partnership; (c) Paul has decided himself what the Partnership should charge PLC/ABF for various services it carried out for PLC/ABF with little or no input from the other directors of PLC/ABF;

(d) Paul refers in his first witness statement to putting two bulk tippers on PLC's Operator's Licence "for convenience" at no cost to PLC. For reasons I will explain, I am satisfied of the following: (i) that Paul did not cause the Partnership bulk tippers to be placed on PLC's Operator's Licence, "as a matter of convenience", but because the Partnership's operator's licence would not allow vehicles to be used to carry loads for third parties, whereas PLC's Operator's Licence did allow this. Vehicles operating under the Partnership's Operator's Licence could not therefore have lawfully carried waste on the Cemex contract; and (ii) Paul knew that only vehicles operated by PLC should have been placed on PLC's Operator's Licence and therefore, in causing (as I find Paul did) Partnership vehicles to be put on a PLC's Operator's Licence, Paul acted dishonestly; and

(e) Paul suggested that he offered PLC the opportunity to enter into the Cemex contract, rather than carrying it out solely through the Partnership because he thought it was fair to share the benefit and profit from that contract with PLC, but I am satisfied that Paul involved PLC in the Cemex contract, at least primarily, because he wanted to put the Partnership vehicles, which would participate in the Cemex contract on the PLC Operator's Licence and involving PLC in the Cemex contract enabled this to happen.

278. Paul accepted that the Partnership had a restricted operator's licence in 2010 but PLC had a standard operator's licence. The difference is that the holder of a standard operator's licence can transport goods for others for reward whereas the holder of a restricted Licence can only carry their own goods. In order to legally transport the Cemex waste the lorries which would carry the waste needed to be registered on a standard operator's licence. Paul accepts that vehicles owned by the Partnership and to be used by it to carry Cemex waste (which Paul says was the role of the Partnership under its sub-contract with PLC under the Cemex contract) were registered at that time on PLC's Operator's Licence. I gave Paul a warning that he was not obliged to answer question if his answer may tend to incriminate him. Paul declined to answer questions about: (a) whether he knew that only vehicles operated by the holder of a standard operator's licence could be included on that operator's licence; and (b) what he told Mr Baldwin about the ownership of the Partnership vehicles which were placed on PLC's Operator's Licence.

279. I cannot say that Paul answered any question in relation to Partnership vehicles being registered under PLC's Operator's Licence untruthfully, because he declined to answer the questions, but I am satisfied that Paul did know that only vehicles operated by PLC could lawfully be included on PLC's Operator's Licence and as the terms of the sub-contract, between PLC and the Partnership were that the Partnership would transport the Cemex waste in Partnership vehicles, I find that Paul caused Partnership vehicles to be included on PLC's Operator's Licence and that he knew that they should not have been, which was dishonest.

280. I am satisfied that Paul caused Mr Baldwin, PLC's then transport manager to include Partnership vehicles on PLC's Operator's Licence because: (a) in Paul's first witness statement he confirmed that Partnership vehicles were put on PLC's Operator's Licence "as

a matter of convenience at no cost to PLC” he did not suggest this may have happened inadvertently; (b) whilst Mr Baldwin could not specifically recall Paul having told him that the Partnership vehicles that he put on PLC's Operator's Licence were owned by PLC, or being operated by it, Mr Baldwin was clear that he does understand that only vehicles operated by PLC should have been included on PLC's Operator's Licence and therefore I am satisfied that Paul either told Mr Baldwin to put the Partnership vehicles on PLC's Operator's Licence without telling him that the vehicles were not to be operated by PLC, or told Mr Baldwin or led him to believe that the Partnership lorries were to be operated by PLC; (c) Paul did not put the Partnership vehicles involved in the Cemex contract on the Partnership's Operator's Licence and therefore he must have known, at or around the time that the Cemex contract started, that they had been placed on PLC's Operator's Licence; and (d) Paul was asked questions about whether he caused the Partnership vehicles to be added to PLC's Operator's Licence but declined to answer those questions on the grounds he may incriminate himself, only if he caused the Partnership vehicles to be added to PLC's Operator's Licence could his answers tend to incriminate him.

281. I am satisfied that Paul knew, when he caused the Partnership vehicles to be added to PLC's Operator's Licence that they should not have been added to that Licence because they were not to be operated by PLC: (a) in paragraph 17 of his first witness statement, Paul says that, in 2009 the Partnership held a restricted operator's licence allowing it to transport its own goods only, but he passed his CPC exams in 2011 which enabled the Partnership to get a standard Operator's Licence. So I am satisfied that Paul knew the difference, in 2010 between the two types of Licences and I am satisfied that he would have known that only vehicles operated by PLC should have been included on PLC's Operator's Licence; (b) I find it inconceivable that Paul could really believe that it was lawful for him to cause Partnership owned and operating vehicles to be added to PLC's Operator's Licence as a way of circumventing the restrictions contained in the restricted operator's licence that the Partnership held, at the time (namely that the Partnership could only transport the Partnership's own goods); and (c) Paul was asked questions about whether he knew that adding Partnership vehicles to the PLC Operator's Licence was unlawful and he refused to answer those questions on the grounds that he may incriminate himself. Only if Paul did understand, or at least suspected that Partnership owned and operated vehicles should not be added to PLC's Operator's Licence, would his answers tend to incriminate him.

282. Paul presented his offer to the board of PLC of the opportunity for PLC to enter into the Cemex contract, rather than carrying out the Cemex contract, through the Partnership alone, as an attempt by him to act fairly in relation to PLC by allowing it to enter into the contract with Cemex and share part of the profit from the Cemex contract with the Partnership. I am satisfied, however, that Paul caused PLC to enter into the Cemex contract, principally because he was searching for ways to move the Partnership from making substantial losses to profit and the Partnership could not have undertaken any of the work under the Cemex contract without involving PLC because:

(a) in the first 17 months of trading to May 2010, the Partnership incurred losses of £187,942, in cross examination Paul accepted that he “obviously” needed to do something about those losses; and

(b) as I have already said, the Partnership only had a restricted operator's licence. The Partnership could not transport Cemex waste on its own operator's licence and I have found that, in order to give the appearance of Partnership vehicles carrying Cemex waste lawfully, Paul caused Partnership vehicles to be registered on PLC's Operator's

Licence which on the face of it allowed those vehicles to transport Cemex waste. I have also found that Mr Baldwin thought that the Partnership vehicles were PLC owned or operated vehicles and that is why he registered them on PLC's Operator's Licence, I do not believe he would have done so otherwise. If PLC had not entered into the Cemex contract and sub-contracted transport work to the Partnership, then I do not consider that Paul could have maintained the pretence that the Partnership vehicles were PLC owned or operated vehicles, necessary to induce Mr Baldwin to put the Partnership vehicles on PLC's Operator's Licence and keep them there.

283. I find that there were the following inconsistencies between: the Defences to the Petitions and/or the Further Particulars of those Defences and/or Paul's witness statements and/or the evidence given by Paul at trial:

(a) the defence to the BIL petition, at paragraph 16 says that Mr Bridges delivered the Telehandler, to Home Farm, in cross examination Paul accepted that it was the hirer of the Telehandler, Anvil Plant that delivered the Telehandler to Home Farm;

(b) a common inconsistency was that a Defence or Further Particulars of Defence asserted that something was disclosed by Paul to, discussed by Paul with, or approved by the directors of the relevant Group company, but Paul conceded in cross examination that it was not disclosed to, discussed with or approved by all the directors of the relevant company, or the details pleaded of such matters was otherwise wrong:

(i) in paragraph 45.4 of the PLC Defence it is stated that Paul informed the board of PLC of an opportunity for PLC to tender for the Cemex contract in early 2010. Paul was taken to the Further Particulars of that pleading, which say that Paul agreed to supply a bulk tipper for the Cemex contract in July 2010, Paul agreed that it was likely that he would have spoken to the other directors of PLC about the Cemex opportunity in June/July 2010 and not early 2010;

(ii) in paragraph 45.10 of the PLC Defence it is stated that Paul made full and frank disclosure to the board of PLC of the Partnership's sub-contract with PLC for the Cemex contract and that Andrew was aware of Paul's interest in the Cemex contract. Further Particulars of the pleading at paragraph 45.10 say that the Partnership's interest in the Cemex sub-contract was disclosed orally at a board meeting at which Mr Large, Mr McQuaide, Paul, Mr Ellis, Mr Sharratt and Mr Tomkinson were present. In cross examination, after being taken to the witness statements of Mr Ellis and Mr Tomkinson (in which they both say that they have no recollection of discussing the Cemex contract at a board meeting) Paul said that: he was 100% sure that the directors knew about the Cemex contract but he could not be sure that it was from a board meeting; and he was sure he spoke to the directors before the contract started. But when Paul was asked what he told each director about the Cemex contract he said he could not recall and he accepted that he alone decided what the Partnership would charge PLC for the services it provided under the Cemex sub-contract. It is unlikely that Paul's memory (or lack of it) of what the other directors were told and when about the Cemex contract is any different now than it was when he signed the statement of truth on the Further Particulars, on 24 March 2019, but there is a stark difference between the content of the Further Particulars on the one hand and the evidence of Mr Ellis and Mr Tomkinson in their witness statements and ultimately the evidence of Paul in cross

examination, on the other, as to the information that Paul gave to the other directors of PLC regarding the Cemex contract;

(iii) further Particulars are given of the approval of the sub-contract between PLC and the Partnership for the Biffa contract, which say that the Biffa contract was discussed and agreed by Paul, Mr Ellis, Mr Sharratt and Mr Tomkinson, terms including applicable rates were discussed and agreed and Paul's interest in the sub-contract was plain for all to see. However, in cross examination Paul, while saying he stood by the content of the Further Particulars, accepted that he had determined what rates the Partnership would charge PLC under the Biffa sub-contract and therefore these rates were not agreed with the other PLC directors; and

(iv) paragraph 57 of the Defence to the PLC Petition states that there have been occasions on which PLC employees carried out work or provided services for the Partnership but it has done so "openly and with appropriate accounting". However, at paragraph 53 of Paul's first witness statement he accepts that there is no record of the occasions on which Messrs Elliot-Dickins and Ward carried out work for the Partnership and he accepts that Mr Miller, Sam and William have worked for the Partnership, but he provides only an estimate of time spent by Mr Ward working for the Partnership and no details of time spent doing so by Sam or William.

284. There are two instances where Mr Zaman asserts that Paul was dishonest or gave dishonest evidence where I am not satisfied that he was dishonest/gave dishonest evidence.

285. The first instance concerned Paul's evidence that he was not interested in politics and that the donations made to the Conservative party by PLC were made to advance Andrew's political career alone and not Paul's. The second was the signing by Paul of a loan agreement between PLC and ABF for the monies that were transferred by PLC to complete the purchase of Barn Farm, Mr Zaman asserted that Paul dishonestly signed the loan agreement, in November 2016, knowing it had been backdated to 14 September 2015.

286. In paragraph 19 of his witness statement Paul says that Andrew asked him whether he wanted to come into politics with him and Paul said that it was not for him. Paul accepted however that he had joined the Conservative party himself, but could not recall when and that he had stood for election as a Conservative councillor on three occasions, unsuccessfully, in 2007, 2011 and 2015. Paul said that he had joined the Conservative party and sought election as a Conservative councillor at Andrew's suggestion, to help Andrew and that he had never canvassed for support in any of the council elections. Paul was unable to explain why his election as a councillor would help Andrew's political career, nonetheless I accept the broad thrust of Paul's evidence, that he was not really interested in politics or in becoming a councillor and that it was something that Andrew had encouraged him to do.

287. Paul was taken to a written resolution of ABF and a loan agreement between PLC and ABF both of which purport to be dated 14 September 2015. The written resolution is signed by Mr Sharratt, purportedly as sole director of ABF and the loan agreement has been signed by Mr Sharratt on behalf of ABF and by Paul on behalf of PLC. Mr Zaman made it clear that he was going to assert that both documents had been back dated and I gave Paul a warning that he could refuse to answer questions on the basis that those answers may incriminate him. Paul refused to answer the questions that were put to him about signing the loan agreement.

288. It is clear that both the resolution and the loan agreement were created on 22 November 2016, because the metadata for those documents show them to have been

created on that date. It is also obvious because the name of ABF on the resolution and loan agreements is AB Farms Limited but that was not the name of ABF on 14 September 2015 and Mr Sharratt was not the sole director of ABF (as the written resolution says) on the 14th of September 2015. In his cross examination Mr Sharratt accepted that he created both the resolution and the loan agreement by copying across documents from a loan which had been made by PLC to BIL and he accepted that both documents were created in November 2016. Mr Sharratt said however that he considered that the documents reflected what had been agreed orally by the directors of ABF/PLC in September 2015 and he did not regard the backdating of the documents to reflect that oral agreement as dishonest. I will deal with the question of whether Mr Sharratt acted dishonestly when dealing with his credibility and honesty. So far as Paul is concerned, I am not satisfied, in spite of him refusing to answer questions about the backdating of the loan agreement, on the grounds that those answers may incriminate him, that Paul acted dishonestly in signing the back dated loan agreement. It seems to me that Paul signed what was put in front of him to sign by Mr Sharratt and I am not satisfied that he would understand that signing the loan document with a date on it which predated the date on which he applied his signature to it, but matched the date on which PLC had transferred the funds to purchase Barn Farm, was a dishonest thing for him to have done. Mr Tomkinson says that paperwork is not one of Paul's strong points and having noted the complete failure of Paul to ensure that the Partnership's use of PLC's resources has been properly documented, I accept that assessment of Paul, which tends to support my conclusion that he would not have overly concerned himself with the question of whether it was proper for him to sign a document put in front of him by Mr Sharratt, in November 2016, dated 14 September 2015, recording the terms of a loan made by PLC to ABF for the purchase of Barn Farm, completed in September 2015.

289. Having said all that, in summary: (a) in the Respondents' Defences, Further Particulars and in Paul's own witness statements blanket assertions have been made about Paul disclosing information to other directors which he had to concede in cross examination were untrue; (b) in managing the business of the Partnership and PLC, Paul has caused the Partnership to use the assets and resources of PLC, without keeping any proper record of what assets of PLC the Partnership was using, when and for what purpose and what the value of those assets was. Paul's evidence as to what assets of PLC have been used for the benefit of the Partnership is therefore unreliable; (c) Paul has, on his evidence, provided compensation or credits to PLC for the Partnership's use of PLC's assets by cheque, credit on the PLC Purchase Ledger, credit on the Partnership Sales Ledger, credit to a recharge account and by charging PLC less than market rates for work on the Biffa contract and at less than NAAC rates for planting, cultivating and harvesting work carried out for ABF/PLC. Paul's evidence as to what credits in one form or another, have been given to PLC specifically to compensate PLC for the use of its assets by the Partnership is also unreliable; and (d) in causing Partnership vehicles to be put on PLC's Operator's Licence, when he knew that he should not have done so, on my findings, out of a desire to reduce the Partnership's losses, Paul has failed to act honestly and with commercial probity.

Mr Sharratt

290. Mr Sharratt had a much better memory of events than Paul had and a better grasp of the reasons why he said certain things were done (or at least he said he did). I am satisfied that Mr Sharratt gave broadly honest evidence, but there were instances where I consider that he: (a) was not honest, in cross examination, about the reasons why he did things or

why things were done and he sought to provide justifications which did not stand up to scrutiny; (b) was not honest, in some cases, about things he had done; (c) did not make appropriate concessions; and (d) suggested meanings for words which were untenable.

291. I will also explain why I am not satisfied that Mr Sharratt lied in the evidence given by him in cross examination on two occasions when Mr Zaman asserted that he had lied and I will explain why I am not satisfied that he acted dishonestly (save in one respect which I will identify) in backdating the ABF/PLC loan agreement and resolution in November 2016 to which I have just referred (in commenting upon Paul's credibility/honesty).

292. Mr Sharratt was asked about the evidence that Mr Brain gave that Mr Sharratt had contacted him about 2 weeks before the start of the trial and that Mr Brain felt intimidated by what Mr Sharratt said to him.

293. Mr Sharratt said that he had contacted Mr Brain because he was concerned for Mr Brain's welfare because of how upset Mr Brain was when he left PLC and because he had heard that Mr Brain had refused or failed to sign a witness statement for Andrew. Mr Brain said he was having a general conversation with Mr Sharratt, towards the end of which Mr Sharratt said that he would send him details of the Respondents' solicitor and then, Mr Sharratt said that he was aware that Mr Brain had taken some data from PLC and Mr Brain felt intimidated by this final comment. Mr Sharratt denied referring to Mr Brain taking PLC's data and attempting to intimidate Mr Brain, he said that Mr Brain told him that his solicitor was on holiday and he told Mr Brain that he could speak to the Respondents' solicitor and he would text him the details which he subsequently did. Mr Sharratt said that he wanted to give Mr Brain the opportunity to sign a witness statement which Mr Brain was happy to sign.

294. I am satisfied that Mr Sharratt's purpose in contacting Mr Brain was not, as he suggested out of concern for Mr Brain's welfare, but in an attempt to promote the Respondents' case in these proceedings, perhaps by persuading Mr Brain to make a witness statement for the Respondents which was favourable to their case, or at least to try to dissuade Mr Brain from signing the witness statement produced by Andrew's solicitors which he understood Mr Brain was, at that point refusing to sign. I am also satisfied, having heard from Mr Brain and Mr Sharratt that, on the balance of probabilities, Mr Sharratt did mention to Mr Brain that he knew that Mr Brain had taken some of PLC's data, which was true and Mr Sharratt knew it was true, because: the Respondents disclosed the emails sent by Mr Brain to his home email address attaching copies of some of PLC's fuel records and the witness summary prepared for Mr Brain referring to those records had been served on the Respondents' solicitors.

295. Mr Sharratt was asked whether he recalled the Partnership sub-contract on Cemex being disclosed to the board of PLC at a board meeting, in light of Paul's evidence that he could not say that there was a board meeting which approved the entry by the Partnership into a sub-contract with PLC to remove waste from the Cemex Site. Mr Sharratt said that he believed that there was such a board meeting. It was then put to Mr Sharratt that Paul/Mr Tomkinson/Mr Ellis/Mr McQuaide could not recall such a board meeting and it was surprising that he could. Mr Sharratt was then asked who attended the board meeting. Mr Sharratt said, all of the directors but probably not Andrew. When asked about what was discussed at the board meeting, Mr Sharratt said that no specifics of the contract would have been discussed, but he then said that he thought that there would have been a discussion of the rates that the Partnership would charge, because Paul was good at saying what would happen. I am not satisfied that Mr Sharratt has any recollection of there being

such a board meeting, he seemed anxious to provide evidence that would support the Respondents' case, rather than providing the court with his honest recollection of events. 296. Mr Sharratt was asked which of the directors of PLC sat in upon the interviews by RSM of PLC's employees. Mr Sharratt said none to his knowledge. It was then put to Mr Sharratt that he had sat in on the interviews, but Mr Sharratt said that he could not recall having done so and he maintained this position after Mr Zaman said that those employees would be giving evidence later and would be asked whether Mr Sharratt sat in on their interviews with RSM. Mr Whetton and Mr Miller subsequently confirmed that they were interviewed by RSM and that Mr Sharratt did sit in on their interviews with RSM. I am satisfied that Mr Sharratt sat in on the interviews by RSM of Mr Whetton and Mr Miller and I am satisfied, on the balance of probabilities that Mr Sharratt recalls having doing so and that he was therefore not honest in saying that he could not recall whether he had sat in on the interviews, by RSM, of PLC employees.

297. Mr Sharratt was taken, by Mr Zaman to an email he sent to Paul/Mr Ellis/Mr Tomkinson on 2 March 2018 in which he provided draft details of all the directors' related party transactions with the intention that these would be forwarded to the auditors for the purposes of the 2017 accounts for PLC. This included a statement that AB Group had engaged the Partnership and "...all transactions are on an arm-length basis and subject to formal documentation between the parties".

298. Mr Sharratt was asked whether he really thought that the transactions between the Partnership and the Group could be described as "arms-length" given that Paul decided what rates the Partnership would charge ABF/PLC for cultivating potatoes. Mr Sharratt said that he thought that describing the transactions as arms-length was a fair description.

299. Mr Sharratt was then asked if he thought the inter party transactions between the Group and the Partnership could fairly be described "subject to formal documentation" between the parties when he accepted there was no written agreement and no document(s) setting out the terms of any agreement between ABF/PLC and the Partnership for the cultivation services provided by the Partnership. Mr Sharratt suggested that "formal documentation" may mean the invoices which were sent to either PLC or ABF.

300. I am prepared to accept (just) that Mr Sharratt may have genuinely believed, in March 2018, that the arrangements for the Partnership to plant, cultivate and harvest potatoes, were arms-length because he appears to have thought that Mr Ellis was exercising some sort of control over the rates that the Partnership was charging for the cultivation services that it was providing to Group companies (although in reality he was not) but I do not accept that Mr Sharratt can genuinely believe, or have believed in March 2018, that invoices sent by the Partnership to ABF/PLC could answer the description that transactions between the Partnership and the Group were subject to "formal documentation". I consider that Mr Sharratt was well aware that the wording could only amount to a representation that there was a written contract or at least a written memorandum setting out the terms agreed and there are none and never have been any. Mr Sharratt failed therefore to make an appropriate concession, that the description, in the 2 March 2018 letter at least of the Partnerships transactions with the Group being subject to "formal documentation" was inaccurate.

301. Mr Sharratt was taken to paragraph 194 of his witness statement, in which he describes his understanding of what a "Quasi-Partnership" is. Mr Zaman pointed out that the paragraph is identical or nearly identical to paragraphs appearing in the witness statements of Mr Ellis and Mr Tomkinson, in which they describe their understanding of

what a Quasi-Partnership is. Mr Zaman asked Mr Sharratt whether this was because: (a) he had discussed his understanding of what a Quasi-Partnership is with Mr Ellis and Mr Tomkinson; or (b) the paragraph was not in his words. Mr Sharratt said that he had not discussed his understanding of Quasi-Partnership with Mr Ellis and Mr Tomkinson, but also that the words in the paragraph were his words. I do not consider it plausible that both of these answers can be correct, given that identical or near identical paragraphs are contained in Mr Ellis and Mr Tomkinson's witness statements. I consider it most likely that the Respondents' solicitors provided the wording and Mr Sharratt accepted it. Mr Sharratt should have conceded that this was the case rather than suggesting that the words were his own.

302. In paragraph 58 of his witness statement, Mr Sharratt says that Andrew instructed Hawkins and Harrison, surveyors to prepare a valuation of the Old Vicarage. Mr Zaman took Mr Sharratt to the Hawkins and Harrison valuation dated 8th December 2011 which is addressed to BIL "FAO Mr Sharratt". Mr Sharratt accepted that the valuation refers to "your instructions" but he maintained that Andrew had nonetheless instructed Hawkins and Harrison to prepare the valuation. In my judgment, whilst the valuation does say "in accordance with your instructions" it is addressed to BIL (albeit for the attention of Mr Sharratt) and is not therefore necessarily referring to Mr Sharratt having instructed Hawkins and Harrison, as opposed to any other individual on behalf of BIL. I am not satisfied therefore that Mr Sharratt was not telling the truth, in paragraph 58 of his witness statement, when he said that Andrew had instructed Hawkins and Harrison.

303. I gave a similar warning to Mr Sharratt as I gave to Paul in relation to the backdating (to 14 September 2015) of the ABF resolution and the loan agreement between ABF and PLC, namely that Mr Sharratt could choose not to answer questions asked of him about this, on the ground that the answers he gave may incriminate him. Unlike Paul, Mr Sharratt chose to answer the questions that were put to him.

304. Mr Sharratt accepted that: (a) The resolution and the loan agreement quoted the wrong name of ABF as at 14 September 2015 (AB Farms Limited, whereas ABF's name, in September 2015 was a AB Farms Developments Limited); (b) he was not the sole director of ABF on 14 September 2015 (the two directors were Mr Tomkinson and Mr Sharratt); and (c) both documents were created on 22nd or 23rd November 2016.

305. Mr Sharratt said that he did not act dishonestly in backdating the resolution and the loan agreement to 14 September 2015. I gave Mr Sharratt the opportunity to explain why he claimed that he was not acting dishonestly. Mr Sharratt's explanation was as follows: (a) the auditors of PLC asked for a copy of the agreement relating to the loan made by PLC to ABF, but at that stage the agreement was only an oral agreement; (b) Mr Sharratt used documents that Shoosmiths had produced for the loan made by PLC to be BIL in May 2010 to create a resolution and a loan agreement for the loan between PLC and ABF; (c) in creating the written documents he was merely formalising the existing oral agreement of September 2015 which he believed was that, the loan from PLC to ABF would be on the same terms as the PLC loan to BIL; (d) he was the sole director of BIL in May 2010, when the PLC loan to BIL was documented and in error, he copied across the sole director resolution from that loan and used it for the PLC loan to ABF (even though he was not the sole director of ABF in September 2015); (e) he made a further error in using the ABF company name as at November 2016 rather than its name as at September 2015; and (f) he thought that it was not dishonest but instead appropriate to date the documents with the same date as that upon which the oral agreement was made.

306. Save in one important respect, I accept Mr Sharratt's explanation of the reasons why he backdated the resolution and loan agreement to 14 September 2015. My reasons are as follows: (a) it is undoubtedly true that the PLC's loan to BIL, in May 2010 was properly documented, in fact Mr Zaman took Mr Sharratt to the board minute approving that loan in order to show that Mr Sharratt knew how a disclosure under section 177 of CA 2006 of a directors interest in a transaction should be made to the board of PLC. I accept Mr Sharratt's evidence that the board minute and loan agreement for the PLC loan to BIL were prepared by Shoosmiths, solicitors; (b) I also accept that PLC's auditors were pressing for a copy of the agreement documenting the loan between PLC and ABF because Mr Sharratt sent the loan agreement to KPMG on 23 November 2016 very promptly after it was executed; (c) use of the resolution from the BIL loan would also explain why Mr Sharratt signed a resolution, purportedly as sole director of ABF when in fact he was only one of the two directors (both in September 2015 and November 2016); and (d) although Mr Zaman suggested that backdating the resolution and loan agreement was part of some plan to deprive Andrew of the benefit of Barn Farm, Mr Zaman was not able to explain how documenting the loan between PLC and ABF and then forwarding this to the auditors of PLC would further that purpose, particularly in circumstances where: (i) Andrew accepted that he was told by Paul almost immediately after the auction that "we have bought a farm" and that it would be put in a new company; (ii) ABF was incorporated in September 2015, shortly after the acquisition of Barn Farm and Barn Farm transferred to ABF; (iii) it is not disputed that the cash reserves of PLC were used to pay the purchase price for Barn Farm; and (iv) it is tolerably clear that the auditors of PLC had already been told that PLC had made a loan to ABF, otherwise Mr Sharratt would not be sending them a copy of the loan agreement on 23 November 2010 shortly after it was executed, without explanation.

307. The respect in which I do not accept Mr Sharratt's evidence, is that he suggested that there was an oral agreement in September 2014 that the loan from PLC to ABF would be on the same terms as the PLC loan to BIL. Mr Tomkinson, the other director of ABF in September 2014 said that he had no recollection of any such oral agreement. On the balance of probabilities I find that there was no oral agreement in September 2014, that the terms on which PLC transferred £1,006,000 to fund the purchase of Barn Farm (acquired in ABF's name) would be that PLC would lend that money to ABF on the same terms as those upon which PLC lent monies to BIL or as to the terms of the loan at all.

308. Mr Zaman asked Mr Sharratt whether he had inadvertently transferred £623,500 from PLC to WPS. Mr Sharratt said that he had not inadvertently transferred the money. Mr Zaman then said that Mr Sharratt was lying. I was surprised that Mr Zaman appeared to be asserting that Mr Sharratt had lied in saying that he had not "inadvertently" transferred £623,500 from PLC to WPS. I asked Mr Zaman to confirm that that was what he was asserting, Mr Zaman confirmed that it was.

309. Mr Zaman then took Mr Sharratt to an email sent by Mr Sharratt to Elizabeth Doyle at Lloyds Bank on 14 September 2014. In that email Mr Sharratt asked Ms Doyle to transfer the £623,500 back from WPS to PLC, plus interest which had been earned on it. In the email Mr Sharratt says that the £623,500 was inadvertently transferred to the new WPS account.

310. Mr Sharratt said that the £623,500 was transferred from PLC to WPS, when it was transferred, because Andrew was, as he put it, paranoid about PLC not having large amounts of cash in it which his then wife could point to as a source of money which could be paid to her as part of the financial settlement in their divorce and that this was why the £623,500 was transferred when it had still not finally been decided to use WPS to carry out

the AD Plant project. In re-examination Mr Sharratt said that the £623,500, having been transferred to a new company but never having been used put the Group, in what he considered, to be in a delicate position with the bank. I can see that transferring £623,500 to WPS, never using a penny of it and then transferring it back to PLC, almost 4 months later might appear somewhat odd and that Mr Sharratt therefore may have felt compelled to provide some explanation for it. Perhaps, as Mr Sharratt appeared to suggest, inadvertence was the best explanation he could come up with at the time, he could hardly have told Ms Doyle that the reason that the money was transferred in May 2014 was to reduce the liquidity of PLC, because Andrew thought this was to his advantage in his divorce proceedings (which is what Mr Sharratt says was the real reason for its transfer at that time). Perhaps it would have been better if he had simply instructed Ms Doyle to make the transfer without comment, but I am not satisfied that Mr Sharratt did transfer the £623,500 “inadvertently”, simply because this is what he said in his email to Ms Doyle, and that he was lying, when he denied that he had transferred the £623,500 “inadvertently”, as Mr Zaman asserted.

Mr Ellis

311. I found Mr Ellis to be an honest and credible witness who I consider gave his evidence in a balanced way, making appropriate concessions.

312. Although Mr Ellis is an executive director of the Group companies, he accepted that his job of purchasing for PLC has kept him very busy throughout his employment by PLC and in consequence of this he has not, he says, had a significant involvement in day to day issues arising in other parts of the business or in taking executive management decisions concerning other parts of the business such as: (a) decisions about the Group structure including which company should own and operate Barn Farm and the AD Plant; (b) the use of PLC's employees and assets by the Partnership or how their use has been accounted for; and (c) the installation of and operation of the AD Plant and steps taken to try to recover payment for the export of electricity by the AD Plant; and (d) the terms on which Mr Bridges made the Telehandler available to Paul.

313. Mr Ellis was involved in: (a) the decision of the board of PLC, to purchase Barn Farm; (b) discussions about the Group growing potatoes; (c) determining the price at which PLC would purchase potatoes from ABF; (d) checking some invoices submitted by the Partnership to ABF/PLC for the planting cultivation and harvesting of potatoes; and (e) meetings of the board of PLC/shareholders of the Group in 2017 at which Andrew sought support for his return as non-executive chairman of PLC.

Mr Tomkinson

314. I am satisfied that Mr Tomkinson was an honest and reliable witness, concerned to do his best to assist the court. He made appropriate concessions, for example: (a) that there was a strong possibility that either PLC or ABF could have dealt with the cultivation of potatoes themselves, rather than engaging the Partnership to do so; (b) that it was his responsibility to ensure that appropriate entries were made in the Group companies accounts of the Partnership's involvement in the Cemex/Biffa contracts and in planting, cultivating and harvesting potatoes and that he had failed to ensure that that had happened; and (c) there were mitigating circumstances as to why there had been a substantial delay in preparing audited and unaudited accounts for Group companies, but those circumstances did not excuse that substantial delay.

315. There is only one matter in respect of which the honesty of Mr Tomkinson was brought into question by Mr Zaman. Mr Zaman took Mr Tomkinson to a text message from Andrew to Mr Tomkinson dated 14 September 2017, in which Andrew said "... What do you know about Water Purification Services Ltd, another company Paul has set up...". Mr Tomkinson replied the same day "... Don't know anything about another company Paul has set up..."

316. Given that Mr Tomkinson (or his firm Tomkinson Teal, at his direction) had been responsible for incorporating WPS and arranging for its subsequent dissolution, Mr Tomkinson's reply, on the face of it is surprising because Mr Tomkinson knew all about WPS. Mr Zaman asked Mr Tomkinson why he had said that he knew nothing about WPS. Mr Tomkinson accepted that he had arranged for the incorporation and subsequent dissolution of WPS, but he said that, when he received Andrew's text, he thought Andrew was talking about a company which had been recently set up and still existed in September 2017, not one that had ceased to exist well before that date.

317. Whilst I find it surprising that Mr Tomkinson did not reply to Andrew's text, by saying that he had been involved in setting up WPS and dissolving it sometime previously, I am not satisfied that Mr Tomkinson's text was a deliberate attempt to mislead Andrew and I accept Mr Tomkinson's explanation that he thought that Andrew's text was referring to a "live company" which had recently been set up and not to WPS which had already been dissolved.

318. There was also one matter, where I consider that Mr Tomkinson was too keen to provide a justification for what Paul had done. This related to the renting by the Partnership to PLC of the Volvo at an annual rent equivalent to its purchase price. Mr Tomkinson said that, knowing Paul's engineering background as he did, he thought it was likely that Paul had improved the condition of the Volvo after he purchased it and before renting it to PLC. I consider that to be unjustified speculation on the part of Mr Tomkinson which seemed to be aimed at providing some justification for the rent charged to PLC for the Volvo compared to its purchase price.

319. The real difficulty with Mr Tomkinson's evidence is that, as a non-executive director of the Group companies he is not involved in the day-to-day management of the Group, nor in day-to-day discussions taking place between the executive directors. His direct evidence of matters relevant to these proceedings is therefore really restricted to those issues which were discussed at board meetings and, as I have already noted, for example, Mr Tomkinson said that he does not recall there being any discussion at a board meeting, of the Cemex or Biffa sub-contracts between PLC and the Partnership.

Mr Elliott-Dickens, Mr Emery, Mr Whetton and Mr Miller

320. Messrs Elliott-Dickens, Emery, Whetton and Miller are all employees of PLC. They are all lorry drivers except Mr Emery whose principal job is transport supervisor, although he says he does some driving for PLC, when necessary.

321. I propose to consider all three together because their evidence was principally aimed at the extent to which they (in the case of Messrs Elliott-Dickens, Whetton and Miller) drove for the Partnership and were, in each case, aware of others having done so. I am satisfied that each of them gave honest and credible evidence to the court, doing the best they could to assist the court.

322. Of the four employees, Mr Zaman only challenged the credibility of Mr Elliott-Dickens's evidence, he did so on the basis that Mr Elliott-Dickens was only re-employed by PLC on 21 June 2021, having resigned in April 2015 and that, in April 2015, Mr Elliott-Dickens wrote a

resignation letter which was critical of Paul's involvement in a disciplinary investigation of which Mr Elliott-Dickens was the subject, before he resigned, including a suggestion, in the letter, that Paul may have misled that investigation.

323. Mr Zaman asked Mr Elliott-Dickens questions about whether he stood by the criticisms of Paul that he made in his resignation letter and whether Mr Elliott-Dickens had been re-employed by PLC in order to obtain a witness statement from him to support the Respondents' case in these proceedings.

324. Mr Elliott-Dickens said that what led to his resignation was a change from PLC's drivers being paid on an hourly basis to being paid at a day rate, which Mr Elliott-Dickens explained he was not happy with, because he worked very long hours and the change would cause him to lose money. Mr Elliott-Dickens said that his father had drafted his resignation letter for him to sign and that he was probably being stubborn and immature in resigning over that issue.

325. As for his re-employment by PLC, Mr Elliott Dickens said that he was a good friend of Mr Emery, PLC's transport supervisor, who had agreed to his working part-time for PLC from around Christmas 2020 onwards and that he became a full-time employee of PLC, in June this year, after apologising to Paul for his behaviour in 2015.

326. I am not satisfied that Mr Elliott Dickens was re-employed by PLC in order to obtain a witness statement for the Respondents in these proceedings, nor am I satisfied that there is anything relevant in Mr Elliott-Dickens' resignation letter from 2015, which I should take into account in these proceedings.

327. Whilst I accept the evidence of Messrs Elliott-Dickens, Emery, Whetton and Miller as to what vehicles they and others drove, their evidence that they considered that they were driving for PLC and not the Partnership is to an extent undermined by the fact that, when they drove Partnership vehicles, namely the Scania and Volvo, they assumed (as did Mr Baldwin in putting those vehicles on PLC's Operator's Licence) that those vehicles were owned and operated by PLC and not by the Partnership.

DETERMINING THE ISSUES

QUASI PARTNERSHIP

Issue 1 - Were each, or any, of the following Companies Quasi-Partnerships:

- (a) **ABPT;**
- (b) **BIL; and**
- (c) **ABF**

Legal Guidance

328. I will deal first with general guidance that has been given as to the circumstances in which the courts will find that the relationship between the shareholders of a company is such that it would be inequitable for the court to allow the majority shareholders to rely on their strict

legal rights. Where these circumstances are present the relationship has been described as a “Quasi-Partnership”.

329. The phrase, Quasi-Partnership and the first attempt to provide guidance as to those circumstances in which one will arise was provided by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd [1973] A.C. 360*, Lord Wilberforce said this (at 379):

“it would be impossible, and wholly undesirable, to define the circumstances in which these [equitable] considerations may arise. Certainly the fact that the company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, and in which it can safely be said that the basis of the association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence-this element will often be found where a pre-existing Partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be ‘sleeping’ members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members’ interest in the company-so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.”

330. In *Croly v Good [2010] EWHC 1 (Ch)* HHJ David Cooke noted:

“As to which companies fall into the Quasi-Partnership category, there is no universal definition. Although the concept has developed from partnership law, it does not require that the company is entered into, or run, as if it were a partnership, or that the members regard themselves as being partners.

331. In *Waldron v Waldron [2019] EWHC 115*, (Ch) HHJ Eyre QC (as he then was) summarised some of the more relevant propositions including:

- (a) the expression Quasi-Partnership is “a convenient description or label and not a definition of the circumstances in which equitable considerations can make it unfair for those in control of the company to rely on their strict legal powers” [para 27]
- (b) he cited with approval HHJ David Cooke in *Pinfold v Ansell [2017] EWHC 889 (Ch)* that:

“the three matters mentioned [in Ebrahimi] are thus indicators of cases where the court may impose equitable considerations on the exercise of shareholders rights, but

not a set of tests that must be satisfied. They need not be present in every case, though they often will be..." [para 28]; and

(c) *"The agreement does not have to have the degree of certainty which would be necessary for an agreement to be enforceable as a contract but there must be "a sufficient degree of agreement that it can be said that there has been a breach of good faith in departing from it."* [para 29];

(d) it is possible for there to be an agreement between only some of the shareholders [paras 31 - 42] (I will consider the guidance given, in particular on this last point in more detail below).

332. I am approaching issue 1 on the basis that what I am being asked is whether any of the three named group companies have ever been Quasi-Partnerships (issue 3 (b) asks that, if the answer to issue 1 is a yes, when did the three named companies cease to be Quasi-Partnerships).

333. I also note that I am not asked to say whether PLC has ever been a Quasi-Partnership. However, given that PLC is a wholly-owned subsidiary of ABPT, that the only business of ABPT is that it holds the share capital of PLC, and that the shareholders of PLC, immediately before ABPT acquired PLC's shares, I consider it necessary to decide whether PLC was, at the time that its shares were acquired by ABPT, a Quasi-Partnership, before I can decide whether ABPT itself became a Quasi Partnership, when it acquired PLC's shares.

Was PLC a Quasi Partnership in December 2006 when its shares were acquired by ABPT?

334. In 1969, Alan and Ann acquired a smallholding at Woolstitch Farm and Alan carried on business as a supplier of fruit and vegetables, some of which he grew at the smallholding. From 1983, Paul joined Alan in the business and from around 1986, Paul became a partner in the business, with a partnership agreement being executed between Alan and Paul in 1987. Andrew came to work for the partnership business shortly thereafter.

335. PLC (then known as AB Produce Limited) was incorporated on 6 April 1988 and the business and assets of the partnership between Alan and Paul were transferred to PLC. On incorporation the 1,000 issued shares in PLC were held by Alan - 500 shares, Ann - 100 shares, Andrew - 200 shares and Paul - 200 shares. All four shareholders were appointed directors of PLC.

336. Mr Auld does not dispute that in the early years after the incorporation of PLC, its business was conducted as a Quasi-Partnership and I am satisfied that at that point PLC was a Quasi- Partnership in that: (a) it had taken over the business of a partnership between Alan and Paul; (b) the relationship between all the shareholders was a family relationship between parents and two of their sons which I find was based upon mutual trust and confidence between the shareholders; (c) given that all the shareholders were also directors of PLC, it appears that they will all have participated in management decisions and have had a reasonable expectation that they would continue to do so ; and (d) at all material times there have been restrictions in PLC's Articles on the transfer of shares by its shareholders.

337. In May 1996 Mr Ellis (purchasing director) and Sidney Gray ("Mr Gray") (non-executive director) were appointed to the board of directors of PLC and in 1997 Alan and Ann resigned as directors and, in Ann's case also as company secretary of PLC. It is common ground that Alan and Ann were spending most of their time in Spain from before 1996, when Mr Ellis and Mr Gray were appointed directors of PLC and had therefore largely retired from participation in the management of PLC, before 1996.

338. As at 7 April 1997 the issued shares in PLC were recorded as: 37,000 shares held by Andrew, 37,000 shares held by Paul and 36,000 shares held by the ABP Pension fund (Alan/Ann's pension fund).

339. I do not consider that the addition of Mr Ellis and Mr Gray to the board of PLC, in 1996 or the resignation of Alan/Ann as officers of the PLC, brought an end to the Quasi-Partnership, between the shareholders of PLC: (a) although the makeup of the board of PLC altered in 1996, in that the directors now included people who were not shareholders, on the evidence it appears that it was Andrew who now took on the leading role in managing the business of PLC occupying the position of Managing Director, with Paul managing the transport function of PLC. Paul has accepted that at this point he had trust and confidence in Andrew's ability to manage the business and make the important decisions; (b) Mr Ellis has accepted that, from the start of his employment by PLC and even after he was appointed purchasing director, he had very little involvement in making decisions about any aspect of PLC's business, other than purchasing; (c) no one has suggested that Mr Gray took on any material role in management decisions; (d) all of the shareholders of PLC remained family members (Alan, Ann, Andrew and Paul until April 1997 and then Andrew, Paul and the ABP Pension fund which was a pension fund for the benefit of Alan and Ann) and in my judgment the basis of the relationship

between those family shareholders remained one of mutual trust and confidence; and (e) given that Alan/Ann had resigned as officers of PLC, in 1997 and had, for some years prior to that, played little role in its management it is clear that there was no expectation that they would continue to be involved in the management of PLCs business, however Lord Wilberforce in *Ebrahimi* acknowledged that shareholders in a Quasi-Partnership may be or may take on the role of “sleeping partners” so the fact that Alan and Ann were no longer involved in and did not have an expectation that they would be involved in the management of PLC, does not prevent it from being a Quasi Partnership after they retired and resigned from their positions as officers of PLC and there was no expectation that they would be involved in the management of PLC.

1998

340. In late 1998 Alan Parker, (executive Finance Director) and Mr Tomkinson (non-executive director) were appointed directors of PLC.

341. As at 9 September 1998 the issued shares in PLC appear to have changed to: Andrew 36,632 shares; Paul 36,632; and 27,742 held by a trust known as the Havelet Trust established for the benefit of Alan and Ann (“the Trust”).

342. On 30 October 1998, PLC was re-registered as a public limited company. It appears that at that time, the possibility of floating PLC on the AIM market was being explored and re-registering PLC as a public limited company was associated with the possibility of PLC being floated on AIM.

343. On 27 November 1998 the Investment Agreement was entered into between the then shareholders of PLC. At that date the shareholdings were: Andrew 37,000 shares; Paul 37,000 shares; a Retirement Scheme SSAS (“the SSAS”) 23,833 shares; Mr Ellis 500 shares; Mr Tomkinson 667 shares and Alan Parker 1,000 shares (Alan and Ann were beneficiaries, along with Andrew and Paul of the SSAS). The terms of the Investment Agreement included: (a) a requirement that Andrew and Paul would not resign as employees or directors of PLC, nor transfer their shares and would dedicate all their time, to the business of PLC; (b) a requirement that the business of PLC should be carried on in accordance with the policies and directions of its board of directors. There were also terms that enabled Alan Parker, Mr Tomkinson and Mr Ellis, to serve notice on PLC to require it to purchase their shares at a price fixed in accordance with a formula set out in the Investment Agreement.

344. Although the addition of Alan Parker and Mr Tomkinson as directors of PLC meant that the majority of the directors of PLC were no longer family members that did not, in my judgment, lead to the ending of the Quasi Partnership. I come to this conclusion, for the same reasons as I concluded that the addition of Mr Ellis and Mr Gray as directors of PLC, in 1996 did not lead to the ending of the Quasi Partnership namely: (a) that this in itself did not alter the fact that, initially all of the shares in PLC were held by family members (namely Andrew, Paul and Pension schemes or trusts for the benefit of Alan and Ann); and (b) on the available evidence the business of PLC continued to be managed by Andrew in whom Paul (and I have no reason to suppose Alan and Ann too as beneficiaries of the Trust) had trust and confidence. I do accept that as family members, Andrew and Paul, only constituted a minority of the Board of Directors, and therefore their control over the day to day management of the business of PLC had been weakened, however family members still held all the shares in PLC at least up until 30 October 1998.

345. The issue of shares to non-family members and in particular the entry by all shareholders into the Investment Agreement poses a greater threat to the status of PLC as a Quasi Partnership, than the appointment of two more non-family members to the board in two ways: (a) because 3 new non-family shareholders were being added to the 3 “family” shareholders (Andrew, Paul and the SSAS) meaning that for the first time there were non-family shareholders to be taken into account in deciding whether a Quasi Partnership continued to exist between shareholders and if so which shareholders; and (b) the Investment Agreement regulated, to an extent the relationship between shareholders (in particular the relationship between Paul and Andrew and the 3 none family shareholders).

Did the introduction of non-family shareholders end the Quasi Partnership?

346. In *Waldron*, HHJ Eyre (as he then was) was faced with a section 994 petition presented by three siblings against their brother, the respondent, who was the largest shareholder and managing director of the company. The company was initially established by the siblings' parents and HHJ Eyre had no difficulty in concluding that there were equitable constraints upon the exercise by the siblings (and in particular the respondent) of their legal rights as shareholders until 2009. In 2009 the company entered into: (a) a creditors voluntary arrangement (“CVA”) with its creditors; and (b) a subscription agreement under which a

subsidiary of its bank took a minority shareholding in the company, as part of a restructuring of the debt that the company owed to its bank (“the Subscription Agreement”).

347. After the CVA and Subscription Agreement were entered into, the respondent dismissed the three petitioners as employees of the company and they brought their petition under section 994 against the respondent on the basis of these dismissals.

348. The respondent, argued that any equitable considerations that arose, if the company was a Quasi Partnership before the bank’s subsidiary took a shareholding in the company and entered into the Subscription Agreement was thereby destroyed, because the bank’s subsidiary, as a new member had a legitimate expectation and understanding that the affairs of the company would be conducted in accordance with its Articles of Association and the law and any understanding between the family members of the company could not cause there to be some further or other restriction on the conduct of the company’s affairs, because that would be contrary to the understanding of the new member.

349. HHJ Eyre considered two authorities on the question of whether equitable constraints upon the legal rights of members could operate between some but not all of the members of a company: (a) *Re Yung Kee Holdings Limited* [2014] 2 H.K.L.R.D 313 (HKCA); and *Estera Trust (Jersey) Limited v Singh* [2018] EWHC 1715 (Ch.)

350. In *Yung Kee* the Hong Kong Court of Appeal upheld the trial judge’s decision that he had no jurisdiction to consider the petition under the Hong Kong equivalent of section 994 but the court then went on to consider, obiter: “whether the existence of third-party shareholders who were not party to the mutual understanding negates the equitable considerations to restrain the exercise of legal rights in accordance with the articles of association of the Company”.

351. The Hong Kong Court of Appeal concluded that: (a) “as a matter of law there is no absolute bar to prevent the operation of equity ... and whether an equitable restraint arises depends primarily on the facts of the case. The court must have regard to the circumstances of each case to determine whether on its factual matrix the exercise of legal rights by a respondent is in contravention of some equitable principles which a petitioner can pray in aid”; (b) the imposition of equitable constraints “rests on a wider basis than the concept of partnership in the guise of a corporation”; and (c) in considering whether equitable constraints extended to companies that could not be regarded as quasi-partnerships “the crucial question is whether there are any equitable considerations arising from the dealings

between the shareholders which call for restraints over the exercise of the strict legal rights on the particular facts of the case”.

352. In *Estera Trust*, Fancourt J considered again obiter the question of whether a quasi-partnership can exist (and give rise to equitable constraints of the type identified in the authorities) where some only of the shareholders are said to be within the scope of the agreement or understanding about participation in management.

353. Fancourt J said that he was “very doubtful” that the relevant equitable restraints could arise where there were shareholders who were not parties to the underlying understanding “except perhaps in a case where the shareholders that are not party to the equitable considerations are either a very small minority or are closely connected to the quasi-partners ... such that the established quasi-partnership character of the company does not change”.

354. HHJ Eyre identified three reasons that Fancourt J had given in his judgment for his conclusion that only where the quasi-partnership character of the company is not changed by the addition of new shareholders, could the quasi-partnership be said to continue:

(a) “The quasi-partnership status of a company arises not just from an informal understanding arising between some or all shareholders (which would otherwise be unenforceable as a matter of contract) but from the particular character that the company has where there is a mutual relationship of trust and confidence, akin to a partnership, and where the agreement or understanding affects the conscience of the members of the company..”

(b) the “understanding is enforceable in equity because of its mutuality” with the relationship of trust and confidence affecting “the conscience of each member equally”. If the majority of the members were not bound by “such mutual rights or understanding” then the company would “not have the characteristics of a partnership”; and

(c) difficulties would arise in respect of the rights of the shareholders who were not a party to the understanding if there were held to be a quasi-partnership between only some of the members, because those shareholders were entitled to expect the affairs of the company to be conducted in accordance with its constitution and in accordance with the best interests of the members as a whole.

355. HHJ Eyre preferred the views expressed by the Hong Kong Court of Appeal because:

(a) he considered that Fancourt J had placed undue emphasis on the character of the company and the need for it to be akin to a partnership whereas HHJ Eyre took the view that, based on his review of the authorities the partnership analogy was not the basis for intervention by the court to control the exercise of legal rights by shareholders but rather the court must ask itself whether it would be inequitable or unconscionable for those in control of the company to exercise their strict legal rights without regard to the understanding between them and other members;

(b) where there is a close analogy between the character of the company and that of a partnership it is more likely that there will be equitable considerations which will warrant intervention to control the exercise by the majority of their legal rights. Similarly, the further removed the circumstances of a company are from the analogy with a partnership and the less akin to a partnership the company is then the less likely it is that the powers of those controlling the company will be subject to equitable constraints. However, that is a question of fact rather than law, the less akin to a partnership the company is, the less likely it is that a member of the company will be able to point to the relevant equitable considerations protecting his or her position and restricting the majority's legal powers;

(c) if, as Fancourt J envisaged, it is possible, although exceptional, for equitable considerations to be present even when not all members of the company are parties to the relevant understanding, then the question is one of fact and degree, not principle;

(d) the reason for the court's intervention in quasi-partnership cases is that there are circumstances making it inequitable for those controlling a company to use their strict legal powers in a particular way. It follows that there must be a particular person or persons who are subject to the constraints and that the constraints must arise because it is unconscionable for that person or those persons to act in a particular way. This means that the focus is to be on the members of the company (and in particular those in control of it) rather than on the company itself as distinct from its members. If it is right that the focus is on whether particular members can act in a certain way then there can sensibly be circumstances in which some members of a company but not others are subject to constraints; and

(e) as was said in *Yung Kee*, the court has wide ranging powers and it does not follow that the exercise of those powers will inevitably harm the rights of third party members. Relief can be crafted without impinging upon the rights of the third-party shareholders or where that is not possible, to say that those rights preclude relief in the particular circumstances.

356. In *Waldron* HHJ Eyre had to consider whether the entry of the company into a CVA with its creditors, the issue of shares to a subsidiary of its bank and entry into the Subscription Agreement brought an end to the quasi-partnership (or equitable constraints on exercise of the respondent's powers) that he found had previously existed. HHJ Eyre found that the issue of shares to the bank's subsidiary and entry into the Subscription Agreement were akin to the grant of security to the bank. The Subscription Agreement regulated the conduct of the company with the outside world (for example restricting its ability to dispose of or acquire assets above a certain value). Neither the issuing of shares to the bank's subsidiary nor entry into the Subscription Agreement were, in his judgment inconsistent with the continuation of the understanding between the family shareholders. It is clear therefore that HHJ Eyre's findings as to the principles that should be applied in deciding whether or not a quasi-partnership continues, following the introduction of new shareholders form part of the ratio of his decision.

357. As HHJ Eyre was at the time of his judgment, a judge of parallel jurisdiction to my own, I should not depart from the principles set out in his judgment unless I consider that they are clearly wrong. I am of the view that HHJ Eyre was right to emphasise that the question of whether or not the court will impose constraints upon the legal rights of shareholders, pursuant to its equitable jurisdiction, depends upon whether there is a relevant understanding between shareholders which would make it inequitable or unconscionable for them to exercise their strict legal rights, the status of the company may be relevant to that question but is not determinative of it. I propose therefore to apply the principles set out by HHJ Eyre in *Waldron* in deciding whether or not the issue of shares, in November 1998, to non-family members and entry into the Investment Agreement, resulted in the equitable constraints, which I have found existed up to that point, on the members' exercise of their strict legal rights in relation to PLC, continued to apply and if so to which members.

358. I am satisfied that equitable constraints on the exercise of Paul, Andrew and the SSAS's rights as shareholders did continue after shares were issued to three new non-family

shareholders and after the Investment Agreement was entered into on 27 November 1998. I am satisfied of this for the following reasons:

(a) I accept that the Trust and then the SSAS were technically new shareholders, but in succession, the ABP Pension Fund (7 April 1997), the Trust (9 September 1998) and the SSAS (27 November 1998) were all trusts and funds for the benefit of Alan/Ann/Andrew/Paul. I do not consider that these new shareholders had any effect upon the understanding between those four family members that the affairs of PLC would be conducted on the basis of trust and confidence between them such that their rights as shareholders were subject to equitable constraints;

(b) the total number of shares held by the three new non-family shareholders was only 2,017, as against nearly 98,000 shares, held by Andrew, Paul and the SSAS. Family shareholders therefore continued to hold the vast majority of PLC's shares. I do not consider that the addition of a small number of additional shareholders, in 1998 with small shareholdings altered the essential character of the members holding the vast majority of PLC's shares (members of the same family whose relationship was based upon mutual trust and confidence). Both Paul and Andrew have accepted that, at least in 1998, they had trust and confidence in each other, with Andrew taking the lead in making management decisions and Paul supporting him. Alan and Ann also demonstrated trust and confidence in Andrew and Paul by agreeing to the issue of new shares in PLC to Andrew and Paul, in 1998, which gave Andrew and Paul control of over 70% of PLC's shares with the SSAS (of which Alan, Ann Andrew and Paul were beneficiaries) holding the vast majority of the remaining issued shares;

(c) my understanding is that all three of the new non-family shareholders were long-standing friends and/or advisers to the family, (and all except Mr Tomkinson, employees of PLC) rather than purely commercial investors, again emphasising the relationship of trust and confidence between all shareholders;

(d) the Investment Agreement imposed terms for the protection of the three new non-family shareholders, including locking Andrew and Paul in as directors and employees of PLC, but did not enable the non-family shareholders, to exercise any control over PLC themselves, as shareholders. The requirement that the business should be carried out in accordance with the policies and directions of the board of directors of PLC was simply a reflection of the position that applied in any event. Non-

family members constituted the majority of the board of PLC, but Paul/Andrew still held between them overwhelmingly the majority of PLC's shares and together with the SASS, they had the ability to pass special resolutions without the support of the non-family shareholders. In any event, what I am concerned with is equitable constraints on the rights of shareholders, not directors. **Jaffe Minority Shareholders 6th Edition** at paragraph 6.10 makes it clear that, the existence of even a complex agreement between shareholders (in my judgment the Investment Agreement is not a complex agreement) does not exclude "*the possibility of the existence of some other arrangements or understanding between the parties express or implied*"; and (e) I have considered whether the three new non-family shareholders who became shareholders in 1998 and entered into the Investment Agreement should also be regarded as part of the Quasi-Partnership (that is part of the relationship of trust and confidence built on an understanding that they and the other shareholders would be constrained in the way in which they exercise their legal rights as shareholders by equitable considerations). In my judgment, however they should not be treated as being subject to such constraints because it seems to me that the Investment Agreement gave the three non-family shareholders some rights against Andrew and Paul to insist on Andrew and Paul continuing to be involved as directors and managers in PLC and the right to call for PLC to purchase their shares. They were therefore able to dispose of their shares without the restrictions in the articles that applied to the family members disposing of their shares.

359. Mr Auld says that the Investment Agreement specifically states that it does not represent a partnership between the parties to it and that this therefore rules out the possibility of PLC being a Quasi Partnership thereafter. Clause 11 of the Investment Agreement provides "Nothing in this agreement shall constitute or be deemed to constitute a partnership between any of the parties hereto and none of them shall have any authority to bind the others in any way." This is a standard "boiler plate" clause, included in many commercial agreements, the effect of which, in my judgment is to exclude any argument that the Investment Agreement constitutes a separate partnership between the parties to it. It does not exclude the possibility that the relationship between the shareholders who are a party to that agreement is built upon mutual trust and confidence, such as to give rise to a Quasi Partnership.

360. Mr Auld also says that there is authority for the proposition that merely preparing to sell the business of a company can bring an end to any existing Quasi-Partnership, even if the sale does not go through. So, says Mr Auld the preparations made to float PLC on the AIM Market by re-registering PLC as a public limited company, bringing in external non-family shareholders and entering into the Investment Agreement, resulted in PLC ceasing to be a Quasi Partnership, even though, ultimately no attempt was made to float PLC on the AIM market. I was not referred to any authority to support that proposition and in the absence of such an authority, I do not consider that mere preparations to float PLC on the AIM market of itself (rather than analysing the effect of the individual preparatory steps as I have already done) resulted in PLC no longer being a Quasi-Partnership.

1999-2006

361. On 22 April 2003 the SSAS (a scheme for the benefit of Alan, Ann, Andrew and Paul) purchased the freehold of Enterprise House, and PLC entered into a 50 year lease with the SSAS. PLC then moved its business from Woolstitch Farm to Enterprise House.

362. On 10 October 2005 PLC carried out a buyback of Alan Parker's shares, from that point the only remaining non-family shareholders in PLC were Mr Ellis and Mr Tomkinson.

363. Mr McQuaide was appointed as a director of PLC in 2002 (Operations Director) and Mr Sharratt was appointed a director (Finance Director replacing Alan Parker) in 2006 neither of them became shareholders.

364. In December 2006: (a) ABPT was incorporated and the shares in PLC transferred to it; (b) BIL was incorporated and the 50 year lease that PLC held from the SSAS upon Enterprise House was transferred by PLC to BIL and BIL entered into a sub-lease with PLC to lease Enterprise House to it; (c) Andrew was appointed sole director of both BIL and ABPT and Paul was appointed Company Secretary of ABPT and BIL.

365. On incorporation, the shares in ABPT and BIL were held, as to 37,000 shares by Andrew, 37,000 shares by Paul, 500 shares by Mr Ellis, 667 shares by Mr Tomkinson and 8,815 shares by the SSAS. The Articles of ABPT contained restrictions upon the transfer of shares by its members similar to those contained in PLC's Articles immediately before PLC's shares were transferred to ABPT.

366. As I have already noted the Investment Agreement was abrogated by PLC becoming a wholly owned subsidiary of ABPT and no replacement investment agreement was entered

into between the shareholders of ABPT. Mr Auld suggests that this destroyed trust and confidence between the shareholders because Mr Ellis and Mr Tomkinson were deprived of the benefits of the Investment Agreement which included the obligations placed on Andrew and Paul to continue to be shareholders and directors of PLC and to dedicate all their time to its business and Mr Ellis and Mr Tomkinson were deprived of the opportunity to require PLC to acquire their shares at a price determined in accordance with a formula set out in the Investment Agreement.

367. I have found that, from the date of the Investment Agreement (27 November 1998) the rights of Andrew, Paul and the SSAS, as shareholders of PLC were subject to equitable constraints (but not the rights of Alan Parker, Mr Ellis and Mr Tomkinson as shareholders). Unless that remained the position immediately before ABPT acquired the entire issued share capital of PLC then, in my judgment it is highly unlikely that any of the shareholders in ABPT (which mirrored the shareholdings in PLC, immediately before PLC became a wholly owned subsidiary of ABPT) would be subject to equitable constraints on their rights.

368. I am satisfied that, immediately before it became a wholly owned subsidiary of ABPT there was a relationship of trust and confidence between the family shareholders in PLC (Andrew, Paul and the SSAS). I have come to this conclusion because: (a) there was a relationship of trust and confidence between the family shareholders in PLC (Andrew, Paul and SSAS) at the start of 1999, for the reasons I have already given; (b) I do not consider that the appointment of Mr McQuaide and Mr Sharratt as directors (in the case of Mr Sharratt replacing Alan Parker) had any material effect upon that position, the majority of the board were not family shareholders but the vast majority of the shares of PLC were in the hands of the family, in fact the purchase back of Alan Parker's shares consolidated the position of the family shareholders and Andrew and Paul, in particular as overwhelmingly the largest shareholders in PLC; and (c) there is no evidence that the mutual trust and confidence between Paul and Andrew did not continue during this period.

369. I consider that, when ABPT acquired the entire issued share capital of PLC, the relationship of trust and confidence between the family shareholders of ABPT (Andrew, Paul and the SSAS) continued, such that they were subject to equitable constraints on their rights as shareholders of ABPT because: (a) Andrew and Paul held a significant majority of the shares in ABPT, just as they had in PLC, before PLC became ABPT's wholly owned subsidiary; (b) there continued to be mutual trust and confidence between Andrew and Paul and the SSAS (in

which Andrew, Paul, Alan and Ann were the beneficiaries); (c) Andrew was the sole director of ABPT and so he controlled the board of ABPT (unlike the board of PLC where the majority of the directors were not members of the Bridgen family); and (d) the business of PLC continued to be managed in the same way as it had been before the restructuring with Andrew making the majority of the decisions and Andrew and Paul ultimately having control of PLC through their shares in ABPT and Andrew's sole directorship of ABPT.

370. As for Mr Auld's point that the abrogation of the Investment Agreement led to a breakdown in the trust and confidence that Mr Ellis and Mr Tomkinson had in Andrew, who was responsible for organising the restructuring, I have found that the relationships which gave rise to equitable constraints and the equitable constraints themselves only applied to the "family" shareholders and not to Mr Ellis or Mr Tomkinson. In those circumstances any breakdown in trust and confidence between Andrew and Mr Ellis/Mr Tomkinson would have no effect upon the trust and confidence and understanding between the family members that their legal rights as shareholders would be subject to equitable constraints. Mr Ellis and Mr Tomkinson were, as shareholders of ABPT, subject to the same restrictions, in ABPT's articles, upon their transferring their shares as the family shareholders (in spite of previously having been able to call upon PLC to purchase their shares, when they were shareholders of PLC). However, I do not consider that this made them Quasi-Partners, subject to equitable constraints on the exercise of their rights as shareholders of ABPT, particularly when it appears that they did not realise that, as a result of the restructuring, they lost the right to have their shares purchased by the company of which they were shareholders.

371. The purpose of the restructuring was to explore the possibility of selling either PLC or its business. For the same reason as I did not accept Mr Auld's submission that the steps taken to prepare to float PLC on the AIM market did not result in PLC no longer being a Quasi Partnership, I do not accept that the restructuring of PLC's shareholdings carried out in December 2006 to prepare it or its business for a possible sale (which sale did not occur) resulted in the destruction of the relationship of trust and confidence between the family shareholders in PLC, immediately before its shares were transferred to ABPT, or prevented that relationship of trust and confidence from passing into the family shareholdings issued in ABPT. The various changes in the shareholdings in PLC and other changes I have noted above, since it was first incorporated in April 1988, resulted, in my judgment, in an erosion of the relationship of trust and confidence and mutual understanding that existed between family

members in 1988, but not to the point at which a relationship of trust and confidence no longer existed between Paul, Andrew and the SSAS.

Was BIL a Quasi Partnership on its Incorporation in December 2006?

372. BIL was incorporated in December 2006 as part of the restructuring of the Group that also included the incorporation of ABPT and PLC becoming ABPT's wholly owned subsidiary. The shares in BIL were held by the same shareholders and in the same proportions as those in ABPT. That is: 37,000 shares held by Andrew, 37,000 shares held by Paul, 500 shares held by Mr Ellis, 667 shares held by Mr Tomkinson and 8,185 shares held by the SSAS. On incorporation, the sole director of BIL was Andrew and the company secretary was Paul. BIL, unlike ABPT had no subsidiary.

373. I have concluded that, on its incorporation, the family shareholders in ABPT were subject to equitable constraints on the exercise of their legal rights as shareholders. The shareholders and officers of BIL, on its incorporation, were the same as the shareholders and officers of ABPT. The purpose of incorporating BIL was to transfer the lease upon Enterprise House from PLC to BIL and to cause BIL to sublet Enterprise House to PLC. I consider that the same relationship of trust and confidence existed between the family shareholders of the BIL as existed between the family shareholders of ABPT, incorporated in the same month. The articles of BIL also contain a restriction on the disposal of its shares by its shareholders and it follows that, for the same reasons as I have found that the family shareholders of ABPT were subject to equitable constraints upon the exercise of their legal rights as shareholders, the family shareholders of BIL were subject to equitable constraints on their legal rights as shareholders in BIL (and for the same reasons, Mr Ellis and Mr Tomkinson were not).

Was ABF a Quasi Partnership on its Incorporation on 28 August 2015?

374. ABF is in a different position to ABPT and BIL, because it was incorporated on 28 August 2015, over 8 ½ years after ABPT and BIL were incorporated. During that intervening 8 ½ year period, Andrew had been elected as an MP and had resigned as a director of ABPT and BIL (May 2010), Mr Large had been appointed as Managing Director of PLC, but later removed (March 2010 and July 2012 respectively), Paul took over as Managing Director of PLC (around August 2012) and Andrew, on my findings, had engineered his own removal as employee and as non-executive chairman and director of PLC (his last directorship of a Group company)

(August 2014). In dealing with issue 3 for PLC (see below) I have concluded that Andrew excluded himself substantially from all further involvement with the management of the Group from the moment that he was appointed as an MP on 6 May 2010 (save for the period from the beginning of 2012 to July 2012 when Andrew involved himself in the process of terminating Mr Large's employment as Managing Director of PLC). The question of whether ABF was a Quasi-Partnership on its incorporation therefore takes place in the context of Andrew not having been a director of or involved in the management of any of the other Group companies, for over 4 years prior to the incorporation of ABF in August 2015.

375. I find that, on its incorporation, none of the shareholders of ABF were subject to equitable constraints upon their legal rights as shareholders and none of ABF's shareholders ever have been subject to such constraints. I have come to this conclusion for the following reasons:

(a) Andrew was not involved in the decision made by PLC to acquire Barn Farm which was made by the directors of PLC on 14 August 2015, the day before the auction (I have already noted that Andrew ceased to be a director of PLC in August 2014, a year earlier) nor was Andrew involved in the decision to establish a new company (in the event ABF) to purchase Barn Farm (although he was informed, on 15 or 16 August 2015 of both the successful bid for Barn Farm at the auction on 15 August 2015 and the intention that Barn Farm would be purchased in the name of a new company and did not indicate that he opposed either;

(b) for reasons that I will explain, when dealing with Issue 11 (the reasons for and circumstances of the incorporation of ABF) I have concluded that the reason why Andrew did not become a shareholder of ABF, when it was incorporated, is that Andrew did not wish to become a shareholder, because he would have to enter such shareholding in the Parliamentary Register of MPs interests. Mr Tomkinson and subsequently Paul therefore held the subscriber share in ABF upon trust for the intended shareholders of ABF (including Andrew), until shares were issued to those intended shareholders, including Andrew, in February 2017;

(c) Andrew has never been a director of, nor involved in making any decision regarding the management of ABF, for example not only was he not involved in the decision to incorporate ABF to acquire Barn Farm, but he was also not involved in the decision, in early 2016 that ABF would grow potatoes and sell them to PLC or employ the

Partnership to plant, cultivate and harvest those potatoes although again I am satisfied (because this is Andrew's evidence) that Andrew was told by Paul over Christmas 2015 that this was intended;

(d) Andrew asserts, in his Reply to the Defence to the ABF Petition that the acquisition of Barn Farm and incorporation of ABF were part of an attempt by Paul to obtain sole ownership of Barn Farm dishonestly;

(e) when the shares were eventually issued in ABF, in February 2017, unlike ABTP and BIL, no shares were issued to the SSAS, and instead 49% of the shares were issued to each of Andrew and Paul, with the remaining 2% being issued to Mr Ellis and Mr Tomkinson; and

(f) I cannot see that in those circumstances, it is even arguable that the relationship between the shareholders of ABF was one of mutual trust and confidence or that (Andrew having played no part in the decision to incorporate ABF nor taken any part in its management) there was any expectation that Andrew would take part in the management of ABF. There is no reason to conclude that Mr Ellis or Mr Tomkinson were subject to equitable constraints on the exercise of their legal rights as shareholders in ABF, any more than they were subject to such constraints in respect of their shareholdings in either ABPT or BIL. Further there is no restriction in the Articles of ABF upon a shareholder transferring their shares.

Issue 2 - did Andrew have a legitimate expectation (or was he otherwise entitled) to participate in the management of each of the companies?

376. In *Ebrahimi*, Lord Wilberforce indicates that one of the three characteristics of a quasi-partnership is that there is an agreement or understanding that all, or some of the shareholders will participate in the management of the business.

377. I conclude therefore that, Andrew never has had any legitimate expectation (nor is he otherwise entitled) to participate in the management of ABF.

378. Andrew had a legitimate expectation that those shareholders of ABPT who were subject to equitable constraints upon the exercise of their legal rights (Paul and the SSAS) would support Andrew's participation in the management of ABPT and PLC and those shareholders

of BIL who were subject to constraints on the exercise of their legal rights as shareholders (again Paul and the SSAS) would support Andrew's participation in the management of BIL.

Issue 3 - if the answer to (1) above is yes in respect of any of the companies:

(a) who were the parties to the Quasi Partnership; and

(b) when (if at all) did they cease to be Quasi Partnerships?

Who were the parties to the Quasi Partnership

379. Based upon my findings in relation to Issue 1 above, the shareholders bound by equitable constraints to support Andrew's participation in the management of the relevant Group company were:

(a) ABPT-from incorporation, Andrew, Paul and the SSAS;

(b) BIL-from incorporation, Andrew, Paul and the SSAS;

(c) ABF- none.

Did ABPT cease to be a Quasi Partnership after its incorporation?

380. Having decided that ABPT was, on its incorporation in December 2006 a Quasi Partnership (in the sense that the family shareholders were subject to equitable constraints upon the exercise of their legal rights as shareholders) I now need to decide whether that has remained the position. In doing so I will again analyse relevant events happening in specified periods.

January 2007-February 2010

381. It is common ground that, from 2008 both Andrew and Paul spent significantly less time in managing the business of PLC, the wholly-owned subsidiary of ABPT, than they had up to that point. Andrew was pursuing his political career and in December 2008, Paul purchased a 50 year lease on Home Farm. Andrew however remained executive Managing Director and Paul Transport Director during this period. Whilst the involvement of Andrew and Paul in the management of PLC declined, such that the remaining executive directors of PLC would have taken on a greater role in managing PLC, I am not satisfied that this meant that the relationship between the family shareholders of PLC was not still one which operated on the

basis of mutual trust and confidence, such as to impose equitable constraints on the exercise of their legal rights as shareholders. The position remained that Paul and Andrew between them held nearly 89% of ABPT's shares with the SSAS holding just under 10% and Mr Ellis and Mr Tomkinson just over 1%. Paul and Andrew had mutual trust and confidence in each other and there is nothing to suggest that Alan and Ann (as beneficiaries of the SSAS alongside Andrew and Paul) did not also continue to have (as "sleeping partners") trust and confidence in Andrew and Paul at this time.

March 2010-July 2012

382. This period started with the appointment of Mr Large as Managing Director PLC on 10 March 2010. Mr Zaman suggests that, notwithstanding the appointment of Mr Large as Managing Director and (what he accepts to be) at least the substantial withdrawal of Paul and Andrew from any role in the management of PLC thereafter, there was still an expectation on the part of the shareholders of ABPT that Andrew/Paul could return to take up more substantial positions in the management of PLC/ABPT at any point thereafter.

383. I am satisfied that Mr Large's appointment was intended to be permanent, regardless of whether or not Andrew was elected as an MP at the election on 6 May 2010 and was carried out to facilitate the withdrawal of both Andrew and Paul from material involvement in management of the Group (including ABPT and PLC) with no expectation that either Andrew or Paul would return to any material involvement in the management of either PLC or ABPT. I make these findings because Mr Large was employed as a permanent employee, not on some form of temporary contract. In his witness statement made in the divorce proceedings in June 2014, at paragraph 23 Andrew said "as far as they (the other shareholders) were concerned the decision had been made to appoint an external managing director to manage the business without any interference by the shareholders and we should leave him to do the job".

384. On 6 May 2010 Andrew was elected as an MP and the following day he resigned as director of BIL and ABPT and became non-executive Chairman of PLC (remaining a statutory director of PLC). Mr Sharratt was appointed sole director of BIL and ABPT in Andrew's place.

385. I am satisfied that, between July and December 2010, Andrew attended none of the monthly Board Meetings of ABPT/PLC. Andrew did attend a board meeting in January 2011, but according to paragraph 24 of Andrew's June 2014 divorce witness statement, in March

2011 the board supported Mr Large's recommendation that PLC should forward purchase potatoes as a hedge which Andrew objected to and... "these discussions caused considerable difficulties between myself and the other shareholders at the time in this regard, the court should be aware that I have not attended a formal board meeting since the decision was made in March 2011. The only duties I have performed for the company since this date is in connection with the eventual and much belated dismissal of Paul Large and attendance at the subsequent employment tribunal."

386. I am not satisfied that the family shareholders remained subject to equitable constraints on the exercise of their legal rights as shareholders from March 2010, which required them to support the participation of Andrew and Paul in the management of ABPT/PLC until the departure of Mr Large as Managing Director in July 2012. I come to this conclusion for the following reasons:

- (a) I have found that, when Mr Large was appointed Managing Director of PLC it was the intention of both Andrew and Paul that they would leave the management of the PLC to Mr Large and the other executive directors. I am also satisfied that this was intended to be a permanent arrangement with Andrew pursuing his political career as an MP and Paul pursuing his interest in farming. The content of Andrew's witness statement in his divorce, which included a statement that he did not take any material part in the management of PLC or the Group more generally, save for dealing with the removal of Mr Large as managing director between early 2012 and July 2012 and the subsequent Employment Tribunal Hearing, is consistent with those conclusions; and
- (b) given that I have found that the appointment of Mr Large was intended to be permanent and that Andrew and Paul both withdrew from their remaining involvement in the management of ABPT/PLC, from May 2010 (having reduced their involvement before that date) I have come to the conclusion that it was not the intention of the family shareholders after May 2010 that Andrew or Paul would be involved in the management of ABPT/PLC and nor was there an expectation that they would return to a management role in the future. As HHJ Eyre made clear in *Worsley*, the question of what, if any equitable restraints on the legal rights of shareholders apply, depends upon the nature of the understanding or agreement between shareholders. I am satisfied that, whatever other equitable constraints

may have applied to the family shareholders in the period from 7 May 2010, they did not include a requirement that they support the involvement of Andrew and/or Paul in the management of ABPT/PLC, during that period, because there was no expectation or understanding that Andrew or Paul would be materially involved in the management of ABPT/PLC, at least for so long as Mr Large remained in office.

1 August 2012 – 31 December 2012

387. During this period, following the removal of Mr Large as Managing Director, Paul took up the position of Managing Director. I am satisfied (this is Paul's evidence, not disputed by Andrew) that Paul asked Andrew to return and take up the role of Managing Director, but Andrew told Paul that he was not prepared to do so and that Paul would have to do the job and that reluctantly Paul agreed to do so.

388. This period ends immediately before the termination of Andrew's employment and remaining office as non-executive director and chairman of PLC.

389. I am satisfied that from around August 2012 Paul was responsible, together with Mr Sharratt for most of the day-to-day decisions made concerning the business of PLC and that whilst Paul kept Andrew informed from time to time as to what was going on, Andrew left Paul to manage PLC and the Group more generally with very little input from Andrew. I make these findings because, although Andrew suggests that he made material input into management decisions during this period, I prefer the evidence of Paul/Mr Ellis/Mr Tomkinson/Mr Sharratt that during this period Andrew was not materially involved in the management of PLC/ABPT. I note that this conclusion is also consistent with the evidence set out in the witness statement made by Andrew in his divorce proceedings.

390. As to the understanding or agreement between the family shareholders, clearly that changed after Mr Large's departure in that Andrew and Paul (reluctantly in the latter case) agreed that Paul would become Managing Director of PLC. Andrew was thereby reposing trust and confidence in Paul to take control of the management of ABPT/PLC and I have no reason to suppose that Alan/Ann (as beneficiaries alongside Andrew/Paul in the SSAS) did not also agree to Paul's appointment and repose their trust and confidence in Paul. Inevitably there was an expectation that Paul would take part in (and indeed lead) the management of PLC, Andrew played no material role in the management of PLC/ABPT, having refused Paul's request that he return as Managing Director, and I am not satisfied that there was any

expectation that Andrew would return to any material management role in ABPT/PLC, beyond holding office as non-executive Chairman of PLC or that the family shareholders were bound to support the return of Andrew to a substantive management role.

1 January 2013 – 31 December 2016

391. During this period Andrew issued a divorce petition against his then wife, Jackie in January 2013. In May 2013 Andrew (on his own evidence) instigated the instruction of Baker Tilly to review directors remuneration packages. I find that he did so in the expectation that Baker Tilly would find that his remuneration package was excessive when compared to the other directors, because he was the highest-paid director, notwithstanding that he was non-executive chairman and had very little involvement in the management of PLC. I find that Andrew instigated the review in the hope that it may be of some benefit to him in seeking to reduce his liability to pay money to Jackie.

392. In June 2013 Andrew issued Form A in his divorce proceedings which is an application for a financial remedy order. In the same month Baker Tilly concluded that Andrew was over remunerated compared to other directors (as I have found Andrew expected them to say).

393. The financial relief hearing in Andrew's divorce took place on 9 and 10 July 2014. Andrew presented evidence to the court and his counsel submitted that there was a real possibility of Andrew being made redundant from his role as non-executive chairman and employee of PLC.

394. Between 4 August 2014 and 2 September 2014 correspondence was exchanged between Mr Sharratt, acting for PLC and Andrew, dealing with the termination of Andrew's employment by, and his appointment as non-executive director of PLC. I have found that Andrew orchestrated that correspondence to give the impression that it was the decision of the board of PLC that his employment/directorship should be terminated when in fact Andrew wanted his employment and directorship to be terminated because he considered that this may assist him to reduce his liability to pay money to Jackie.

395. I am satisfied that any agreement or understanding amongst the family shareholders that Andrew would be involved in the management of ABPT/PLC going forward ceased when Andrew agreed to the termination of his employment by PLC and, on my findings, resigned as non-executive chairman of PLC, because: (a) after 1 August 2014 Andrew continued to have no material involvement or engagement in the affairs/management of PLC/ABPT); and (b) Andrew, having brought about the termination of his own employment/directorship of PLC

(and having accepted substantial compensation for termination of his employment with no agreement that he even act as a consultant (a possibility which was mooted but not pursued)) could have no expectation that Paul and the SSAS would support his return in a management/director role.

396. Mr Zaman suggests that, even if Andrew resigned as de jure director of PLC, he still remained a de facto director. Mr Zaman asserts that (a) Andrew returned before Christmas 2015 when there was a crisis at PLC in its preparations for Christmas, in order to help resolve that crisis; and (b) Paul sent a text to Andrew on 14 January 2016 apologising for the problems over the Christmas period and promising that it would not happen again. Andrew has produced communications between him and the Conservative Party whips' office about him taking time off before Christmas 2015 and suggests that this is evidence that Andrew came back to Enterprise House before Christmas 2015 to help resolve the crisis. Paul, in contrast, says that Andrew refused to come back to help and offered only moral support via a few text messages which have been disclosed, for the issues that Paul was dealing with.

397. I prefer Paul's evidence and find that Andrew did not return to Enterprise House to help resolve the crisis and instead confined himself to exchanging a few text messages with Paul, containing general words of encouragement. I find this because I believed Paul's evidence on this point, rather than Andrew's and because I would expect Andrew to be able to produce more than simply a request to the Whips office for time off to support his case and none of the short text messages passing between Andrew and Paul refer to or imply that Andrew did attend Enterprise House in person before Christmas 2015 to help resolve the crisis. If he had done so, I would expect there to be some mention of it in those text messages, but there is none. Far from showing engagement by Andrew with PLC's business, in the period from Andrew's resignation up to the end of 2016, on my findings, Andrew's failure to return to help with a crisis, before Christmas 2015, even for a short period of time and the existence of only a few short texts passing between Andrew and Paul at the end of 2015/beginning of 2016 with general words of encouragement from Andrew to Paul in relation to that crisis (in a case in which a very substantial number of texts/emails have been disclosed) tends to support my conclusion that Andrew did not engage with PLC/ABPT's affairs from August 2014 to the end of 2016 and certainly could not be said to have acted as a de facto director of PLC, as Mr Zaman suggests.

2017 to date

398. If I am wrong and there remained an understanding between the family shareholders that Andrew was entitled to expect them to support his return to take part in the management of ABPT/PLC and/or to be appointed as a director of one or both of them, then I am satisfied that that understanding ended when Andrew actually sought re-appointment as non-executive director and Chairman of the Group companies from the beginning of 2017.

399. I accept the evidence of Paul/Mr Ellis/Mr Tomkinson/Mr Sharratt (not challenged by Mr Zaman, other than in the case of Paul and not denied by Andrew) that when Andrew sought the support of shareholders of ABPT for his reappointment as non-executive Chairman of PLC he acted in an aggressive and arrogant manner, calling the other directors and shareholders “a bunch of wankers”, “liars and thieves” and suggesting to Mr Ellis that his mouth had been “stuffed with silver” by Paul. I am also satisfied that Paul/Mr Ellis/Mr Tomkinson, as shareholders of ABPT/BIL/ABF and the directors of a ABPT/PLC/BIL/ABF, acting bone fide, genuinely formed the view: (a) that Andrew was only interested in promoting his own financial interests rather than those of the Group companies; (b) the executive directors would be unable to work with Andrew given his behaviour; and (c) it would in those circumstances not be in the interests of the Group companies for Andrew to be reappointed as a director of them. All of that leads me to conclude that even if (contrary to my finding) there was a continuing understanding amongst the family shareholders (Andrew, Paul and the SSAS) and/or the non-family shareholders (Mr Ellis and Mr Tomkinson) that Andrew was entitled to their support for him to return and take part in the management of PLC and be appointed as a director of it, then that understanding and the trust and confidence on which it was based, was destroyed as a result of Andrew’s behaviour.

400. It was reasonable for the shareholders to conclude that the executive directors would be unable to work with Andrew because this was obvious from the way in which Andrew spoke to them in 2017.

401. It was reasonable for the shareholders to form the view that Andrew was only interested in promoting his own financial interests because:

- (a) I accept the evidence of Paul, Mr Ellis, Mr Sharratt and Mr Tomkinson that at the start of each shareholders’ meeting in 2017, Andrew told them how financially destitute he was;

(b) I accept the evidence of Paul, Mr Ellis, Mr Sharratt and Mr Tomkinson that Andrew only proposed to work for half a day a week when Parliament was sitting and on one day per week when it was not for remuneration of £50,000-£60,000 per year, I accept that Paul, Mr Ellis and Mr Tomkinson genuinely believed that paying that amount of money to Andrew for him to dedicate so little time to the Group would not be in the Group's interests;

(c) Andrew had received substantial financial support and benefits from the Group, before 2017 in terms of: (i) BIL purchasing both the Willows and then the Old Vicarage; on my findings to help Andrew, rather than because it was in the interests of BIL to do so; (ii) loans; (iii) a compensation payment for loss of his employment by PLC, in August 2014 in excess of his strict entitlement; and (iv) a substantial dividend payment from ABPT, to help Andrew clear outstanding legal fees from his divorce and the tax on that dividend had been met by ABPT. I accept the evidence of Paul, Mr Tomkinson, Mr Sharratt and Mr Ellis that Andrew had also suggested that the other shareholders of ABPT should waive their entitlement to a dividend in order to maximise the dividend Andrew would receive.

402. Mr Zaman suggests that the trust and confidence between shareholders was lost as a result of the unfairly prejudicial conduct of which Andrew complains in his ABPT Petition, before Andrew's behaviour, from early 2017 onwards occurred. Therefore, says Mr Zaman, as the catalyst for the break down in trust and confidence was Paul's behaviour, rather than Andrew's, there was a continuing expectation that Andrew would be entitled to take part in the management of PLC.

403. I do not accept Mr Zaman's submission. In his letter of 1 September 2017, addressed to Paul, Andrew asserted that the affairs of the Group companies had been conducted in a manner unfairly prejudicial to Andrew. Andrew's complaints centred upon his exclusion from the management of the company and from financial benefits in the form of remuneration and dividends. Other than that Andrew only refers to conflicts of interest between Paul's Partnership and PLC's business and the use of William and Sam's time, as employees of PLC, for the benefit of the Partnership. I am satisfied that those complaints would not justify Andrew (or the SSAS) losing trust and confidence in Paul because:

(a) as I have found Andrew orchestrated his own removal as employee and director of PLC in August 2014 but still received financial support from PLC thereafter in the form of compensation for loss of office, loans and substantial dividend payments;

(b) none of the allegations of fraud now made by Andrew feature in his letter of 1 September 2017 and I do not consider that his vague reference to conflicts of interest and the use of William and Sam for the benefit of the Partnership, would justify how he behaved from the beginning of 2017, towards the directors and other shareholders, when seeking their support for his re-employment by PLC;

(c) as I will relate, later in this judgment I have not found (save in relation to Paul causing Partnership vehicles to be placed on PLC's Operator's Licence) that Paul has acted in a deliberately dishonest or fraudulent manner in relation to Group companies and therefore the factual basis for the allegations that Andrew makes in his petition (insofar as they are made out) are not, in my judgment, a basis upon which he (and the SSAS) would be entitled to lose all trust and confidence in Paul, had he known about those facts before he behaved as he did from the beginning of 2017; and

(d) I am satisfied that the anger aggression and insulting attitude of Andrew towards Paul, Mr Ellis, Mr Tomkinson and Mr Sharratt and other matters mentioned by me in paragraph 399 above, mean that, even if Paul were responsible for a breakdown of trust and confidence before Andrew behaved in the manner he did, the Respondents were not bound, acting in good faith in the interests of PLC/ABPT to support the re-appointment of Andrew to the boards of those companies.

Did BIL cease to be a Quasi Partnership after its incorporation?

404. Andrew resigned as sole director of BIL and was replaced by Mr Sharratt on 7 May 2010, the day after Andrew was elected an MP. I am satisfied that Andrew played no material part in the management of the BIL after that date, although he did persuade Paul to persuade Mr Sharratt (sole director of BIL at the time) to cause BIL to purchase the Old Vicarage from Andrew, in December 2011 for £1.5 million.

405. The main project that has been undertaken by BIL, is the acquisition of the AD Plant. Until at least September 2014 it was anticipated that WPS may acquire the AD Plant but, in that month the decision appears to have been taken that WPS would not acquire the AD Plant and instead BIL would do so. Andrew played no part in that decision. A number of loans were

made by BIL to Andrew at his request (including a loan of £60,000 on 23 December 2014) as the counter party to those loans, Andrew played no part in the decisions that BIL would make those loans to him.

406. In my judgment, the equitable constraints upon the family shareholders of BIL, which existed at the date of its incorporation, creating an understanding that the family shareholders would support Andrew's involvement in the management of BIL ceased on 7 May 2010, when Andrew resigned as its sole director because: (a) Andrew was replaced as sole director by Mr Sharratt, who was not a shareholder in BIL; (b) the evidence, in my judgment demonstrates that, after Andrew resigned as director of BIL and was replaced by Mr Sharratt, Mr Sharratt made all the management decisions for BIL, in conjunction with Paul. For example that BIL, rather than WPS would acquire the AD Plant, that BIL should purchase the Old Vicarage from Andrew, which Mr Sharratt says he was reluctant to do but was persuaded to do by Paul. There is no evidence that Mr Sharratt consulted either Mr Ellis or Mr Tomkinson in relation to these decisions and they deny that they were involved in making them; (d) for those reasons I consider that following Andrew's resignation, the management of BIL was no longer carried out on the basis of mutual trust and confidence between the family shareholders generally, but rather between Mr Sharratt, as sole director and non-shareholder and Paul, one of the family shareholders; and (e) there was no expectation amongst the family shareholders that Andrew would take part in the management of BIL again and that they would therefore support him doing so.

407. If I am wrong and the understanding of the family shareholders that Andrew would be entitled to their support in returning to take part in the management of BIL somehow survived his resignation as director of BIL and his failure to participate in its management thereafter, then the trust and confidence upon which that understanding was based was destroyed by Andrew's conduct from the beginning of 2017, in the same way as it was for ABPT (ending any understanding the Andrew would be entitled to participate in the management of PLC) (see paragraphs 399-401 above).

TERMINATION OF ANDREW'S EMPLOYMENT AND DIRECTORSHIP/EXCLUSION

408. It is convenient to deal with the issues under this heading, other than in the order in which they appear in the agreed list of issues (because for example it makes sense to answer the questions, did Andrew request to be appointed as a director and was that request refused, before answering the question was Andrew wrongly or unfairly excluded from management). I will however retain the numbering of each issue as they are set out in the agreed list of issues.

Issue 4 - Was the termination of Andrew's employment and directorship in August 2014 with his consent?

409. I have already found (paragraphs 227-237) in considering the credibility and honesty of Andrew, that he not only consented to his removal as an employee of PLC (and resigned as non-executive director/chairman of PLC) but he also orchestrated his correspondence with Mr Sharratt in an attempt give the false impression that he was not consenting to the termination of his employment and resigning as director of PLC.

Issue 5 - Did Andrew have a legitimate expectation of being (or was he otherwise entitled to be) re-appointed to management (as a de jure director or otherwise) after August 2014?

ABPT/PLC

410. I have already found that the non-family shareholders of ABPT were never subject to equitable constraints affecting the exercise of their rights as shareholders and equitable constraints that affected the exercise by the family shareholders of ABPT of their legal rights, as shareholders (based upon an understanding that Andrew would be entitled to participate in the management of ABPT/PLC) such that they were bound to support Andrew's participation in the management of ABPT/PLC, ended:

- (a) in May 2010, when Andrew resigned as director of ABPT and became non-executive Chairman of PLC and was replaced as Managing Director by Mr Large; alternatively, if that is wrong;
- (b) in August 2014 when Andrew orchestrated the termination of his employment by PLC and resigned as de jure director; alternatively, if that is wrong: then

(c) in early 2017, when Andrew's behaviour, in seeking his re-appointment as non-executive chairman of ABPT/PLC ended those obligations.

411. It follows that Andrew's legitimate expectation of being (or being otherwise entitled to be) appointed to the management of ABPT/PLC (as de jure director or otherwise) ended on one of those 3 dates.

BIL

412. I have found that the non-family shareholders of ABPT were never subject to equitable constraints affecting the exercise of their rights as shareholders and the equitable constraints that affected the exercise by the family shareholders of BIL of their legal rights, as shareholders (based upon an understanding that Andrew would be entitled to participate in the management of BIL) such that they were bound to support Andrew's participation in the management of BIL, ended when Andrew resigned as sole director of BIL and was replaced by Mr Sharratt on 7 May 2010 (and thereafter did not participate in the management of BIL). It follows that Andrew's legitimate expectation of being (or being otherwise entitled to be) appointed to the management of BIL (as de jure director or otherwise) ended on 7 May 2010.

ABF

413. I have found that Andrew never was involved in the management of ABF and there was never any expectation that he would be involved in its management.

Issue 8 - Did Andrew request to be re-appointed to management (whether as a de jure director or otherwise) and if so when and on what basis?

414. Mr Zaman says that this issue does not arise upon the pleadings, however, if Andrew did not request to be re-appointed to management, then this is at least relevant to the question of whether Andrew was wrongly or unfairly excluded from management, from August 2014, which is an agreed issue (Issue 6).

415. It is part of Andrew's case that he initially raised the question of his returning to take part in the management of the Group by suggesting to Paul, at around Christmas 2015 that he would not seek re-election as an MP at the next election, and return to manage the Group, but he says that his parents then visited him and told him that there was no place for him at the business. I do not accept that evidence: (a) there are no documents referring to this, either contemporaneous or near contemporaneous referring to the asserted request or response of

Andrew's parents; (b) given Andrew's forceful character and his view of his own value to the business, I think it highly unlikely that he would be put off seeking his re-appointment, simply because his parents told him that there was no place for him; and (c) Paul denies it and I prefer the evidence of Paul on this point.

416. The first document in which Andrew refers to his request to be appointed as a director is his text to Mr Tomkinson of 14 January 2017. This text says "Derek, I think I have to return to the company as chairman, what are your thoughts? Can we speak at lunchtime today to discuss? Andrew". Paul then sent a text to Andrew on 30 January 2017 which says "I understand you are coming back to AB as Chairman" to which Andrew responds "Yes Paul I wish I didn't have to".

417. On 5 February 2017 Andrew sent to each of the shareholders of ABPT/BIL and to Mr Sharratt an email in which he set out his request to return as non-executive director/Chairman and set out details of what he would contribute towards and do, if appointed. Where relevant, that email said "I write to request support from shareholders to my return as chairman of AB Produce.... I would stress that I do not wish to take over the day-to-day running of the business. I am well aware that serving as the MD requires a full attendance and immersion in the business in order for it to be successful...". Andrew then goes on to say (amongst other things) that he wishes to ensure that there are board meetings on a bimonthly basis for PLC, BIL and ABF and wishes to work with the managing director and executive directors to develop a clear strategy for each of the businesses.

418. In my judgment Andrew was proposing that he should return as non-executive chairman of all the Group companies. Whilst the email refers only to "returning as chairman of AB produce" and Andrew had resigned as a director of ABPT and BIL as long ago as 2010 (but only as non-executive chairman of PLC, in August 2014) Andrew's reference to wishing to ensure that there were full board meetings on a bimonthly basis for all three trading companies (PLC, BIL and ABF) was only something that Andrew could realistically have ensured happened if he was a director of all three trading companies and I consider it likely that Andrew, in referring to returning as chairman of AB Produce meant ABPT and all three trading companies.

Issue 9 - Was Andrew's request refused (and if so on what basis) and if it was, was this wrongful or unfair?

419. Andrew says that this issue also does not arise on the pleadings, but I consider that the question, "was Andrew's request refused?", has to be answered either separately, or as part of Issue 6. The remainder of Issue 9 however appears to be a duplication of Issue 6 and I will deal with the basis upon which Andrew's request was refused and whether the refusal was unfair as part of Issue 6.

420. Andrew's request, as I have found it to be, to be appointed non-executive chairman of all the Group companies was refused by those shareholders of ABPT/BIL/ABF who participated in the meetings in 2017 when Andrew pressed his request, namely Paul, Mr Ellis and Mr Tomkinson. The SSAS does not appear to have been represented at any of those meetings. Andrew appears to have accepted that the votes of Paul, Mr Ellis and Mr Tomkinson against his re-appointment as non-executive Chairman of the Group companies were sufficient to vote down his request at each of those meetings, it is not disputed by either party that they were not sufficient to vote it down and I therefore find that Andrew's request to be re-appointed as non-executive Chairman of the Group companies was refused.

Issue 7 - Did Andrew continue to participate in the management of the companies after August 2014?

421. I have already found that Andrew was not involved in any material way in the management of PLC in the period between August 2014 and the end of 2016.

422. In paragraph 188 of his witness statement, Andrew says that, in spite of the shareholders refusing to agree to his proposal that he be re-appointed non-executive chairman he still assisted the Group in 2017 and 2018 in the following ways:

- (a) Paul had fallen out with Envitec, the German supplier of the AD Plant who were owed money for the installation of the AD Plant and that, at Paul's request, Andrew approached Envitec and obtained the release of computer cards needed for the operation of the AD Plant;
- (b) Paul asked him to look at the Lidl contract and he gave his opinion that agreeing of an annual price was a bad idea. There is a text dated 2 March 2018 from Andrew to Paul

which says "I think that I had better come and look at the numbers for the Lidl contract tomorrow";

(c) he liaised with Mr Snipe in connection with the AD Plant (although he does not say about what);

(d) he had discussions with North West Leicestershire District Council (although he does not say about what);

(e) he arranged tours around Parliament and attended charity dinners with big customers of PLC; and

(f) he told Paul that he thought he could get planning permission for a bungalow to be built on a plot at the rear of the Willows and he liaised with the planning officer and architect about obtaining such planning permission. There is an email exchange between Andrew and Paul dated 17 January 2018. Andrew sends to Paul designs for a bungalow created by David Grainger Design. Paul suggests the design should be different to the bungalow already built and Paul asked for details of the architects costs for designing the bungalow and obtaining planning permission. Andrew responded that the cost will be £2,650 plus VAT (excluding planning fees) and he suggests they get on with the planning application as soon as possible.

423. It is perhaps surprising that, after Andrew's request to return as non-executive chairman of the Group was refused, and Andrew had sent a letter to Paul on 1 September 2017, threatening the commencement of Section 994 proceedings, that Andrew was involved with any issues relating to the Group's businesses at all. I do not however regard the matters to which Andrew refers as amounting to material participation in the management of the Group for two reasons: (a) over a 2 year period the amount of Andrew's involvement, on his case in matters relating to the businesses of the Group is relatively small and amongst the vast amount of disclosure in this case communications with Andrew on only 2 dates (17 January 2018 and 2 March 2018) have been produced); and (b) none of the matters to which Andrew refers in paragraph 188 of his witness statement persuade me that he was materially involved in making or implementing management decisions as opposed to being asked to assist with or involving himself in a small number of specific issues. I note also that none of the issues relate to the business of ABF.

Issue 6 - Was Andrew wrongly or unfairly excluded from management (as a de jure director or otherwise) from August 2014?

424. I find that Andrew was not wrongfully excluded from the management of ABPT/BIL/PLC, after August 2014, for the following reasons:

(a) for the reasons I have already given, I have found that: (i) the non-family shareholders in ABPT/BIL/ABF (Mr Ellis and Mr Tomkinson) were never subject to equitable constraints upon their legal rights, as shareholders, which required them to support Andrew's participation in the management of those companies, or of PLC; (ii) the family shareholders of ABPT/BIL (Paul and the SSAS) were not subject to equitable constraints on their shareholdings in PLC, which required them to support Andrew's participation in the management of PLC, after: - May 2010 (after Mr Large had been appointed Managing Director of PLC and Andrew resigned as director of ABPT/BIL and became non-executive director/chairman of PLC following his election as an MP); alternatively, - August 2014, when Andrew resigned as non-executive director (Chairman) of PLC and consented to the termination of his employment by PLC; alternatively - early 2017, when Andrew requested that the shareholders of PLC re-appoint him as non-executive Chairman of PLC (because of the way Andrew behaved when he sought that re-appointment); and (iii) there were never any equitable constraints on the family shareholder of ABF (Paul) requiring him to support Andrew's participation in the management of ABF;

(b) even if any of the shareholders did have equitable constraints on their legal rights as shareholders which required them to support Andrew's re-appointment as director of the Group companies or any of them, then, such equitable constraints would not, in my judgment, have required them to support Andrew's re-appointment as director, if they reasonably considered that the appointment of Andrew to that position would be significantly detrimental to the interests of the relevant Group company;

(c) I have set out in paragraphs 398-401 above what I accept to be the reasons why the shareholders ABPT/BIL/ABF did not support Andrew's request to be appointed as non-executive director of the Group companies. I have concluded, in those paragraphs, that it was reasonable, in those circumstances for the shareholders, acting bona fide, to form the view that it would cause material harm to the businesses of the Group companies

if Andrew did return as director. I find this, notwithstanding that, I accept that Andrew was involved in the specific activities to which I refer in paragraph 421 above, because, in my judgment, there is a significant difference between, on the one hand, Andrew being involved in specific issues, in many cases working on his own, rather than with the executive directors and, on the other hand, Andrew attending board meetings and being involved in making significant decisions about the management of Group companies, in circumstances where Andrew had behaved as he did in 2017, at meetings of shareholders/directors when seeking his reappointment as non-executive chairman; and

(d) finally Mr Zaman suggested that if Mr Tomkinson/Mr Ellis had known, in 2017, when considering Andrew's request to be appointed non-executive director, of the activities Paul had been engaged in (putting Partnership vehicles on PLC's Operator's Licence, backdating documents and causing the Partnership to use PLC's resources) then they would have taken a different view of Andrew's request and so the refusal of Andrew's request was unfair because Mr Ellis and Mr Tomkinson were unaware of that behaviour when they voted. I do not agree, Mr Ellis and Mr Tomkinson accepted that Paul's use of PLC's Operator's Licence lowered their opinion of Paul and effected their trust in him, I have not accepted that Paul acted dishonestly in signing the loan agreement between PLC and ABF backdated to 14 September 2014 and I consider that Mr Ellis/Mr Tomkinson would have considered Mr Sharratt to be primarily responsible for that happening. Finally, whilst I consider that Mr Tomkinson/Mr Ellis would have wanted to ensure that use by the Partnership of PLC assets ceased or was properly recorded, and accounted for, I do not think that they would have concluded that Paul was using PLC assets in a deliberate attempt to gain a financial advantage for the Partnership at the expense of PLC. Had they known those three things, I consider that Mr Ellis and Mr Tomkinson would still have concluded (because of the way in which Andrew pressed his request to be appointed as non-executive chairman of the Group Companies) that the executive directors would be unable to work with Andrew, that Andrew was simply interested in furthering his own financial interests and not in acting in the best interests of the Group companies and for those reasons that it would not be in the best interests of the Group companies for Andrew to be appointed a director of them or any of them.

Issue 10 - Have the Respondents made an offer to acquire Andrew's shares at full independent value; and if not is his exclusion (arising out of all any Quasi-Partnership and legitimate expectation) wrongful or unfair.

425. It is common ground that the Respondents have not made such an offer. Andrew's exclusion from the management of PLC is not wrongful or unfair for the reasons set out in paragraph 423 above.

AB FARMS LIMITED

Issue – 11 - What were the reasons for and the circumstances of the incorporation of ABF (formerly Shartom Developments Limited)? and

Issue - 12 - In what circumstances and on what basis did ABF acquire Barn Farm?

426. For convenience I will deal with issues 11 and 12 together.

427. The simple answer to the question of why ABF was incorporated, on 28 August 2015, is that it was incorporated in order to complete, in its name, the acquisition of Barn Farm, which Mr Ellis had successfully bid for at the auction which took place on 15 August 2015. However, two competing reasons are put forward as to why Barn Farm was acquired in ABF's name, rather than in the name of PLC (given that it was PLC's money that was used to fund the purchase):

- (a) Andrew says that the incorporation of ABF and purchase in its name of Barn Farm had the underlying purpose of enabling Paul to acquire Barn Farm for his own benefit;
- (b) Mr Sharratt and Paul say (and Mr Ellis and Mr Tomkinson support this) that ABF was incorporated and Barn Farm acquired in ABF's name, in order to separate the business opportunities offered by Barn Farm (cold storage facilities for potatoes, development opportunities for dilapidated outbuildings and to construct new cottages, and the opportunity to grow crops, not necessarily potatoes) from the business of PLC. In particular they say that they wished to ensure that any profit made as a result of the acquisition of Barn Farm did not appear in PLC's accounts as this may be used, by PLC's customers as an argument for PLC to reduce its prices.

428. Andrew's ABPT Petition asserts that:

- (a) in or around August/September 2015, he was informed by Paul that “we have bought a farm” referring to Barn Farm. Andrew understood Barn Farm was to be purchased by PLC;
- (b) unknown to Andrew, ABF was incorporated on 28 August 2015 with Mr Tomkinson as sole director and holder of the subscriber share;
- (c) ABF purchased Barn Farm for £1,006,000 using funds provided by PLC;
- (d) it is to be inferred that Mr Tomkinson was holding the subscriber share for Paul who had kept the details of the transaction to himself;
- (e) on 13 July 2016, Mr Tomkinson resigned as director of ABF and transferred the legal interest in the subscriber share to Paul and Paul was appointed a director, no consideration was paid for the transfer of the share which Mr Tomkinson had been holding as nominee for Paul;
- (f) there can be no innocent explanation for the above, it was a secret breach of fiduciary duty by Paul; and
- (g) upon Andrew challenging Paul the following occurred: (i) on 26 May 2017, Mr Tomkinson was reappointed as a director of ABF along with Mr Ellis, Mr Sharratt had already been appointed on 13 September 2015; and (ii) under threat of proceedings in August 2017, Paul altered the shareholding in ABF so that the shares were held as to Andrew 49 shares, Paul 49 shares, Mr Ellis 1 share and Mr Tomkinson 1 share.

429. In their Defence, the Respondents say that Andrew was told that Barn Farm would be put into the name of a new company in which shares would be issued in line with the shares which had been issued in ABPT and at paragraph 39.2, the Respondents say that Andrew “appears to advance a case that Paul intended to misappropriate over £1 million from PLC in order to acquire sole ownership of Barn Farm.

430. In Andrew’s Reply, at paragraphs 2(1) he states that Paul did not tell him that Barn Farm was to be put in the name of a new company, in which shares would be issued in line with the shares in ABPT and at paragraph 4 (7) of his Reply, Andrew makes it clear that he is asserting that Paul intended to misappropriate £1 million from PLC by acquiring sole ownership of Barn Farm.

431. Mr Zaman says that the following matters support Andrew’s case:

- (a) the reason given, by the Respondent’s, for transferring the subscriber share in ABF (taken up in the name of Mr Tomkinson) from Mr Tomkinson to Paul, on 13 July 2016 is

that KPMG had advised that there may be issues, if Mr Tomkinson died with the subscriber share still being registered in his name (the problem being that his estate might treat that share as being owned beneficially by Mr Tomkinson) and so the subscriber share was transferred to Paul, but, says Mr Zaman: (i) no document has been disclosed which demonstrates that KPMG gave the alleged advice; and (ii) transferring the subscriber share to Paul did not solve any problem associated with the holder of the subscriber share dying whilst holding that share, because Paul might have died, whilst holding the subscriber share and the same problem may then arise with Paul's estate;

(b) contemporaneous documents show that the true intention of transferring the subscriber share, from Mr Tomkinson to Paul was that it was intended that Paul would become the sole owner of ABF (and through ABF, Barn Farm). The documents are: (i) an email dated 24 June 2016 sent by Mr Sharratt to Carol Malin of HSBC bank which says "I can now advise that in fact Andrew will not be a shareholder of AB Farms Ltd this company will be primarily if not 100% owned by Paul Bridgen with Paul and myself as directors..."; and (ii) an email dated 13 July 2016 (the day on which the subscriber share was transferred) from Mr Sharratt to Mr Tomkinson which says "having had a discussion with Paul (who has been in discussions with Andrew) it now seems probable that the farming enterprise will be a personal venture rather than part of AB group per se. I am in the process of formalising the loan agreement between AB Produce [PLC] and AB Farms [ABF] re-the purchase of Barn Farm. As part of this exercise it would be appropriate to install Paul now as sole shareholder and as a director of AB Farms Limited. I will remain as a director for operational ease..".

(c) there was no loan agreement in place on 14 September 2015 between PLC and ABF and this left it open to Paul to take ABF, using borrowings from PLC;

(d) the backdating of the loan agreement and resolution on 22 November 2016, so that they appeared to have been executed on 14 September 2015, were part of the process by which Paul was attempting to obtain Barn Farm for his own benefit; and

(e) the allotment of shares to Andrew only occurred on 6 February 2017, after Andrew protested and the change of shareholders was not recorded at Companies House until 14 September 2017 (after Andrew had threatened to issue a petition under Section 994 CA 2006, in his letter dated 1 September 2017).

432. I reject Andrew's case that the incorporation of ABF, ABF's acquisition of Barn Farm and/or the transfer of the subscriber share in ABF from Mr Tomkinson to Paul were part of a scheme aimed at enabling Paul to benefit personally from the acquisition of Barn Farm.

433. I accept that a new company was established (ABF) to acquire Barn Farm because Mr Sharratt and Paul considered that there was at least a potential benefit in separating the business of PLC from any profit made as a result of the acquisition of Barn Farm (that benefit, for PLC being that customers of PLC would not be able to use any profits made by PLC, following the acquisition of Barn Farm, if it was acquired in PLC's name, as a justification for seeking a price reduction for the supply to them of product by PLC). So far as Mr Tomkinson and Mr Ellis are concerned, I am satisfied that they supported that strategy: (a) Mr Tomkinson was clearly aware (as initially the holder of the subscriber share and as a director of ABF) that ABF had been incorporated and had acquired Barn Farm, he said he was supportive of the rationale for not holding Barn Farm in PLC, but instead incorporating a separate company to acquire it; and (b) Mr Ellis says that he does not recall it being decided, before the auction how the purchase of Barn Farm would be structured, but he and the other directors relied on Mr Sharratt to advise on how to structure it, he also said that many other food processors grow food using separate companies to do so and that the storage facilities for potatoes at Barn Farm and potential to grow food there were two of the reasons (apart from development potential) discussed by the board of PLC for purchasing Barn Farm.

434. In his witness statement, at paragraphs 165-166, Andrew says that Paul told him in around September 2015 that we have purchased a farm, it had cost over £1 million, PLC had funded the purchase and Paul was going to set up a new company to purchase Barn Farm. This last point is inconsistent with Andrew's PLC Petition, which says that he understood Barn Farm was to be purchased by PLC and directly contradicts the first part of paragraph 2(1) of Andrew's Reply, in which Andrew says that Paul did not tell him that Barn Farm was to be put in the name of a new company.

435. I have already said, in considering the credibility and honesty of Andrew as a witness, that, given that all of the directors of PLC and Andrew were aware, well before Barn farm was transferred to ABF, on 14 September 2015, that PLC was providing the purchase price to acquire Barn Farm, but it was to be transferred into the name of a new company (in the event ABF) it seems highly unlikely that there could have been any intention by Paul (with or without the assistance of other directors of PLC and with or without the assistance of the directors of

ABF) that Paul would acquire the benefit of Barn Farm for himself. I put it to Andrew that, given that he accepted (as he did) in cross examination, that Paul had told him the day after Mr Ellis had successfully bid for Barn Farm at the auction, that: (a) “we have bought a farm”; (b) PLC was providing the money to buy the farm; and (c) it was intended to set up a new company to which Barn Farm would be transferred, this hardly seemed like the prelude to any attempt on behalf of Paul to fraudulently obtain Barn Farm for his own benefit. Andrew responded that Paul was attempting a distinctly different type of fraud to that set out in Andrew’s ABPT Petition. Andrew asserted that what Paul was attempting to do was to sell Barn Farm quickly, repay the debt owed to PLC and pocket the profit. In my judgment Andrew made that suggestion (which is not mentioned in his PLC Petition, his witness statement, for which there is no evidence and which is inconsistent with the facts that Barn Farm has not been sold and no part of the debt owed to PLC has been repaid) in response to my question, because he saw the difficulty in maintaining that there could have been any intention on Paul’s part to obtain Barn Farm for his own benefit, in August 2015, given all that Andrew accepted that Paul had told him on 16 August 2015, the day after the auction.

436. I start with the position therefore that I find that it is highly unlikely that Paul would have told Andrew, on 15 or 16 August 2015 about the successful auction bid the previous day, that PLC would fund the purchase of Barn Farm and that a new company would be set up to buy Barn Farm (all of which had already happened or did happen) if he intended to commit the fraud alleged in the ABPT Petition.

437. I am satisfied that there has been no attempt by Paul to obtain any benefit from the acquisition of Barn Farm by ABF for himself, other than in his capacity as 49% shareholder of ABF. I come to this conclusion for the following reasons:

(a) I have said that I am satisfied that both Mr Tomkinson and Mr Ellis were honest witnesses. I go further than that and say that, in my, judgment, neither Mr Tomkinson nor Mr Ellis would have been knowingly part of any arrangement, the purpose of which was to enable Paul to obtain a benefit from the acquisition of Barn farm, beyond his 49% shareholding in ABF. It was never suggested to either Mr Tomkinson or Mr Ellis in cross examination that they have been knowingly a party to any such attempted fraud. Mr Tomkinson in particular was very clear that the subscriber share in ABF that he held, following the incorporation of ABF was a share that he held, not for his own personal benefit, but for the benefit of the shareholders of ABPT (including himself) and that

when he transferred that subscriber share to Paul, on 13 July 2016, he regarded Paul as holding that subscriber share on the same basis. I accept that evidence of Mr Tomkinson, which again makes it highly unlikely that there could have been any conceivable expectation on the part of Paul that he would be able to maintain that he was entitled legally and beneficially to the subscriber share;

(b) on 31 January 2017, Mr Sharratt sent an email to Andrew, Mr Tomkinson, Mr Ellis and Paul saying that he had been remiss in not sorting out the shareholdings in ABF. He suggested that Alan, rather than the SSAS should be a shareholder of ABF (the SSAS being a shareholder of ABPT). Andrew objected, by email of the same day, on the basis that if Alan had shares in ABF, then Paul would control ABF, because Andrew expected Alan to vote with Paul. In his reply of 1 February 2017, Mr Sharratt suggested that no shares should be issued to Alan or the SASS so that the shares in ABF would be 49 to Andrew, 49 to Paul, 1 to Mr Tomkinson and 1 to Mr Ellis. Andrew responded the same day "good yes that is fine by me". Shares were issued to reflect those shareholdings on 7 February 2017 and on 8 February 2017, Mr Tomkinson reported that the share structure at companies house had been altered;

(c) whilst there was clearly a delay in issuing shares in ABF to Andrew, Mr Ellis, Mr Tomkinson and Paul I am not satisfied that shares were only issued to Andrew in ABF because he challenged the directors at a meeting in February 2007 and threatened legal proceedings (as he suggests in his letter before action dated 1 September 2017), nor is the ABPT Petition correct, when it asserts that shares were only issued to Andrew, Mr Ellis and Mr Tomkinson following a threat of proceedings in August 2017. The correspondence between Mr Sharratt and Andrew on 31 January 2017 and 1 February 2017 about issuing shares in ABF and agreeing what shares will be issued to who, predates any meeting in February 2017 (and August 2017). By his email 1 February 2017, Andrew agreed to Mr Sharratt's suggestion that the shares in ABF should be issued in the same proportions as for ABPT, save that the SSAS would not receive any shares (Paul and Andrew received those shares);

(d) as for the delay in registering the shares issued on 7 February 2017 at Companies House, Mr Tomkinson confirmed on 8 February 2017 that the records at Companies House had been updated to reflect the issue of the new shares on 7 February 2017. Mr Tomkinson's firm, Tomkinson Teal dealt with the issue of the shares on 7 February 2017

and I take his email of 8 February as confirmation of his understanding that Tomkinson Teal had updated the records at Companies House to record the issue of the new shares. This does not seem to have happened, but I see nothing sinister in that and accept that, for some reason the records at Companies House were not updated on 7/8 February 2017. The updating of Companies House's records on 14 September 2017 was no doubt prompted by Andrew's letter before action of 1 September 2017, but that letter is wrong to assert that the shares had not been issued as it is common ground that they were issued on 7 February 2017 and Andrew knew they were issued then. Failure to record the issue of the shares at Companies House does not mean that they were not legally issued;

(e) I whilst it is true that no document recording KPMG's advice that it could cause problems if Mr Tomkinson were to die, while holding the only issued share in ABF, has been produced, this advice could have been given to Mr Sharratt, as he suggested, only verbally. Also, whilst the transfer of the only share to Paul did mean that similar problems could be caused, were Paul to die, it appears that matters had moved in that it was being contemplated that Paul might become the sole shareholder of ABF. Mr Zaman refers: (i) the email of Mr Sharratt to Carol Malin of 24 June 2016; and (ii) the email of Mr Sharratt to Mr Tomkinson of 13 July 2016, both of which suggest that Paul might become the sole owner of ABPT. If that were to happen, then there would be no issue about Paul holding the subscriber share for Andrew, Mr Ellis, Mr Sharratt and himself;

(f) as for Mr Zaman's suggestion that the emails of 24 June and 13 July 2016 are evidence that Paul was trying to secretly obtain all of the shares in ABF for his personal benefit, I am not satisfied that they show any such thing: (i) there is no mention in the emails of the basis on which Paul might take forward ABF as a personal venture; (ii) Paul says (and I accept his evidence) that Andrew told him on at least one occasion that he was not interested in being involved in a farming business and Paul said he would buy Barn Farm from ABF if that was how Andrew felt about it, only for Andrew to say that he did not want to give up the development potential at Barn Farm. So it may be that, in June/July 2016 Paul was contemplating purchasing Barn Farm and taking it forward as a farming venture personally, possibly without the benefit of the development opportunity; and (iii) I am satisfied that KPMG advised on proposals to:- acquire Lockharts' farm, a farm

close to Enterprise House and it was mentioned in those proposals that this purchase might be made by Paul; and there was a proposal to buy out Andrew/Mr Ellis/Mr Tomkinson's shares at the end of March 2016. I am satisfied of this, because a KPMG Group restructure document dated 30 March 2016 refers to both those proposals, neither of which were taken forward, but had they been taken forward, particularly the proposal to buy Andrew out, then Paul would have become the sole shareholder of ABF, with Andrew's agreement; and (iv) as Andrew was fully aware that PLC had funded the purchase of Barn Farm and he had been told that a new company was to be set up to acquire it, and Mr Ellis and Mr Tomkinson knew all that too, the suggestion that Paul was intending somehow to obtain beneficial ownership of all ABF's shares without the knowledge or agreement of Andrew to this, is in my judgment fanciful; and

(g) Mr Zaman suggested that; (i) the loan from PLC to ABF was not documented in September 2015, so that this would leave Paul free to acquire Barn Farm with funding from PLC; and (ii) the backdating of the ABF resolution and PLC/ABF loan agreement on 22/23 November 2016, to 14 September 2015, was somehow associated with Paul's attempt to obtain Barn Farm for his own benefit. I do not accept either of those points. Barn Farm was acquired in ABF's name and all the directors of PLC (including Mr Ellis and Mr Tomkinson) and Andrew knew that. Mr Zaman was unable to explain, when I asked him, how initially not documenting the loan from PLC and then backdating the resolutions of PLC/ABF approving it and the loan Agreement would assist with (on his case) Paul's fraudulent plan in light of the fact that Andrew, Mr Tomkinson, Mr Ellis and Mr Sharratt all knew that PLC had loaned the money to ABF for it to purchase Barn Farm. Mr Zaman's submissions appear to amount to pointing to anything that has not been done properly and claiming that this is evidence of fraud, rather than just a failure to document non-fraudulent activity properly, which I find to be the true explanation.

Issue 13 - What were the financing arrangements for the acquisition of Barn Farm by ABF and were they on commercial terms as between PLC and ABF?

438. I have already found that: (a) the resolution of Mr Sharratt, purportedly as sole director of ABF; and (b) the PLC/ABF Loan Agreement, between PLC and ABF, purportedly dated 14 September 2015, were created by Mr Sharratt on 22 or 23 November 2016 and sent by him

to KPMG as an agreement reflecting the terms upon which PLC agreed to lend £1,006,000 to ABF to purchase Barn Farm. I have also rejected Mr Sharratt's evidence that the directors of PLC/ABF agreed orally the terms of a loan from PLC to ABF on 14 September 2015 (or around that date) and that the loan agreement, backdated to 14 September 2015, simply reflected the terms of that oral agreement. Notwithstanding those findings, it is common ground that Barn Farm was purchased using money from PLC's bank account and that it was purchased in the name of ABF. I accept the evidence of all of the directors of PLC and ABF, as at 14 September 2015 (Paul, Mr Sharratt, Mr Ellis and Mr Tomkinson) that they were aware that PLC's funds were being used to purchase Barn Farm and that Barn Farm was purchased in the name of ABF (it is also Andrew's evidence that he was told by Paul, on 16 August 2015 that PLC's money was being used to purchase Barn Farm and that it would be purchased in the name of a new company).

439. Whilst I am not satisfied that the directors of PLC/ABF ever discussed the terms of such a loan from PLC to ABF, I am satisfied that they can only (acting bona fide in the interests of PLC) have agreed to the loan being made upon "commercial terms" and I am satisfied that the best evidence of what "commercial terms" might reasonably be expected to have been, in September 2015, were the terms upon which PLC lent money to BIL in May 2010 (2.5 % above Lloyds TSB Banks base rate) which are the terms which Mr Sharratt "copied across" from the PLC/BIL loan to the PLC/ABF loan and I find that those are the terms on which the PLC/ABF loan was made. In short I find those terms to be appropriate because: (a) they provide for a margin to be made by PLC over and above the rate of interest paid by PLC on monies borrowed by PLC from its bank (although PLC did not need to borrow money to advance the £1,006,000 to ABF (PLC did borrow from its bank to lend money to BIL, in May 2010) because it came out of PLC's cash reserves I am still satisfied that that rate is still an appropriate commercial rate); and (b) professional advice was taken upon the PLC/ABF loan and the rate of interest determined after taking that advice into account.

Issue 14 Did any of the above matters involve any breach of fiduciary duty, or duty under the Companies Act 2006 by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

440. My answers to issues 11-13 do not support any of the allegations in the ABPT Petition which are clearly allegations that Paul attempted to commit a fraud, for his own personal benefit, in connection with the acquisition of Barn Farm by ABF, using the funds of PLC. Issue 14 is not however confined to pleaded breaches of duty and I find that there have been the following un-pleaded breaches of duty, in relation to the matters I have dealt with in Issues 11-13: (a) a failure by all the directors of PLC/ABF to declare their interests, as shareholders of ABF and PLC, in the PLC loan to ABF under Section 177 CA 2006 (as the directors of PLC/BIL had done in relation to the PLC loan to BIL); (b) a failure by all the directors of PLC/ABF to comply with their duty under Section 174 CA 2006, to act with reasonable skill and care, by not agreeing the terms upon which PLC lent £1,006,000 to ABF, on or before 14 September 2015 and a failure to document that loan properly at the time (as the loan by PLC to BIL had been); and (c) the backdating of the ABF resolution and the PLC/ABF Loan Agreement to 14 September 2015 was a breach of fiduciary duty, principally by Mr Sharratt who I find orchestrated the backdating and execution of those documents, but also by Paul who signed the PLC/ABF Loan Agreement on behalf of PLC without questioning whether it was right to backdate it (I am not satisfied that Mr Tomkinson or Mr Ellis were aware of the backdating of those documents (they denied it and they were not challenged on those denials by Mr Zaman) but as I have said I am not satisfied, for the reasons already explained that the backdating of the resolutions and loan document was dishonest. No loss has been suffered by PLC/ABF as a result of the failure of the directors of PLC/ABF to agree and document the terms of the loan in September 2015, because I am satisfied that the PLC/ABF Loan Agreement does represent a proper commercial basis for the loan, and I have found its terms to be the terms of the loan.

CEMEX

Issue 15 - Was the contract for removal of lime from the Cemex Site between:

- (1) PLC and 4R; or**
- (2) the Partnership and 4R**

441. Both experts and Mr Zaman and Mr Auld agree that the contract for the removal of lime from the Cemex Site was between PLC and 4R (or rather PLC and Bi-Product and then PLC and 4R) and I so find.

Issue 16 - What were the terms of the Sub-Contract (or arrangement) between PLC and the Partnership in respect of removal of lime from Cemex?

442. Paul accepts that he determined what rates the Partnership should charge PLC for transporting waste from the Cemex Site. In paragraph 46 of his second witness statement, Paul says that the Partnership charged Bi-Products/4R £230 plus VAT for loads transported from the Cemex Site, the same as Gilbert, the other sub-contractor employed by PLC and at paragraph 50 that, notwithstanding that Mr Bell has concluded that: (a) PLC made a profit of 8% on the difference between what Gilbert charged PLC to transport waste from the Cemex Site and what PLC charged Bi-Products/4R; but that (b) PLC did not make a similar profit on the transport work invoiced by the Partnership to PLC, PLC made the same margin on the same work carried out by the Partnership/Gilbert. I conclude that the terms of the sub-contract between the Partnership and PLC were that the Partnership would charge the same rates as Gilbert, for the same haulage work because it would only be possible for PLC to make the same margin on the same work carried out by the Partnership and Gilbert if they both charged the same amount for the same work. For the avoidance of doubt, as Paul, in paragraph 50 of his second witness statement asserts that PLC made the same margin on the same transport work sub-contracted to and carried out by the Partnership as it made on transport work sub-contracted to and carried out by Gilbert, I find that it was not a term of the sub-contract between PLC and the Partnership that PLC would bear any of the Partnership's costs of providing the transport services, in addition to paying the Partnership's invoices (for example the driver's wages or the costs of running and maintaining the Partnership vehicles used by the Partnership to transport the Cemex waste).

Issue 17 - Did the Sub-Contract (or arrangement) with the Partnership involve any conflict of interest on the part of Paul and if so what conflict?

443. There was a clear conflict of interest between Paul's position as a partner in the Partnership and his position as a director of PLC. The conflict was that: (a) in deciding whether PLC should enter into a sub-contract with the Partnership and if so, on the terms of that sub-contract, Paul's personal interests, as a partner in the Partnership lay with PLC agreeing to enter into a sub-contract with the Partnership so that the Partnership could make a profit out

of the sub-contract and for the terms of the sub-contract to be as risk free and lucrative as possible for the Partnership (as he had a 50% interest in the Partnership and his wife held the remaining 50% interest); and (b) as director of PLC it was Paul's duty to ensure that PLC only entered into a contract with the Partnership if it was in the interests of PLC to do so and if it was, to ensure that the terms of the sub-contract were as risk free and lucrative as possible for PLC.

Issue 18 - Did Paul disclose the nature and extent of his interest in the Sub-Contract (or arrangement) to the directors of PLC?

The Duty to Disclose

444. Mr Auld and Mr Zaman agree, consistent with the judgment of David Richards J (as he then was) in *Re Corain Limited 2012 EWHC 2343 (Ch)* at paragraph 583, that Section 175 CA 2006 (duty to avoid conflicts of interest) and Section 177 CA 2006 (duty to declare interest in proposed transactions or arrangements) are mutually exclusive, by virtue of section 175 (3) CA 2006 which provides "This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company".

445. Here, the sub-contract between the Partnership and PLC, for the Partnership to transport waste from the Cemex site, is a transaction or arrangement with PLC and therefore the provisions of Section 177 apply to it and not the provisions of Section 175.

446. Section 177 CA 2006, where relevant provides as follows:

"(1) If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.

(2) the declaration may (but need not) be made:

(a) at a meeting of the directors, or

(b) by notice to the directors in accordance with: (i) section 184 (notice in writing), or (ii) Section 185 (general notice).

(3) if a declaration of interest under this section proves to be, or becomes, inaccurate or incomplete, a further declaration must be made.

(4) any declaration required by this Section must be made before the company enters into the transaction or arrangement.

(6) a director need not declare an interest:

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

(b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware.....”:

447. In *Gwembe Valley Developments Co Limited v Koshy* [2003] EWCA Civ 1048 Lord Justice Mummery at paragraph 65 of his judgment said, in describing what disclosure a director must provide to shareholders, in order to comply with his duty not to make an unauthorised profit from his position said *“Disclosure requirements are not confined to the nature of the director’s interest: they extend to disclosure of its extent, including the source and scale of the profit made from his position so as to ensure that the shareholders are “fully informed of the real state of things” ...”*. Although *Gwembe* was concerned with director’s common-law duties, prior to the enactment of the CA 2006 (and dealt with a duty to disclose to shareholders rather than directors) Chapter 2 of the CA 2006, which sets out the general duties of directors of which Section 177 forms part was predominantly a codification of director’s existing common-law duties. I find *Gwembe* helpful, for those reasons, in illustrating one aspect of what the obligation of a director under Section 177 CA 2006 to provide disclosure of the nature and extent of their interest in a contract with the company entails.

448. In my judgment, the purpose of Section 177 CA 2006 is to ensure that the other directors of a company have sufficient information about the contract in which the relevant director is interested to enable them to decide whether or not it is in the interests of the company to enter into that contract and if so on what terms. The likely profit that the other contracting party will derive from the contract (in which the director is interested) is one aspect of the disclosure that I consider the relevant director must make, as will be the terms of the contract and the profit that the index company is likely to make as a result of entering into the contract and any known risks, for the company, associated with entering into that contract. This will enable the other directors to decide: (a) whether it is in the interests of the company to enter into a contract of the type proposed; (b) if so, whether to enter into that contract with the other director or party in which the director has an interest; and (c) if so, on what terms the company should enter into the contract.

449. As to whether Paul complied with his duties under Section 177, I find as follows:

- (a) on the available evidence it appears that the Partnership started to transport waste from the Cemex Site in mid-2010;
- (b) there were 7 directors of PLC in mid-2010, namely Mr Large, Mr McQuaide, Mr Sharratt, Andrew, Paul, Mr Ellis and Mr Tomkinson. I have evidence from all those directors except for Mr Large;
- (c) I find that Paul did not disclose the sub-contract between the Partnership and PLC to transport waste from the Cemex Site at a board meeting of PLC;
- (d) I am satisfied that Paul mentioned the sub-contract to Andrew, Mr Large, Mr Ellis, Mr Tomkinson and Mr Sharratt. I find that in the case of Mr Large and Mr Sharratt that this would have happened before the Partnership started to perform the sub-contract, but in the case of Andrew, Mr Ellis and Mr Tomkinson, I am not satisfied that Paul did tell them about the Cemex sub-contract before it started;
- (e) I find that Paul did not mention the sub-contract to Mr McQuaide and he first found out about it through talking to PLC drivers who were involved in the removal of waste from the Cemex Site;
- (f) no director was provided with any detail in relation to the Cemex sub-contract, beyond the fact that the Partnership would be one of the two sub-contractors who would be transporting waste from the Cemex Site;
- (g) Paul decided, both for the Partnership and PLC, what price the Partnership would charge PLC for the transporting of waste from the Cemex Site, by the Partnership;
- (h) the profit made by PLC from its contract with Bi-Products and then 4R was included in figures provided to directors at board meetings for PLC's financial performance from 5 October 2010; and
- (i) Paul did not therefore comply with his duty under section 177 CA 2016, in that: (i) he did not disclose to all of the directors of PLC the existence of the Cemex sub-contract with the Partnership (he did not disclose it to Mr McQuaide); (ii) he did not disclose the nature and extent of the Cemex sub-contract with the Partnership to any director of PLC whether before that contract started or at all. On the balance of probabilities I find that, all directors other than Mr McQuaide knew that the Partnership was entering into the sub-contract and all the directors, including Mr McQuaide, knew that Paul was a partner in the Partnership. The directors of PLC, other than Paul were therefore denied any real opportunity to decide whether it was in the interests of PLC to enter into a sub-

contract with the Partnership for it to transport waste from the Cemex Site at all and if it was, what the terms of that sub-contract should be.

450. I will set out in the paragraphs that follow, the reasons why I have made the findings I have made, in paragraph 449.

451. In the Respondent's Defence to the PLC Petition, at paragraph 45.10 it is asserted that "Mr Paul Bridgen made full and frank disclosure to the board of [PLC] and the petitioner [Andrew] was aware of Mr Paul Bridgen's said interest in the contract." The Respondents' Part 18 Replies state that the disclosure was made in a Board Meeting, however the Respondents' witnesses, in their witness statements (other than Mr Sharratt) do not support the assertion that Paul made any relevant disclosure of the Partnership's Cemex sub-contract, in a Board Meeting of PLC.

452. Mr Ellis and Mr Tomkinson in their witness statements say that they do not recall discussing the Cemex contract "at board level". Mr Tomkinson maintained that position in cross examination. Mr Ellis, in cross examination, said that now that he had had his memory refreshed by looking at board minutes, he believed that the Cemex contract had been disclosed at a board meeting. Mr Ellis's memory appears to have been refreshed by seeing Board Minutes dated 7 September, 5 October and 2 November 2010. These board minutes refer to the results for PLC of its participation in its contract with Bi-Products/4R and not to the sub-contract between the Partnership and PLC and do not suggest that there was any discussion of that sub-contract. In cross examination, Mr Ellis said that he could not recall the content of the meeting, at which he thought that Cemex had been discussed. It seems to me that Mr Ellis did not have any true recollection now of there being a discussion of any Cemex contract at all, and even if there was a discussion, the Board Minutes suggest (and I find) that any discussion was confined to what PLC was making out of its contract with Bi-Product and did not concern any detail of the Partnership sub-contract with PLC.

453. In Paul's second witness statement, at paragraph 43 he says that he is sure that Andrew, Mr McQuaide, Mr Ellis, Mr Tomkinson and Mr Sharratt all knew about the PLC Cemex contract and that some of the work was being sub-contracted to the Partnership by PLC. Paul refers to the turnover from the Cemex contract having been included in PLC's figures which were sent to Andrew. In his cross-examination, Paul said he was 100% sure that all the directors knew about the Cemex contract but he could not say that their knowledge was as a result of a board meeting and that he was a 100% sure that he spoke to all the directors before the contract

started. When Mr Zaman asked Paul about what he had told particular directors he said that: (a) he thought he would have told Mr Ellis that PLC's contract was with Bi-Products and the Partnership was transporting the waste; (b) he would not have told Mr Tomkinson as much as he told Mr Ellis; (c) he was not sure what Mr McQuaide knew; and (d) he thought he would have discussed it with Mr Large more extensively than anyone else. Paul accepted that he would not have given to any of the directors any profit forecasts for the Partnership and that he decided what the Partnership should charge PLC, with no input from any other director of PLC and nor did he tell the directors what the terms were.

454. In paragraph 47 of his witness statement, Mr Sharratt maintained that he recalled a board meeting of PLC at which Paul had mentioned the Cemex opportunity, and Paul suggested, at that meeting, there would be a bit of the margin in it for PLC, which might represent a useful income stream for PLC. Mr Sharratt said it was agreed, by the directors that, on the basis that there was minimal capital expenditure for PLC and some margin potential for PLC, that Paul should take it forward for PLC. In cross examination Mr Sharratt was unable to provide any detail of the board meeting that he said had taken place, at which the Cemex opportunity was discussed.

455. Mr McQuaide, in his witness statement (paragraphs 48, 56 and 59) says that he first learnt about the existence of the Cemex contract as a result of discussions that he had with the PLC drivers that were involved in the contract and not at a board meeting or through any discussions with other directors. He says he asked Paul about what the profit or loss was for Cemex and Paul told him that Paul would discuss it with Mr Sharratt "off-line". Mr McQuaide maintained that position during his cross examination and I accept his evidence.

456. As for Andrew, he says he had no knowledge of the Cemex contract. In paragraph 55 of his witness statement, Mr McQuaide says that he asked both Paul and Andrew about the Cemex contract, Paul said it was a private matter and Andrew did not question it so he thought it was to do with BIL rather than PLC. Andrew was asked about his knowledge of Cemex in cross examination, Andrew said that Paul did not tell him about it and when he saw old lorries in the yard at Enterprise House (which he complained to Paul about because they were old and battered and detracted from the image he considered PLC was trying to portray) Paul told Andrew that it was a private matter.

457. I am satisfied that all of the directors of PLC, except Mr McQuaide (but including Andrew) knew about the involvement of PLC in the contract with Bi-Products, at around the time the

contract started because Paul mentioned it to them individually (with the exception of Mr McQuaide) but not at a board meeting. I find this because:

(a) that is the substance of the evidence, at trial of Paul, Mr Ellis and Mr Tomkinson (so far as the knowledge of Mr Ellis and Mr Tomkinson are concerned);

(b) it is unlikely that Paul would not have told Mr Large about PLC's contract with Bi-Products. Mr Large, as Managing Director, was in charge of the day to day management of PLC at the relevant time and the results for PLC of its participation in the Cemex contract were reported to the board of PLC, in September, October and November 2010;

(c) I accept Mr McQuaide's evidence about how he found out about the Cemex contract and therefore that he was not told about it before it started. Mr McQuaide is however shown as present at the September, October and November 2010 Board Meetings when the results, for PLC of its participation in the Cemex contract were reported to the board of PLC, so Mr McQuaide would, at those board meetings have been informed, if he did not know before, that PLC had a contract to remove waste from the Cemex Site;

(d) I do not accept Mr Sharratt's evidence that the Cemex contract was discussed at a board meeting, before it was entered into, because that evidence was not supported by Mr McQuaide or Mr Tomkinson, or ultimately by Paul or Mr Ellis and Mr Sharratt, it seemed to me had no genuine recollection of any such Board Meeting. Given however that Mr Sharratt, as finance director and his department would need to deal with raising PLC invoices to Bi-Products and receiving and paying invoices from the Partnership/Gilbert, I consider it likely that Paul will have discussed the PLC contract with Bi-Product and the sub-contracting arrangements with the Partnership and Gilbert, with Mr Sharratt before it started;

(e) I consider it to be unlikely that Andrew did not know about the Bi-Products contract or the involvement of the Partnership, as sub-contractor to PLC, in spite of his denials, because: (i) Paul said that he continued to discuss the affairs of PLC with Andrew from time to time notwithstanding that they had both substantially withdrawn from involvement in the management of PLC from around May 2010 and that at this time relations between them were good (there is no evidence to the contrary on that latter point). I think it likely that Paul will have mentioned to Andrew, at least in outline what the contract involved and the Partnership's involvement in it; (ii) if Andrew had not been

at least aware, in outline, of Cemex and the Partnership's involvement in it, then I would expect him to have reacted differently when Mr McQuaide asked him about it and when (on his case) he spoke to Paul about not liking seeing old lorries in the yard at Enterprise House. Andrew would not, in my judgment have accepted Paul saying it was a "private matter" and left it at that; and (iii) I consider it likely that the Board Minutes from the Board Meetings on 7 September, 5 October and 7 November 2010 (which Andrew did not attend) which mention PLC's financial results, and make specific reference to PLC's contract with Bi-Product, will have been sent to Andrew.

458. I am however satisfied that Paul did no more than make those directors that he did tell about Cemex aware that it involved PLC contracting with Bi-Product and the Partnership becoming a sub-contractor to PLC, in order to transport the waste from the Cemex Site. There was no disclosure of what the Partnership would charge PLC for its services, what margin PLC would make on the transport services provided by the Partnership, PLC's expected profit from the contract as a whole, what profit the Partnership was expected to make before the sub-contract started or at any point thereafter or what profit the Partnership was actually making. The directors of PLC were also unaware that Paul had arranged to place Partnership vehicles used on the Cemex sub-contract on the PLC's Operator's Licence, or that the Partnership did not have its own operator's licence which would have allowed it to transport the Cemex waste.

Issue 19 - Did the Sub-Contract (or arrangement) involve any breach of fiduciary duty, or duty under the Companies Act 2006 by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

Paul

459. Andrew asserts in the ABPT Petition that PLC's resources (employees, fuel, and repair and maintenance services) have been used by the Partnership and that PLC paid for road tax and insurance for Partnership vehicles without PLC being properly compensated for that use: (a) in connection with the Partnership performing the Cemex sub-contract (paragraph 58.2) and Biffa subcontracts (paragraph 54); and (b) generally (under the heading of "Home Farm") (paragraphs 55-58). Andrew says that, in each case the Respondents caused or allowed such use of PLC's resources by the Partnership to occur and that, in each case, this amounts to a

breach of duty by the Respondents. Issues 15-18 for the Cemex sub-contract and issues 20-23 for the Biffa sub-contract do not however ask what use the Partnership made of PLC's resources, for the purpose of carrying out those sub-contracts, but issues 25-27 do ask what assets of PLC have been used by the Partnership (and issue 28 asked whether the Partnership has been recharged by PLC properly for that use). I have therefore dealt with, as part of issues 25-27 the question of what resources of PLC have been used by the Partnership (including in connection with the Partnership's performance of the Cemex and Biffa sub-contracts) and I have summarised below what findings I have made, in answering issues 25-27 below, in respect of the use of PLC's resources by the Partnership to assist it in performing the Cemex sub-contract.

460. In summary, so far as the Cemex sub-contract is concerned, I have found (in answering issues 25-29 below) that:

- (a) Mr Whetton (paragraph 509 (a)) and Mr Elliott-Dickens (paragraph 515 (b)), both employees of PLC, drove Partnership vehicles for 20 days and 9 Months respectively on the Partnership's Cemex sub-contract;
- (b) Partnership trailers used on the Cemex sub-contract were repaired and maintained by PLC for the duration of the Cemex sub-contract (paragraph 536 (b));
- (c) Partnership vehicles used on the Cemex sub-contract were taxed and insured by PLC, for so long as they remained on the PLC Operator's Licence (paragraph 540); and
- (d) Partnership vehicles used on the Cemex sub-contract filled up with PLC fuel on 72 occasions (paragraph 539 (a)).

461. As to whether the Respondents breached the duties that they owed to PLC, by causing or allowing the Partnership to use PLC's resources for the purpose of the Partnership's Cemex sub-contract (as summarised above):

- (a) Paul breached his duties to PLC in a manner set out by me in paragraph 542 below (Issue 29);
- (b) I have found that Mr Ellis breached his duty to PLC (paragraph 543) because he was aware that the Partnership was using PLC fuel and employees generally but left Paul to record usage and decide upon and implement the credit that would be given to PLC for that use (paragraph 543 (b)). I am not however satisfied that Mr Ellis breached his duties by allowing Paul to record the usage, decide upon and implement a credit to PLC from the Partnership for the use of PLC employees or fuel on the Partnership's Cemex sub-

contract because I am not satisfied that Mr Ellis was aware, or ought to have been aware, that PLC employees and fuel were being used by the Partnership in performing the Cemex sub-contract. Of PLC's employees, only Mr Whetton and Mr Elliott-Dickens were involved in the Cemex sub-contract and their evidence, which I accept, was that they only very rarely returned to Enterprise House (filling up with fuel when they did so). I have found that the Partnership vehicles engaged in the Cemex sub-contract filled up at Enterprise House on 72 occasions in total over the course of the 3 years for which the Cemex sub-contract was operating (paragraph 539 (a)). The basis upon which I have concluded that Mr Ellis knew that PLC employees and fuel was being used by the Partnership, other than when the Partnership was working for PLC is the frequency with which this was occurring, which I have concluded would be apparent to Mr Ellis, however I am not satisfied that in the period 2010-2013, when the Partnership was performing the Cemex sub-contract that the use of PLC's employees and fuel was so frequent that Mr Ellis would have seen this happening, and ought to have known that PLC employees were working for the Partnership on the Partnership's Cemex sub-contract or that PLC fuel was being used to fill up Partnership vehicles engaged in that sub-contract; and

(c) I have accepted that Mr Tomkinson neither knew nor ought to have known about the Partnership using PLC's resources at any point in time (paragraph 545).

462. In the ABPT Petition, Andrew asserts that Paul breached his duty to PLC by not declaring the nature and extent of his interest in the Cemex sub-contract and his fiduciary duties to PLC by causing PLC employees and sub-contractors to carry out part of the Partnership's obligations under the sub-contract, causing Partnership vehicles to be added to PLC Operator's Licence and to be maintained, fuelled, taxed, insured and repaired at the expense of PLC. As for the use of PLC's employees and fuel and causing PLC to repair and maintain, tax and insure Partnership vehicles used on the Cemex sub-contract I will consider this point separately as part of the allegation that Paul caused PLC resources to be used for the benefit of the Partnership (to avoid double counting). As to the remaining points, I am satisfied that Paul has breached his duties as a director of PLC in the following ways:

(a) he failed to comply with his duty under Section 177 of CA 2006 to declare the nature and extent of the Partnership's interest in the sub-contract between the Partnership and PLC for the Partnership to transport waste from the Cemex Site, in the manner I

have set out in response to issue 18. I am satisfied that the directors of PLC all knew that Paul was a partner in the Partnership, therefore Paul's obligation under Section 177 CA 2006 was to disclose the nature and extent of the Partnership's interest in the Cemex sub-contract;

(b) it was, in my judgment also a breach by Paul of his fiduciary duty for him to agree himself on behalf of both the Partnership and PLC what the Partnership would charge PLC for transporting waste from the Cemex Site, rather than asking the board of PLC to negotiate or nominate someone to negotiate on behalf of PLC. There was a clear conflict of interest in him doing this; and

(c) finally, in my judgment Paul breached his fiduciary duty to PLC by causing Partnership vehicles to be placed on PLC's Operator's Licence and on my findings he only involved PLC in the Cemex contract, in order to enable Partnership vehicles to participate in the Cemex sub-contract by having them put on PLC's Operator's Licence by Mr Baldwin, on the pretext that they were PLC's vehicles, was a breach by Paul of the fiduciary duties that he owed to PLC.

463. Section 173 (1) CA 2006 provides: "A director of a company must exercise independent judgment." I find that Mr Ellis and Mr Tomkinson breached their duties under Section 173 CA 2006 for the reasons that follow.

464. At paragraph 47 of his witness statement, Mr Tomkinson says "I have no recollection of the Cemex or Biffa contracts being discussed at board meetings. To my mind if everything was undertaken with the full knowledge of the executive directors it didn't necessarily need to have been mentioned at board meetings. Because of the relationship between PLC and the Partnership there could possibly have been a conflict of interest. However as far as I was concerned, Paul had always operated on the basis that he made sure that he fully took the company's interest into consideration."

465. Mr Tomkinson is and was in 2010, a non-executive director of PLC, as such it is not reasonable to expect that he would exercise the sort of control over the affairs of PLC that can reasonably be expected of an executive director. Nonetheless, whilst I have accepted that Paul did not disclose the sub-contract between the Partnership and PLC at a board meeting of PLC, which Mr Tomkinson, as non-executive director could be expected to have attended, I am satisfied that Mr Tomkinson knew in general terms at or about the time that the sub-

contract was entered into, that a sub-contract had been entered into between the Partnership and PLC and he knew that Paul was a partner in the Partnership.

466. There are three problems, with paragraph 47 of Mr Tomkinson's witness statement, so far as him fulfilling his duties under section 173 (1) are concerned:

(a) everything was not "undertaken with the full knowledge of the executive directors" because Paul did not disclose the nature and extent of the Partnership's interest in the sub-contract to the executive directors and Mr Tomkinson does not suggest that he made any attempt to ensure that everything was being undertaken "with the full knowledge of the executive directors", he just seems to have assumed that it was;

(b) even if everything had been "undertaken with the full knowledge of the executive directors" it would still, in my judgment, be an abdication by Mr Tomkinson of his obligation under section 173 (1) to exercise his own independent judgment for him to simply leave it to the executive directors to decide whether, and if so on what terms PLC should enter into a sub-contract with the Partnership;

(c) not only could there be (as Mr Tomkinson recognises in his witness statement) a conflict of interest, but clearly there were a number of conflicts of interest between the interests of PLC and the interests of the Partnership, including: (i) whether PLC should enter into a contract with Bi-Products at all and if so on what terms (I have found that Paul's primary motive for getting PLC to enter into the contract with Bi-Products was to facilitate the Partnership carrying out part of the transport work as a sub-contractor to PLC (with Paul procuring that Partnership vehicles were put on PLC's Operating Licence to give the appearance that those vehicles could legally transport waste for others); (ii) whether PLC should enter into the sub-contract with the Partnership for it to carry out part of the transport work (Gilbert Transport carried out part of the transport work so PLC could have employed independent contractors to carry it all out); and (iii) what the terms of PLC's sub-contract with the Partnership should be; and

(d) it is again an abdication of Mr Tomkinson's duty to act independently, for him simply to leave Paul to take the interests of PLC into account when Paul decided the basis upon which PLC would enter into a contract with the Partnership (of which Paul was a partner).

467. As for Mr Ellis he is and was an executive director (although he refers, in paragraph 5 of his witness statement, to being engaged fully in his own role as purchasing director and having

very little time available to become involved in such matters as the Biffa and Cemex contracts).

468. In paragraph 51 of his witness statement, Mr Ellis says “Whilst I played virtually no role in the matters relating to the Cemex and Biffa contracts, I was aware through conversations with Paul Bridgen that these contracts had been acquired by PLC and that some of the work in distributing and land spreading the waste products from these companies was being done by the Partnership. I had trust and confidence in Paul and could not see any damage to the business coming out of this arrangement...”.

469. The position for Mr Ellis is therefore similar to that for Mr Tomkinson and that is that he was aware that PLC had entered into contracts with the Partnership, but he took no interest in the detail of the contracts or in ensuring that either PLC’s contracts with Bi-Products/4R or PLC’s sub-contracts with the Partnership were contracts which it was in the interests PLC to enter into or in the terms on which it did so. Mr Ellis simply trusted Paul to ensure that the contract was fair to PLC. I am afraid that that also is an abdication of Mr Ellis’s responsibility to act independently under Section 173.

470. I think that I should mention, in fairness to Mr Tomkinson and Mr Ellis that, based upon my findings that all of the directors of PLC (including Andrew, but excluding Mr McQuaide) knew about the Cemex sub-contract with the Partnership before or shortly after it started and all of the directors (with the exception of Mr McQuaide) simply left Paul to it, they all, in my judgment equally breached their duties under Section 173 to act independently.

BIFFA

471. The issues for the Biffa sub-contract are identical to the issues for the Cemex sub-contract and the answers to those issues are, in most cases the same. In dealing with the Biffa issues (20-24) I will indicate whether the answer is different to that given by me for the identical Cemex issue and if so why. If my answer is different, then I will set out my reasons for that answer in full.

Issue 20 - Was the contract for the removal of waste and spreading from Biffa, Rugby between:

(1) PLC and 4R; or

(2) the Partnership and 4R

472. The answer to this issue is the same as for issue 16 in relation to Cemex and that is that, both experts and both counsel agree that the evidence shows that the contract with 4R for the Biffa Site was between 4R and PLC.

Issue 21 - What were the terms of the Sub-Contract (or arrangement) between PLC and the Partnership in respect of removal of waste and spreading from Biffa?

473. I accept the evidence that Paul gives in paragraph 78 of his second witness statement as to the terms of the Partnerships sub-contracts with PLC for the transport/spreading of waste from the Biffa Site.

474. Paul says at paragraph 78 of his second witness statement and I accept that, initially the contract between PLC and 4R for the Biffa Site was for the transport of solid waste and PLC sub-contracted the transport of the solid waste to the Partnership and the Partnership in turn sub-contracted the transport of the solid waste to a third party at "little or no margin". That evidence is imprecise, as Paul does not suggest that there was any formula for the Partnership to charge PLC more than what it was charged by the third party. In those circumstances I find that the agreement was that the Partnership would simply charge PLC the same amount as it was charged by the third party, I do so because Paul has not provided evidence that the terms were more advantageous to the Partnership than that.

475. Paul says (paragraph 78 of his second witness statement) that, from 2013, the contract with 4R for the disposal of waste from the Biffa Site involved the removal and spreading of liquid waste and 4R employed PLC and another contractor to do that. PLC transported the liquid waste which it collected from the Biffa Site either to lagoons, or to Prestons which acted as sub-contractor to PLC in spreading it on farm land. From late 2014, the other contractor dropped out of the contract with 4R and from that point PLC was responsible for collecting all the liquid waste from the Biffa Site and spreading it. Prestons and the Partnership were then employed by PLC to spread the liquid waste on land. If the land on which it was to be spread was close to the Biffa Site, Prestons/the Partnership would collect it direct from the Biffa Site, or if not, it was delivered by PLC's vehicles to Prestons/the Partnership for spreading. To do this the Partnership used its own tractors, but PLC's tankers and 15 metre boom. The

Partnership charged £7-£8.50 per tonne for the liquid waste which it spread on farm land which Paul says took account of the fact that the Partnership was using PLC's tankers and 15 metre boom, to spread the liquid waste. Paul accepts that he alone decided what the Partnership would charge PLC.

Issue 22 - Did the Sub-Contract (or arrangement) with the Partnership involve any conflict of interest on the part of Paul and if so what conflict?

476. I find that the same conflicts of interest arise in relation to the Partnership's sub-contracts with PLC in relation to transport and disposal of waste from the Biffa Site as arose in relation to the sub-contract between PLC and the Partnership for transport of waste from the Cemex site, (and for the same reasons) in circumstances where Paul determined for both the Partnership and PLC what the Partnership would charge PLC and upon the other terms of the sub-contracts.

Issue 23 - Did Paul disclose the nature and extent of his interest in the Sub-Contract (or arrangement) to the directors of PLC?

477. The relevant section of CA 2006, as for Cemex, is Section 177 and the nature and the extent of the disclosure which Paul was required to make to the Board of Directors of PLC is the same as I have set out in answering Issue 18.

478. The 4R contract with PLC for the Biffa site, from the end of 2012 was for the disposal of solid waste only. PLC entered into a sub-contract with the Partnership, and in turn, the Partnership entered into a sub-contract with a third party to transport the waste. The directors of PLC at the end of 2012 were Andrew, Paul, Mr Tomkinson, Mr Ellis and Mr Sharratt (Mr Large having been dismissed in July 2012 and Mr McQuaide having left in 2011).

479. I am satisfied, for the reasons that follow, that: (a) there was no discussion amongst the directors of PLC at a board meeting of either the PLC contract with 4R for the removal of solid waste from the Biffa Site, or of the sub-contract between PLC and the Partnership to transport that solid waste; (b) Paul did tell Mr Ellis, Mr Tomkinson and Mr Sharratt (but not Andrew) that PLC was entering into or had entered into the contract with 4R to remove waste from the Biffa Site and that PLC would be sub-contracting to the Partnership transport work on the contract; and (c) Paul did not tell any of the PLC directors what the Partnership would charge

PLC for the work it would carry out, what profit the Partnership expected to make, or in due course, what profit it was making, nor did he tell the directors that the Partnership was itself sub-contracting the transport work to a third party or the identity of that third party.

480. It was the evidence of Mr Ellis and Mr Tomkinson that they could not recall being told about the 4R contract for the Biffa Site, at a board meeting. They both say that Paul told them about it, but neither of them suggest that they were provided, by Paul, with any of the details that I have found they were not provided with. I accept their evidence.

481. Mr Sharratt, in his witness statement, says that Paul told the directors of PLC, at a board meeting, about PLC's Biffa contract and the Partnership's sub-contract and that the board were happy with the arrangement to proceed. However I am not satisfied that that is correct: (a) it is contrary to the evidence of Mr Ellis and Mr Tomkinson both of whom say they have no recollection of there being any such discussion at a Board Meeting; (b) there are no board minutes recording any discussion about the removal of waste from the Biffa site (and unlike Cemex no board meetings referring to the revenue and profit that PLC was generating from the Biffa contract); and (c) I have rejected Mr Sharratt's evidence that there was a discussion, at a board meeting of the contract to remove waste from the Cemex Site for similar reasons and this undermines the reliability of his evidence that the removal of solid waste from the Biffa Site was discussed at a board meeting.

482. As for Andrew, whilst I have found that Andrew knew about the removal of waste from the Cemex Site, I am not satisfied that he knew about removal of waste from the Biffa Site because: (a) for Cemex, I have accepted the evidence of Mr McQuaide that he told Andrew about Cemex, but Mr McQuaide had left before PLC entered into a contract with 4R in relation to the Biffa Site, so Mr McQuaide could not have told Andrew about Biffa; (b) PLC's turnover and profit relating to the Cemex site are referred to in the minutes of the board meetings on 7 September, 5 October 2 November 2010 which I am satisfied Andrew would have seen, however there are no board minutes referring to Biffa; and (c) by the end of 2012, Andrew had become increasingly detached from the affairs of the Group companies (having dealt with the termination of Mr Large's employment in July 2012 and having persuaded Paul to take on the role of Managing Director) so it is less likely that Paul will have told Andrew about Biffa.

483. Neither Paul nor Messrs Sharratt, Ellis or Tomkinson suggest that Paul gave any of them details of what the Partnership would charge PLC for arranging to transport the solid waste,

or what profit the Partnership was likely to make, or in due course what the Partnership had made from arranging to transport solid waste from the Biffa Site.

484. From the end of 2014, the Partnership started to spread liquid waste, from the Biffa site, as a sub-contractor to PLC. At that point the directors of PLC were Paul, Mr Sharratt, Mr Ellis and Mr Tomkinson (Andrew having resigned, on my findings, as a director of PLC in August 2014). I am satisfied that Paul will have told Mr Sharratt in general terms about the Partnership starting to spread liquid waste from the end of 2014, under the terms of a sub-contract with PLC. I am not satisfied that Paul mentioned this to either Mr Ellis or Mr Tomkinson at all. I am not satisfied that Paul told Mr Sharratt what the terms of the sub-contract were or what profit the Partnership was likely to make or in due course what profit the Partnership was making from this sub-contract. My reasons are as follows:

(a) the sub-contract to transport solid waste and the sub-contract to spread liquid waste are two distinct sub-contracts and none of Mr Ellis, Mr Tomkinson or even Mr Sharratt suggested that any of them were told about these two distinct sub-contracts, or that PLC had become sole contractor to 4R from late 2014;

(b) Mr Sharratt is different, in that he was at the time and is the executive Finance Director of PLC, as such he and his department would deal with the raising of PLC invoices to 4R and the receipt of invoices from the Partnership. I think it likely therefore that Paul will have told Mr Sharratt about the changes in late 2014 (PLC taking on the whole contract and the Partnership becoming involved in spreading liquid waste) however the fact that Mr Sharratt does not deal with this in his evidence suggests that Paul simply told Mr Sharratt for his information, rather than seeking his approval to what the Partnership was doing; and

(c) neither Paul, nor Mr Sharratt suggest that Paul told Mr Sharratt what the Partnership would charge PLC for spreading the liquid waste, or what profit the Partnership was likely to make, or in due course did make.

Issue 24 - Did the Sub-Contract (or arrangement) involve any breach of fiduciary duty, or duty under the Companies Act 2006 by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

485. As already noted, issues 20-23 which refer to the Biffa sub-contracts do not ask what use the Partnership made of PLC's resources to assist it in performing the Biffa sub-contracts, but issues 25-27 (below) do ask more generally what resources of PLC have been utilised by the Partnership.

486. I have concluded, in answering issues 25-27 (below) that: (a) I am not satisfied that any employees of PLC were used by the Partnership to assist it in performing its role under the Biffa sub-contracts (paragraphs 501-531); (b) the Partnership did not use PLC's equipment or repair or maintenance services for its vehicles involved in the Biffa sub-contracts (paragraph 536 (c)); but (c) that the Partnership did use PLC fuel for the tractors which were involved in spreading liquid waste on the second Biffa sub-contract (paragraph 539 (b)). I am not satisfied that PLC taxed or insured any Partnership vehicles involved in the Biffa sub-contracts, because Partnership vehicles were not involved in the Biffa sub-contracts until 2014, which is well after Partnership vehicles ceased to be included on PLC's Operator's Licence and it was the inclusion of Partnership vehicles on PLC's Operator's Licence which led to them being taxed and insured at PLC's expense (the Partnership vehicles involved in spreading liquid waste were in any event tractors and not lorries which had been previously included on PLC's Operator's Licence).

487. As to whether the Respondents breached their duties to PLC, by causing or allowing the Partnership to use PLC's fuel for the Partnership tractors engaged in spreading liquid waste from the Biffa Site:

(a) Paul breached his duty under Sections 172 and 175 CA 2006, in the manner described by me in paragraph 542;

(b) I am not satisfied that Mr Ellis knew that Partnership tractors engaged in spreading liquid waste on the second Biffa sub-contract were using PLC fuel because Mr Ellis accepted that he was aware that Partnership vehicles removing liquid waste from Enterprise House were using PLC fuel. I have concluded (paragraph 543 (a)) that Mr Ellis ought to have been aware that the Partnership's use of PLC's fuel was more extensive than could be accounted for by the Partnership only using PLC fuel for the Partnership vehicles engaged in removing liquid waste from Enterprise House but: (i) it would be difficult to distinguish Partnership tractors being used to remove liquid waste from the Biffa Site, which showed up at Enterprise House, from Partnership tractors being used to remove and spread liquid waste from the lagoons at Enterprise House; and (ii) Mr

Brain's evidence, that Partnership vehicles filled up on an almost daily basis at Enterprise House, led me to conclude that Mr Ellis would have noticed such regular usage of PLC's fuel and ought to have concluded that Partnership vehicles were not only using PLC's fuel when they were engaged in emptying the lagoons at Enterprise House. However Mr Brain was employed by PLC, between 2017 and 2020 and the spreading of liquid waste from the Biffa site by Partnership tractors took place between 2014 and the end of 2015 (paragraph 81 of Paul's second witness statement). The extensive use of PLC's fuel to which Mr Brain refers, which caused me to conclude that Mr Ellis knew or ought to have known that Partnership vehicles were using PLC's fuel when engaged in activities other than removing liquid waste from Enterprise House, therefore took place after the Partnership had ceased spreading liquid waste from the Biffa Site; and (c) I have accepted that Mr Tomkinson did not know nor ought he to have known about the Partnership's use of PLC fuel (paragraph 545).

488. In the ABPT Petition, Andrew asserts that Paul breached his duty to PLC by not declaring the nature and extent of his interest in the Biffa sub-contracts and his fiduciary duties to PLC by causing PLC employees and sub-contractors to carry out part of the Partnerships obligations under the sub-contracts, causing Partnership vehicles used on the Biffa sub-contracts to be added to PLC Operator's Licence and to be maintained, fuelled, taxed, insured and repaired at the expense of PLC. As for the use of PLC's employees and fuel and causing PLC to repair and maintain, tax and insure Partnership vehicles used on the Biffa sub-contracts I will consider this point separately as part of the allegation that Paul caused PLC resources to be used for the benefit of the Partnership (to avoid double counting). As to the remaining points, on my findings:

(a) Paul breached: (i) his duties of disclosure under Section 177 of the CA 2006 ; and (ii) his fiduciary duties by agreeing, on behalf of PLC and the Partnership the terms of the first and the second sub-contracts between PLC and the Partnership for the transport of solid waste and then the spreading of liquid waste, in each case because there was a conflict of interest between PLC and the Partnership (of which Paul was a partner) I make these findings for the same reasons I have given in answering Issue 19 in relation to the sub-contract between PLC and the Partnership for the Cemex Site. I have already found that Paul breached his duty to PLC by causing Partnership vehicles to be placed on PLC's Operator's Licence as part of the arrangements for the Cemex sub-contract. By

the time the first Biffa sub-contract for the transport of solid waste was entered into in 2012, the Partnership had its own standard operator's licence and Partnership vehicles had been moved from the PLC Operator's Licence to the partnership operator's licence, in any event Partnership vehicles were not used to transport solid waste from the Biffa Site (a 3rd party sub-contracted to the Partnership did this);

(b) Mr Ellis and Mr Tomkinson breached the duties that they owed to PLC under Section 173 CA 2006 to act independently in relation to the first sub-contract to transport solid waste, because they were aware at or about the time that this sub-contract was entered into, that PLC had entered into arrangements with the Partnership, under which the Partnership would carry out part of the work of transporting and disposing of waste from the Biffa Site, but on their evidence, they simply trusted Paul to do the right thing and left him to agree the terms of that sub-contract on behalf of PLC and the Partnership; and

(c) I am not satisfied that Mr Ellis and Mr Tomkinson have breached the duties that they owed to PLC under Section 173, in relation to the second sub-contract between the Partnership and PLC for the spreading of liquid waste, because Mr Ellis and Mr Tomkinson, on my findings were not aware that there was a second sub-contract between PLC and the Partnership for spreading liquid waste from the Biffa Site.

489. I note, in passing that although Mr Sharratt is not a respondent to the ABPT Petition (because he is not a shareholder of ABPT) he breached his duties under Section 173, in relation to both the first and the second sub-contracts between PLC and the Partnership relating to the Biffa Site, because, on my findings, he was aware of both sub-contracts and, just like Mr Ellis and Mr Tomkinson simply trusted Paul to do the right thing in agreeing those contracts for both PLC and the Partnership. I am not satisfied that Andrew (who was a director PLC when the first Biffa sub-contract between PLC and the Partnership for the transport of solid waste was entered into) breached his duties under section 173 CA 2006, in relation to the first Biffa sub-contract, because I have found that he was not told about that sub-contract.

THE PARTNERSHIP'S USE OF PLC'S RESOURCES

490. In his oral closing argument, Mr Auld said that I should not attempt to resolve the precise amount of time for which PLC employees worked for the Partnership or the precise value of

PLC's assets used by the Partnership. Mr Auld says that the onus is on Andrew to prove that there has been a failure by PLC to recharge the Partnership enough to compensate PLC for the use of its employees and assets by the Partnership and he has not proved it.

491. Mr Zaman refers me (in relation to Issues 25-29 generally to the decision of the Supreme Court in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and MasterCard Inc* [2020] UKSC 24 in support of his proposition that I should take a "broad axe" approach to estimating the amount of PLC employee time and PLC resources consumed by the Partnership. At paragraph 217 and 218 of the judgment of the Supreme Court, in *Sainsbury's*, the Supreme Court said:

"217. The court in applying the compensatory principle is charged with avoiding under-compensation and also overcompensation. Justice is not achieved if a claimant receives less or more than its actual loss. But in applying the principle the court must also have regard to another principle, enshrined in the overriding objective of the CPR, legal disputes should be dealt with at a proportionate cost. The court and the parties may have to forego precision, even where it is possible, if the cost of achieving that precision is disproportionate, and rely on estimates. Common law takes a pragmatic view of the degree of certainty with which damages must be pleaded and proved..."

218Lord Shaw in Watson Laidlaw & Co Ltd 1914 SC (HL) 18 spoke of restoration by way of compensation being "accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe"..."

492. The particular point that the Supreme Court was dealing with in the *Sainsbury's* case was that, if the cost of establishing the precise level of loss is disproportionate, then the court may rely on estimates of that loss. The situation here is different, in that, at this stage I am not concerned with precisely calculating the cost to PLC of supplying its employees for use by the Partnership or the precise value of PLC's assets used by the Partnership. Instead I have to decide whether the affairs of PLC have been conducted in a manner which is unfairly prejudicial to Andrew as a member of ABPT. For that purpose, a precise calculation of the loss to PLC, caused by the Partnership using its employees and assets is not necessary, an estimate will suffice provided it is accurate enough to enable me to answer issue 28 which is whether PLC has been properly compensated for the use of its employees and assets by the Partnership by recharges made by PLC to the Partnership.

493. I have considered Mr Auld's submission that, if Andrew cannot show what resources of PLC have been used by the Partnership, then he has not proved his case, that PLC has not been compensated for that use by recharges made by PLC to the Partnership. However, as will become apparent, when I deal with the Partnership's use of particular PLC resources, the principal reason why I cannot say precisely what PLC resources have been used by the Partnership is attributable to Paul not keeping or ensuring that a proper record has been kept of that use and in some cases and to an extent, because the Respondents have not produced evidence from witnesses directly involved in the use of those resources (principally Paul's sons Sam and William). I will therefore take a "broad axe" approach at this stage to estimating the Partnership's use of PLC's assets in order in order to determine issue 28 (whether PLC has been properly compensated for the use of those assets) and I will also use that approach in making findings as to the use of those employees/assets, to hopefully enable the experts to provide some estimates of the value of that use for consideration at any remedies hearing.

Issue 25 - Did employees of PLC work for the Partnership and if so, which employees, what work and over what period?

494. Paul accepts that employees of PLC did work for the Partnership, so that point is not in dispute, but which employees, doing what work and for what period is in dispute.

495. The first point I will make is that it is common ground that no records have been kept of what work was carried out, over what period and by which PLC employees, for the Partnership.

496. The current directors of PLC (other than Paul) provide no information to assist me in answering Issue 25: (a) Mr Sharratt at paragraph 150 of his witness statement says "I was aware anecdotally from time to time that employees were involved in off-site activities..." and he was aware that Mr Miller was driving a harvester; (b) Mr Ellis, at paragraph 47 of his witness statement says "I was also aware that drivers and others employed by PLC from time to time did work at Home Farm but what they were doing, who it was for and who was paying for it I didn't know. I trusted Paul to ensure that all necessary credit was given."; and (c) Mr Tomkinson does not deal with the point in his witness statement at all.

497. As for Andrew's witnesses:

(a) Mr Woolrich gives evidence that he and members of his PLC maintenance team worked on Partnership vehicles, but he provides no evidence as to the quantity of this work;

(b) Mr Parker says that he carried out some repairs to equipment and machinery at Home Farm and he says he saw Adam Maziak, Sam and William working at Home Farm;

(c) Mr McQuaide says he saw Mr Emery, Mr Miller, Mr Baldwin and Ian Sturgess working for “Paul”, whilst employed by PLC;

(d) Anthony says that Mr Whetton worked as a driver on Cemex whilst employed as a sub-contractor by PLC and Anthony worked on Cemex while paid by PLC as a private contractor; and

(e) Mr Baldwin says that Mr Whetton, Mr Elliott-Dickens and Stuart Ward, all employees of PLC, worked on Cemex and some of the same employees worked on Biffa, in each case for 100% of their time. Mr Baldwin also says that “Terry” and Robert Bayley were employed as additional drivers for the Biffa contract and he believes that they were employed by PLC, because he used to give them their wage slips.

498. The best source of information on this issue ought to be Paul, because he is the person, on whose instructions PLC employees will have been allocated to do work for the Partnership, but he was providing information from his memory, and as I will mention shortly his evidence on this issue has changed, at least in certain respects over time. The other potentially reliable sources of the evidence are those PLC employees who were actually involved in working for the Partnership (at least as to the work they did). Those employees who gave evidence on this are all witnesses relied on by the Respondents and are: (a) Mr Whetton; (b) Mr Emery; (c) Mr Elliott-Dickens; and (d) Mr Miller, but their evidence is of more limited use than it might be expected to be, because in some cases, the employees themselves were not always aware of whether what they were doing was for PLC or the Partnership.

499. Eight employees of PLC are named in the ABPT Petition as having worked for the Partnership. In addition to these nine employees, Mr Zaman refers to Mr Parker and Mr McCabe, as employees of PLC who have worked for the Partnership. In advancing a claim for those two additional employees, Mr Zaman relies upon the fact that the ABPT Petition says that other employees of PLC, whose identities will be ascertained on disclosure and inspection of the PLC’s books and records) worked for the Partnership. In my judgment, Andrew is confined to those nine employees who are mentioned in the ABPT Petition, it was open to

him after inspection, to have amended his ABPT Petition to include Mr Parker and Mr McCabe as additional PLC employees who he wished to allege were engaged in working for the Partnership. He did not do so and therefore, I will only consider the nine employees mentioned in the ABPT Petition.

500. I will now consider each of those 8 employees in turn, in doing so I will not only make findings as to the work that they did for the Partnership and over what period, but also the amount of time spent by them during that period in working for the Partnership, rather than PLC (in order that I can answer issue 28, whether the use of those employees time was correctly recharged by PLC to the Partnership).

Anthony

501. Anthony refers, in his witness statement, to working on the Cemex contract while being paid by PLC, but it is clear, from his witness statement, that the work that he was doing on the Cemex contract was loading lorries overnight with waste at the Cemex site, which is the part of the Cemex contract performed by PLC and not by the Partnership, under its sub-contract with PLC. Anthony was not therefore working for the Partnership on the Cemex contract.

502. Anthony also says, in paragraph 26 of his witness statement, that he did general work for Paul at Home Farm, collecting potatoes which could not be sold for human consumption and delivering them to farms for animal feed. He says that both he and Mr Elliott-Dickens were given Partnership ticket books for recording the deliveries to farms, and for that reason he believes that when he made those deliveries he was working for the Partnership. Anthony then goes on to say, in paragraph 34 of his witness statement, that PLC paid for most of the work that he did and at paragraph 35 that he only received three or four cheques from the Partnership during the time that he was working for "Paul".

503. I am not satisfied that Anthony worked at Home Farm for the benefit of the Partnership, whilst being paid by PLC because:

(a) I have already said that I found Anthony's evidence to be heavily influenced against Paul by his dislike and resentment of Paul and I have also expressed concerns about the reliability of Anthony's memory, given that he conceded himself, in cross-examination, that his memory was poor ("it is an age thing");

(b) Anthony was not an employee of PLC, but rather a private contractor who would invoice the party for whom he worked (PLC, the Partnership or otherwise) he conceded

that he was paid some cheques by the Partnership but he has produced no documentary evidence of who he invoiced for his work or by whom he was paid. To the extent, if at all, that Anthony did work at Home Farm, for the benefit of the Partnership, I am not satisfied that he was not paid by the Partnership; and

(c) there is a complication, in that, as I have already mentioned, it was ABF who grew potatoes at least from early 2016, including renting land at Home Farm the Partnership which planted, cultivated and harvested those potatoes and at least in the early years, PLC which paid the Partnership for the work that it did (deducting these payments from what it paid to ABF for its potatoes). The sale of potatoes, for animal feed, may therefore have been a sale by ABF and not the Partnership and Anthony may have been paid for the work that he did in delivering poor quality potatoes for animal feed, by PLC or ABF, legitimately. Anthony's recollection that Partnership tickets were used for deliveries does not convince me that it was the Partnership that was selling the potatoes, rather than ABF or even PLC and therefore the Partnership that ought to have paid Anthony.

Mr Whetton

504. Andrew says that Mr Whetton drove lorries on the Cemex and Biffa contracts and worked at Home Farm for the Partnership.

505. In his first witness statement at paragraph 53.2, Paul said that he had found no evidence that Mr Whetton worked at Home Farm. However, whilst in paragraph 248.1, of his second witness statement, Paul said that he had spoken to Mr Whetton and Mr Whetton could not recall having worked at Home Farm, Paul went on to say at paragraph 248.2, that Mr Whetton had driven Partnership lorries for 4 days in 2013, but he does not say doing what.

506. In his witness statement, Anthony identifies Mr Whetton as one of the PLC employees who work at Home Farm.

507. In his witness statement, Mr Whetton says: (a) at paragraph 4 that he worked on Cemex loading lorries at night for around a year or so, and occasionally took out a lorry to a farm field or to Broughton; (b) at paragraph 10 that he drove on the Biffa contract pulling a road tanker, but never spread any liquid digestate; and (c) that he had done a couple of days at Home Farm, one of which was not a working day and one day at Home Farm, welding machinery.

508. In their cross examinations, both Mr Emery and Mr Elliott-Dickens confirmed that Mr Whetton had worked on the Cemex contract. In his cross-examination, Mr Whetton said that,

at the time he drove the Scania and Volvo lorries (which are owned by the Partnership) he thought that they were owned by PLC and that he was driving for PLC. This appears however to make no difference to his evidence that he only took a lorry out on the Cemex contract occasionally.

509. I find that Mr Whetton:

(a) drove lorries for the Partnership on its Cemex sub-contract for a total of 20 days. Doing the best I can, this is my estimate of the number of days which Mr Whetton drove for the Partnership, on the Cemex contract, based upon his evidence that he did so "occasionally". As for Mr Whetton's evidence that he was loading on the Cemex contract for a year or so, loading lorries at the Cemex site was, as I have already said, performed by PLC under its contract with Bi-Products/4R and not by the Partnership under its sub-contract from PLC;

(b) did not drive for the Partnership on its Biffa sub-contract because, I have accepted that, the Partnership's role on the Biffa contract was to spread liquid digestate on fields using a tractor. I accept Mr Whetton's evidence that he was driving an articulated lorry pulling a road tanker and therefore, I find that, in doing so, he was not working for the Partnership; and

(c) Mr Whetton worked at Home Farm for the Partnership on 2 days when he was paid by PLC, one of those days when he was carrying out general work and one day when he was welding. Paragraph 11 of Mr Whetton's witness statement refers to three days but he says that one of those days was one of his days off, when he would not have been paid by PLC to work for it.

Mr Elliott-Dickens

510. At paragraph 53.3 of Paul's first witness statement he says that he spent some Sundays at Home Farm, training Mr Elliott-Dickens particularly in welding until 2011 and that sometimes Mr Elliott Dickens was paid by PLC and sometimes by the Partnership. Paul says that he accepts that when he was training Mr Elliott-Dickens, Mr Elliott-Dickens would have done some things that benefited the Partnership. He says there are no records of these occasions and an appropriate credit will be no more than £1,600.

511. In Paul's second witness statement, at paragraph 249.2, he accepts that Mr Elliott-Dickens worked for the Partnership for a few months at the end of the Cemex contract.

512. In Mr Elliott-Dickens' witness statement he says that: (a) he did not work much at Home Farm, he did one day on a potato harvester with Tim Gilbert and a couple of days spreading dredgings from the PLC lagoons; (b) he drove the Partnership lorries on the Cemex contract, he can't remember how long he did that for, it could have been half a year or longer; (c) he also worked on the Biffa contract on a handful of occasions driving the Partnership's 8 wheeler tipper truck taking sludge to fields; (d) he spent a longer period of time driving Volvo lorries pulling road tankers of liquid waste on the Biffa contract mostly delivering it to lagoons and occasionally to waiting tractors. He never spread any liquid waste on the Biffa contract; (e) he spent a considerable period of time spreading waste water from the lagoons at Enterprise house; and (f) he can't recall spending time training on welding at Home Farm with Paul.

513. In his cross-examination, Mr Zaman put it to Mr Elliott Dickens that he had been driving on the Cemex contract for a year, Mr Elliott Dickens said that a year seemed too long when it was put to him it was 9 months he said "maybe".

514. A number of other witnesses confirmed Mr Elliott Dickens's involvement in the Cemex contract but none of them were able to help in determining the period for which he had been involved in driving on this contract.

515. I find that Mr Elliott-Dickens performed the following work for the Partnership, whilst being employed and paid by PLC:

(a) he worked at Home Farm, including welding and working with Tim Gilbert on harvesting. I find that he did so for the period of 15 days. Whilst this is longer than Mr Elliott-Dickens himself suggested that he worked at Home Farm and Mr Elliott Dickens said that he could not recall being trained by Paul to weld at Home Farm, I am satisfied the Paul's recollection of this welding is correct. Paul has suggested a credit of no more than £1,600 for Mr Elliott Dickens's attendance at Home Farm, which suggests that Mr Elliott Dickens spent a reasonably substantial number of days at Home Farm, rather than the 2 or 3 days to which Mr Elliott-Dickens referred (given that Mr Elliott-Dickens was relatively young at the relevant time and is likely to have been paid a low hourly rate). In arriving at my estimate of 15 days, I disregarded the 2 days that Mr Elliott-Dickens said he was spreading dredgings from the Enterprise House lagoons because I take that to be work that Mr Elliott-Dickens was doing for the benefit of PLC and not the Partnership;

(b) I find that Mr Elliott-Dickens was working full-time on the Cemex sub-contract, driving lorries for the Partnership for 9 months. Whilst Mr Elliott Dickens thought that 12 months was too long, he responded “maybe” when Mr Zaman suggested 9 months and 9 months appears to me to be around the right time period, based upon those responses; and

(c) I am not satisfied that Mr Elliott-Dickens spent any time working on the Biffa contract for the Partnership, because, as I have already said, the only work that the Partnership carried out directly on the Biffa contract was spreading liquid digestate on fields and Mr Elliott-Dickens confirmed that he did not spread any liquid digestate on fields in connection with the Biffa contract.

Nigel Miller

516. In his first witness statement, Paul said that he accepted that Mr Miller had driven a harvester for the Partnership for four seasons, driving for no more than six weeks in each season and for no more than 70 hours a week. In his second witness statement, Paul said that he understood that Mr Miller had also been involved in planting potatoes for one season.

517. In his witness statement, Mr Miller confirmed that he had driven a harvester each year since 2016 and that in a low season he would drive the harvester for as little as four weeks and in a high season, for as much as two months, in each case 12 hours per day on average and 7 days a week. In cross-examination, Mr Miller confirmed that the length of the harvest depended upon how many potatoes had been planted each season and that he worked for 12 – 14 hours a day when harvesting and finally he confirmed that he had been involved in planting potatoes in 2017.

518. I find that Mr Miller worked for the Partnership, whilst being paid by PLC:

(a) for each of the 6 years from 2016 to 2021, harvesting for 13 hours a day for an average of six weeks in each year (this is a broad average of the figures provided by Mr Miller in his witness statement and in cross-examination); and

(b) worked on planting potatoes in 2017. In the absence of having any details of the amount of time spent, I find that, by analogy with the work spent harvesting that he spent 6 weeks planting, for an average of 13 hours a day.

Stuart Ward

519. In his first witness statement, Paul said that Mr Ward drove a Partnership vehicle for 3-4 weeks, but he has no record of the occasions upon which this occurred. There is no witness statement from Mr Ward.

520. In their witness statements, Anthony referred to Mr Ward working at Home Farm at around the same time as the Cemex contract was underway and Mr McQuaide said that Mr Ward drove tractors on the Partnership land but he gives no detail of the amount of time involved.

521. In his cross-examination, Mr Miller recalled Mr Ward working for PLC but he did not think that he had driven on the Cemex contract.

522. I find, consistent with Paul's evidence, that Mr Ward drove for the Partnership, whilst being paid by PLC for 4 weeks, there are no records and there is no reliable evidence to contradict Paul's estimate.

Mr Emery

523. Paul could not recall whether Mr Emery had worked for the Partnership. In his witness statement, Mr Emery said that he had never worked for the Partnership as far as he was aware, he confirmed that he never worked at Home Farm and never drove on either the Cemex or Biffa contracts and that he had never done any farm work or driven any farm machinery. Mr Emery's job is transport supervisor, for PLC and his evidence is that he has only driven lorries occasionally, when PLC was suffering driver shortages.

524. Mr McQuaide and Anthony both referred to Mr Emery as being one of the people who worked at Home Farm.

525. I accept Mr Emery's evidence and find that he has not worked for the Partnership whilst being employed by and paid by PLC.

Sam

526. Sam is Paul's eldest son. In his first witness statement, Paul accepted that Sam had been paid as an employee of PLC, whilst working for the Partnership in overseeing potato growing. In paragraph 256.1 of his second witness statement, Paul said that, since April 2016 Sam had been paid by PLC whilst spending 3-4 weeks at the start of each potato growing season driving tractors, 3-4 weeks at the end of each potato growing season harvesting potatoes with some organisational work in relation to growing potatoes between those dates. When not working on the potato crop, Paul said that Sam worked for PLC, including spreading PLC's liquid digest from the lagoons at Enterprise House. During his cross-examination, Paul was asked why Sam

had not made a witness statement, Paul accepted that there was no reason why Sam could not have made a witness statement.

527. In their cross-examinations: (a) Mr Emery said that Sam worked mainly on the farm; and (b) Mr Miller answered yes, when Mr Zaman asked him if Sam just worked on the farm.

528. In respect of Sam, I find:

(a) Sam worked for the Partnership, whilst being paid as an employee of PLC from 15 March 2013 to 29 March 2019 (it is common ground that Sam became an employee of the Partnership from 30 March 2019);

(b) during the period 15 March 2013 - 1 March 2016 Sam spent 50% of his time working for the Partnership and the remaining 50% of his time working for PLC. In making this finding I take into account the evidence of Mr Emery and Mr Miller that Sam was substantially working on the farm, but also that this evidence may relate to the later years from around 1 April 2016 when Sam was taking primary responsibility for the husbandry work that the Partnership performed on the potato crops of ABF. Absent detailed evidence of what Sam was doing before the Partnership started to carry out husbandry work on ABF's potato crops, splitting Sam's time equally between working for PLC and the Partnership seems appropriate in circumstances where Sam could have given evidence as to what he was spending his time doing between 15 March 2013 and 30 March 2016, but has not done so, and there is no good reason why he has not done so; and

(c) during the period 1 March 2016 - 23 March 2019, Sam spent 75% of his time working for the Partnership. In making that finding I take into account the perception of Mr Emery and Mr Miller that Sam was substantially working on the farm which is likely to be more reliable for this later period, the fact that Paul's evidence is vague as to what Sam was doing, in the time between planting and harvesting of potatoes and the fact that Sam could have given evidence as to what he was spending his time doing during this period, but has not done so, and there is no good reason why he is not done so. In those circumstances I consider it appropriate to conclude that Sam spent the majority of his time working for the Partnership and 75% appears an appropriate "broad axe" estimate.

William

529. In his first witness statement, Paul said that he accepted that William had worked more for the Partnership than for PLC. In his second witness statement, at paragraph 257.1, Paul said that William joined PLC in 2016 when he was still in full-time education, he spent almost the entire summer of 2016 carting lagoon waste from the PLC lagoons, he worked in the prep Department of PLC, and William and Sam came to help their grandfather, Alan, produce château potatoes each Christmas and that William carried out other work such as jet washing kit, for PLC.

530. Mr Emery and Mr Miller's evidence in cross-examination in relation to William was the same as for Sam, namely, in the case of Mr Emery that William worked mainly at the farm and in the case of Mr Miller, he answered yes, when Mr Zaman asked him if William just worked at the farm.

531. In respect of William my findings as to when he worked for the Partnership, whilst being employed and paid by PLC are:

(a) according to Mr Bell, the payroll records of PLC show that William worked for PLC from 25 June 2016 to 29 March 2019, however I will accept Paul's evidence that during the summer of 2016, William worked almost exclusively on emptying the PLC lagoons and find that to be between 25 June 2016 and 31 August 2016;

(b) from 1 September 2016 to 29 March 2019 William worked 80% of his time for the Partnership and only 20% of his time for PLC. In coming to that conclusion, I take into account the perceptions of Mr Emery and Mr Miller, that William was working exclusively, or almost exclusively at the farm, Paul's acceptance in his first witness statement that William worked more for the Partnership than PLC, the fact that Paul gives very little detail, in his second witness statement, of what William was doing for PLC, between those dates and the fact that William could have given evidence as to the time that he spent working for PLC/the Partnership but has not done so and there is no good reason why he has not done so.

Issue 26 - Did the Partnership use equipment from PLC and/or have maintenance or repair of its own equipment undertaken by, or at the cost of PLC and if so, over what period?

532. There is little direct evidence that the Partnership used equipment or machinery belonging to PLC. Such evidence as there is comes from Mr Brain who says that PLC's low loader was often used to move agricultural machinery for the Partnership, PLC's vehicles were used to transport maize grown by the Partnership for use in the AD Plant, Paul demanded that potato seed was collected by PLC's vehicles and Paul and his "farmhands" often arrived unannounced in the evenings and at weekends and took away articulated vehicles from Enterprise House.

533. Paul, Mr Woolrich and Mr Baldwin all confirmed that PLC had some of its own agricultural machinery and equipment. This appears to have been used to empty the lagoons at Enterprise House and to dig lagoons elsewhere (including at Home Farm) in order to store waste water from PLC's production process. Some of the agricultural machinery that Mr Brain refers to as being moved by PLC's low loader may therefore have been PLC's own machinery and equipment. Alternatively it could have been the Partnership's equipment which was being used to empty and spread liquid waste from the lagoons at Enterprise House or to dig lagoons elsewhere for the liquid waste to be stored in. In this scenario the Partnership's machinery and equipment were being used, at the time, for the benefit of PLC, in which case the use of PLC's low loader, without charge to transport the Partnership's machinery and equipment may have been appropriate.

534. Paul confirmed, during his cross examination that the Partnership sold maize to PLC to be fed into the AD Plant. It is not clear whether those arrangements required the Partnership to transport the maize to Enterprise House, or for PLC to collect the maize, and it is equally unclear whether any of PLC's articulated lorries collected at night and at the weekend by Paul and his farm hands (assuming that they were PLC's articulated vehicles) were to be used for purposes connected with PLC's business or that of the Partnership. As for the collection of potato seed by PLC's vehicles, the potato crop, from 2016 (Mr Brain started his employment with PLC in 2017) belonged to ABF and therefore the benefit of having potato seed transported is likely to have accrued to ABF, rather than the Partnership. I am not satisfied, on the evidence available from Mr Brain, that the Partnership has made any material use of PLC's machinery and equipment for the purposes of its own business.

535. The position is different for Andrew's allegation that Partnership machinery and equipment was repaired and maintained at PLC's expense. There is much more evidence of such maintenance and repair work being carried out. Given that Paul accepts that at least

some maintenance and repair work, may have been carried out to Partnership machinery and equipment at Enterprise House, the question is really one of degree, rather than whether Partnership machinery and equipment was repaired and maintained at the expense of PLC at all:

(a) Mr McQuaide (Operations Director 2002-2011) says: (i) PLC's labour was used for maintenance work at Home Farm; (ii) Paul often brought machinery and vehicles to Enterprise House to be fixed; and (iii) PLC's maintenance people were often off doing repairs to tractors, for Paul, which prevented Mr McQuaide from getting PLC's production lines fixed;

(b) Mr Woolrich (Maintenance Manager October 2008- November 2015): (i) vehicles used on the Cemex contract were often fixed by his team, the lime would often damage the trailers which required welding work to repair them, which his team carried out; (ii) on the Biffa contract, damaged pipes and wiring was replaced by his team on tankers; (iii) his maintenance team were not involved in maintaining or repairing the lorries or trailers except occasional repairs to the curtain sided lorries (maintenance and repair of the lorries and trailers was normally dealt with by an external contractor based in Swadlincote); (iv) Paul asked him to set up irrigation on "Paul's farm" and to repair equipment, particularly welding and fabricating work, at the farm, which he often undertook himself; and (v) he could not say how much time he and his team spent repairing and maintaining the Partnership's vehicles, machinery and equipment;

(c) Mr Baldwin (Transport Manager 2008 - March/April 2015): (i) vehicles used on the Cemex and Biffa contracts were, so far as he can recall maintained by PLC and (ii) Jason Redfern, an offsite contractor carried out some maintenance and repair work but towards the end of Mr Baldwin's employment by PLC, Mr Miller carried out the maintenance and repair work (rather than Mr Redfern) in order to save costs;

(d) Mr Brain (Transport Manager 2017 - 2020) says that tractors and machinery operated by the Partnership were maintained and repaired by PLC's employees (including Mr Miller) either at Enterprise House or in the field. All parts used were invoiced to PLC;

(e) Mr Parker (Environmental Operations Manager November 2014-July 2017) says that he carried out tractor repairs at Home Farm;

(f) Paul, in his first witness statement, says that it may be that occasionally equipment owned by the Partnership was repaired at PLC's premises if they could not be repaired at Home Farm. He confirmed that no records were kept of this;

(g) Mr Elliott-Dickens (employed as a driver) says that he took the lorries that he drove on the Cemex contract to Tom Yates, an independent contractor, to carry out repair and maintenance work; and

(h) Mr Miller (employed as a driver from around 1990 to date) says that he did some maintenance and repair work on Partnership vehicles, but not regularly.

536. I make the following findings regarding the repair and maintenance of Partnership machinery and equipment and vehicles by or at the expense of PLC:

(a) the Partnership did not start to trade until at least 23 December 2008 when it acquired a lease upon Home Farm, so no repair or maintenance work can have been carried out to Partnership machinery, equipment or vehicles prior to that date;

(b) I am satisfied that, for the duration of the Cemex contract, the trailers of the Partnership lorries which were used on that contract were repaired by Mr Woolrich's maintenance team at Enterprise House. On the other hand any repair and maintenance work of a mechanical nature to the cabs of those vehicles was carried out by an external contractor. I am satisfied that the work carried out by Mr Woolrich and his team was carried out at the expense of PLC, but not the mechanical work carried out by the external contractor, as there is no evidence as to whether this was paid for by the Partnership or PLC. This is the substance of the evidence of Mr Woolrich (apart from the question of who paid the off-site contractor) which I accept;

(c) As for the Biffa contract, the work splits down into three parts: (i) I have accepted that whilst solid waste was being removed from the Biffa site (until 2013) the Partnership used a sub-contractor to carry out that work and it does not appear that Partnership vehicles were therefore used at this stage of the Biffa contract. For that reason I am not satisfied that PLC was repairing or maintaining any Partnership vehicles because of their involvement in the removal of solid waste from the Biffa Site; (ii) I have accepted the Respondents' evidence that the Partnership only had a small involvement in the spreading of liquid waste from the Biffa Site (the second stage of the Biffa contract) that involvement being that Partnership tractors were used to pull PLC tankers. Any repairs/maintenance of tankers used on the Biffa contract by PLC was

therefore PLC repairing/maintaining its own tankers (or at least not the tankers of the Partnership); and (iii) the Volvo which was owned by the Partnership was hired to PLC for approximately 3 years from mid-2013 until mid-2016. I have accepted Paul's evidence that the terms of that hire provided that PLC would be responsible for maintaining and repairing the Volvo. It follows that PLC did maintain and repair the Volvo for 3 years, from mid-2013 to mid-2016; and

(d) allowing for holidays over Christmas and the new year of 2008/2009, I find that, from January 2009, PLC carried out some but not all of the repair and maintenance work to Partnership machinery, equipment and vehicles (in addition to those Partnership vehicles involved in the Cemex and Biffa contracts which I have dealt with above). This conclusion is supported for the following periods, by Andrew's witnesses: (i) Mr McQuaide, January 2009 - 2011; (ii) Mr Baldwin, January 2009 - April 2015; (iii) Mr Woolrich, January 2011 - November 2015; (iv) Mr Parker, November 2014 - July 2017; and (v) Mr Brain, 2017 - 2020. The Respondents' witness, Mr Miller accepts that he undertook some maintenance and repair work to Partnership vehicles, although he says not regularly and Paul accepts that PLC may have repaired Partnership equipment, if it could not be repaired at Home Farm, but that there are no records of what was repaired and when.

Issue 27 - Did the Partnership use fuel from PLC and if so, over what period?

537. The direct factual evidence presented by Andrew, that the Partnership has used fuel purchased by PLC consists of:

(a) Mr McQuaide (Operations Director 2002 - 2011) Paul's vehicles were openly filling up at Enterprise House;

(b) Anthony (independent contractor who worked on the Cemex contract) that he saw the Partnership's 8 wheel tipper lorry, Volvo and Scania at Enterprise House filling up. In cross-examination he said that he thought this was around 2010, but he could not be sure;

(c) Mr Baldwin (transport manager 2008 - March/April 2015) he was aware of agricultural tractors filling up at PLC, he did not think much of it, he saw some tractors pumping waste into the lagoons at Enterprise House, even when tractors filled up at

Enterprise House and went to Paul's farm, he assumed that it was just part of the family business. In cross-examination he accepted that fuel fobs and pin numbers could be swapped between drivers (or in the case of pin numbers guessed);

(d) Mr Brain (transport manager 2017 - July 2020) Sam, Adam Marczk, Henry Lovatt and other farmhands, on an almost daily basis, collected fuel from Enterprise House, using bowsers or filled up, at Enterprise House, tractors and other plant and machinery based at Home Farm. He says that PLC's key fobs were used to extract fuel for Partnership tractors/equipment. He provided Andrew with fuel records for the pin number that he says was allocated to Sam. He would not expect drivers to swap pin numbers allocated to them because PLC's system would record fuel drawn against that pin number and drivers allocated a pin number may be required to account for the fuel use recorded against that pin number. He sent to his home email address the fuel records for the pin numbers allocated to Sam and two Polish workers that he believed were working for the Partnership. The fuel records cover the period from 2015 to 2020. Much of the fuel use is gasoil (otherwise known as red diesel) which is used for tractors and machinery but not lorries.

538. Relevant factual evidence of the Respondent's witnesses consists of:

(a) Mr Elliott-Dickens, who says that when he drove lorries on the Cemex contract and later on the Biffa contract, he used a Partnership fuel card apart from the odd occasion when the lorries went to Enterprise House when they would fill up there;

(b) Mr Whetton says that when he drove on the Cemex contract he refuelled the lorries that he was driving at the shell garage which was close to the Cemex site, using a fuel card which he believes belonged to Paul, but when the lorries went to Enterprise House, they would fill up there.

(c) Mr Miller (employed, by PLC since around 1990) says that he drove the harvester for every potato harvest since 2016 and drove a tractor planting potatoes in 2017 and he filled up at Enterprise House every day or had fuel delivered from Enterprise House by Bowser to the fields he was working in. He confirms that he used his PLC pin number to draw fuel for the harvester; and

(d) Paul says that the Partnership has its own fuel tanks for diesel and gas oil at Home Farm, but he accepted that the Partnership used PLC fuel if it was doing planting, cultivation or harvesting work for ABF or working for the benefit of PLC. He accepted

that paragraph 185 of his second witness statement was wrong, in saying that, to avoid any suggestion that the Partnership was using fuel paid for by PLC, gas oil used by the Partnership was no longer ordered and paid for by PLC and delivered to Home Farm, Paul accepted that this was still happening.

539. It follows from the above, that the Partnership has used and does use PLC's fuel. As for when it has done so, my findings are as follows:

(a) during the Cemex contract which ran from mid-2010, through to around mid-2013, the Partnership lorries engaged on that contract filled up at Enterprise House occasionally, when those lorries came to Enterprise House for some reason, otherwise Partnership fuel cards were used and the fuel paid for at the Partnership's expense. I will estimate that one Partnership vehicles being used on the Cemex sub-contract filled up at Enterprise House on two days in every month for 3 years (that is on a total of 72 occasions);

(b) from late 2014 to late 2015 the Partnership carried out some spreading of liquid digestate for the Biffa sub-contract. I have no direct evidence from the drivers of Partnership tractors that were dealing with this spreading but, consistent with Paul's evidence that, if Partnership vehicles were working for PLC, they would refuel at Enterprise House, I find that the Partnership's tractors spreading liquid digestate used on the Biffa sub-contract did refuel at Enterprise House;

(c) Paul gives evidence that the Partnership was extensively involved in spreading liquid digestate produced by PLC's production process, in three phases: (i) around January 2009 until September/October 2016, pumping out waste water from the lagoons at Enterprise House from time to time; (ii) in September/October 2016, as a result of an environmental injunction being sought by North West Leicestershire District Council, PLC vehicles, Partnership vehicles and independent contractors vehicles were all employed to urgently empty the lagoons at Enterprise House and dig new lagoons elsewhere (including at Home Farm) in which the liquid waste could be stored pending spreading and spreading it. Thereafter liquid waste produced on a weekly basis at Enterprise House was taken by Partnership vehicles to lagoons for storage and spreading, until mid-2017; and (iii) from mid-2017 after the AD Plant started operating pasteurised waste water has been collected from PLC and spread on fields or placed in storage lagoons, pending spreading. I am satisfied, consistent with Paul's evidence, that

Partnership vehicles engaged in these processes would have refuelled at Enterprise House (where the liquid waste was collected from) at PLC's expense;

(d) from early 2016 to date, the Partnership has carried out husbandry services for ABF (planting, cultivating and harvesting potatoes). Paul accepts that PLC fuel was used and is being used by the Partnership vehicles that carried out these services and the evidence of Mr Miller, that he always filled up at Enterprise House, when planting and harvesting potatoes supports this. I find that PLC fuel has been used for all of the Partnership vehicles, equipment and machinery involved in planting, cultivation and harvesting of potatoes carried out by the Partnership for ABF; and

(e) the more difficult question is whether PLC fuel has been used by the Partnership at times when it was not carrying out work for the benefit of PLC/ABF. I am not satisfied that this occurred before early 2016. There is no direct evidence that this occurred before early 2016 and it would be easier to distinguish, before early 2016 between work done to benefit the Partnership and work done for the benefit of PLC/ABF (there is no evidence that the Partnership carried out agricultural work for ABF prior to early 2016 when it started to carry out all the husbandry work on ABF's potato crops). However, once the Partnership started to undertake planting, cultivation and harvesting work for ABF, from early 2016, the distinction between agricultural work carried out for the benefit of the Partnership and agricultural work carried out for the benefit of ABF would have been less clear and I find that, from early 2016 to date, PLC fuel has not only been used by the Partnership for agricultural operations connected with the planting, cultivation and harvesting of potatoes for ABF, but also for at least some agricultural operations which benefitted the Partnership and its crops. I make that finding because:

(i) whilst Paul suggests that PLC fuel was only used in circumstances where the Partnership was working for PLC or ABF, he accepts that no records have been kept of when the Partnership has used PLC fuel or what it was used for and I find that Paul does not know when, or on each occasion, for what purposes the Partnership has used PLC fuel;

(ii) Paul does not suggest that he ever instructed his sons, Sam or William or anyone else using the Partnerships tractors, machines or equipment, when they should and should not use PLC fuel for the Partnership vehicles, equipment and machinery and I find that no such clear instructions were given. Absent such clear instructions, it is

likely that PLC fuel will have been used by those working for the Partnership, on occasions other than only those on which the Partnership was carrying out work which benefited PLC/ABF;

(iii) as previously mentioned, neither Sam nor William have been called to give evidence and Paul accepted that there is no good reason why they have not been called to give evidence. In addition no one else who has actually used Partnership tractors, machinery and equipment since the beginning of 2016 has given any evidence as to where they obtain the fuel from (other than Mr Miller who says that he always obtained the fuel from PLC);

(iv) the circumstances in which it is appropriate to make an adverse inference as a result of a party not producing evidence from a witness who it appears is available to give evidence on a particular issue has been the subject of comment in a number of cases. For present purposes I will refer to the judgment of David Richards J (as he then was) in *Re Coroin Limited* [2012] EWHC 2343 (Ch) at paragraph 261, where he said, in the context of a Section 994 Petition: *"The basic requirement is to consider the appropriate inference, if any, to be drawn and the weight to be attached to it in the particular circumstances of the case...."* The judge quoted from the judgment of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 at 339: *"... it may be accepted that the effect of the party failing to call a witness who would be expected to be available to such party to give evidence for such party and who in the circumstances would have a close knowledge of the facts on a particular issue, would be to increase the weight of the proofs given on such issue by the other party and to reduce the value of the proofs on such issue given by the party failing to call the witness...."* David Richards J said that this was not however an absolute proposition, it depended on the circumstances of the case;

(v) here Mr Bell in his report of 1 April 2021 suggests that a very substantial amount of fuel (£272,509) has been drawn using the pin number allocated to Sam, Mr Lewis suggests that the pin number apparently allocated to Sam on the fuel system may have previously been allocated to others and that fuel pin numbers may have been swapped between drivers. It would or should have been apparent to Paul that Sam's evidence, on the question of how the PLC fuel system comes to have recorded such a substantial amount of fuel as drawn against the pin

number allocated to Sam would be of key importance, as would Sam and William's evidence generally about how much fuel he or others using his pin number drew for use by Partnership vehicles/equipment/machinery and what proportion of that was for the benefit of the Partnership's business, rather than that of PLC/ABF. It is appropriate therefore, in my judgment to apply a relatively strong inference in support of Andrew's case that the Partnership made use of PLC fuel for work carried out for its own benefit and not just when carrying out work for PLC/ABF; and

(vi) the Partnership making use of PLC fuel beyond merely using it for contracting work for ABF or work that benefitted PLC (principally collecting and spreading liquid digestate from Enterprise House) would be consistent with Mr Brain's evidence that PLC's fuel was being used on an almost daily basis, given that cultivation work carried out for ABF is seasonal and carting away and spreading liquid digest from Enterprise House, whilst it may happen at regular intervals, would not be a daily occurrence.

Issue - 28 - If the answer to any of the above is yes, was it recharged correctly as between PLC and the Partnership?

540. Whilst, during his cross examination, Paul suggested that recharges were made, by PLC to the Partnership, for the use of PLC employees for the benefit of the Partnership, I have not been taken to any documents that demonstrate that any such recharges have been made. It is not asserted that any recharges have been made for PLC fuel used by the Partnership, or for maintenance or repair work that I have found has been carried out to Partnership vehicles, equipment or machinery by PLC or otherwise at its expense. Whilst not included in issues 25-27 Andrew's ABPT Petition does assert that Partnership vehicles were insured and taxed at the expense of PLC both generally (paragraph 57) and as part of his allegations relating to the Cemex (paragraph 48.2.3) and Biffa sub-contracts (paragraph 52.3). I will deal with it here. I am satisfied that the Partnership vehicles included on PLC's Operator's Licence were taxed and insured at PLC's expense for the period that they were added to that licence. Paul suggested that the Partnership taxed and insured all its own vehicles throughout, whether they were on PLC's Operator's Licence or not. It may well have done, but this does not mean that PLC did not also tax and insure them and I accept Mr Baldwin's evidence that he, as a matter of course would arrange to road tax and finance would arrange to place on PLC's

insurance policy, all vehicles included on PLC's Operator's Licence. There is no evidence of those costs being recharged to the Partnership.

541. I will mention now that Paul does say that allowance has been made for the use of PLC fuel and employees in connection with the husbandry work carried out by the Partnership for ABF, in that the Partnership has charged less than full NAAC rates to ABF, a matter I will mention in greater detail when dealing with Issue 30 below. He has also said that, if the Partnership had used its own fuel when working for PLC, it would have charged PLC for the use of that fuel, but where it used PLC fuel it has not done so.

Issue 29 - Did any of the matters referred to above involve any breach of fiduciary duty, or duty under the Companies Act 2006 by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

542. I am satisfied that Paul breached his duties in the following respects:

(a) under Section 172 CA 2006 to act in the way that he considered, acting in good faith, would be most likely to promote the success of PLC for the benefit of its members as a whole, alternatively Paul's more general fiduciary duty to act in the best interests of PLC, by procuring that, or allowing: (i) the repairing and maintenance of Partnership vehicles, equipment and machinery to be carried out at the cost of PLC; (ii) fuel paid for by PLC to be used in Partnership vehicles, machinery and equipment; (iii) PLC to pay for the insurance and road tax for Partnership vehicles included on PLC's Operator's Licence between 2010 and 2011; and (iv) PLC employees to be used for the purposes of the Partnership's business, in each case, without any authority from the board of PLC, and whilst failing to ensure that a proper record was kept of the value of PLC's resources used on each occasion, or that the costs incurred by PLC were properly recharged to the Partnership; and

(b) failing to ensure that another director of PLC took responsibility for properly recording and charging the Partnership for the use of PLC's resources, was also, in my judgment a breach of Paul's duty under Section 175 CA 2006 to avoid conflicts of interest, because Paul put himself in a position where he took responsibility for deciding what should be recharged to the Partnership, or what credits should otherwise be allowed by the Partnership to PLC in respect of the use by the Partnership of PLC's

resources, the use of which he failed to ensure either he or anyone else properly recorded. That put Paul in a hopeless position of conflict in deciding how PLC should be credited for the use of its resources by the Partnership, in circumstances where even Paul had and has no idea of what PLC resources the Partnership had used, other than in general terms.

543. I am satisfied that Mr Ellis breached his duty under Section 172 CA 2006 to act in the way that he considered, acting in good faith, would be most likely to promote the success of PLC for the benefit of its members as a whole, alternatively Mr Ellis's more general fiduciary duty to act in the best interests of PLC and that he breached his duty under Section 173 CA 2006 to exercise independent judgment:

(a) Mr Ellis made it clear in his witness statement that he was aware that fuel purchased by PLC was being used by Partnership vehicles. He suggests that this was confined (so far as he was aware) to vehicles which were removing liquid waste from Enterprise House. In fact, I consider that Mr Ellis was aware or ought to have been aware that the Partnership's use of PLC's fuel was more extensive than that, because he accepted, in cross examination, that his office overlooks the yard in which refuelling takes place at Enterprise House and I have accepted Mr Brain's evidence that Partnership tractors, equipment and machinery were filling up with fuel at Enterprise House on an almost daily basis, that amount of regular fuel use is inconsistent with the Partnership only using PLC's fuel for vehicles used to remove liquid waste from Enterprise House;

(b) Mr Ellis accepted that he left Paul to decide on the appropriate level of any recharges or credits to be given to PLC and took no steps to ensure that the Partnership's use of fuel was properly recorded. In order to comply with his duty to act independently, Mr Ellis ought to have ensured, either that the Partnership did not use PLC fuel at all, or if it did, that it was properly recorded and recharged by someone senior within PLC, other than Paul;

(c) in his witness statement, Mr Ellis also accepted that he knew that PLC's employees were working for the Partnership, but he did not know on what and that he relied upon Paul to ensure that rates charged by the Partnership to PLC were properly discounted to take this into account. This again demonstrates the same failure on Mr Ellis's part to either ensure that PLC's employees were not used for the benefit of the Partnership at all, or that, if they were, their use was properly recorded and recharged by PLC to the

Partnership, by someone acting independently in the interests of PLC and not left to Paul; but

(d) I accept that Mr Ellis was not aware that the Partnership's vehicles, machinery and equipment were being maintained and repaired by PLC, that is his evidence and there is no evidence that anyone told him that this was happening. I am also not satisfied that he ought to have known that PLC was maintaining and repairing Partnership vehicles, equipment and machinery, given that Mr Ellis's responsibility was purchasing. Transport and maintenance appear to have been Paul's responsibility at all relevant times.

544. At paragraph 83 of his witness statement, Mr Tomkinson accepts that he knew that PLC vehicles were going to Home Farm for legitimate purposes, such as spreading waste, but he says he had no knowledge of PLC employees working at Home Farm or elsewhere for the Partnership, or of items being purchased by PLC for the Partnership.

545. I accept the evidence set out in paragraph 83 of Mr Tomkinson's witness statement as truthful. I am also satisfied that, as a non-Executive Director of PLC, who visited Enterprise House relatively infrequently, unlike the executive directors, Mr Tomkinson cannot be expected to have the same knowledge of the day to day affairs and operation of PLC's business as the executive directors. For example, unlike Mr Ellis, he had little opportunity to notice that the Partnership's agricultural vehicles were filling up with fuel at Enterprise House on an almost daily basis. I am not therefore satisfied that Mr Tomkinson ought to have known that the Partnership was using PLC fuel, employees and maintenance and repair services. Absent that knowledge, I am not satisfied that Mr Tomkinson breached any fiduciary or statutory duties that he owed to PLC.

546. Finally I will, again mentioned Mr Sharratt, who is not a respondent to any of the petitions (because he is not a shareholder of any of the Group companies). Mr Sharratt is and was at all relevant times, the full-time executive finance director of PLC. That role gives him a greater responsibility than any other director of PLC for ensuring that any use of PLC's assets by a third party is recorded properly and PLC compensated for that use, or if not that it did not happen. As such Mr Sharratt either had or ought to have had more knowledge of what resources of PLC were being used by the Partnership than Mr Ellis and Mr Tomkinson and more responsibility than them, for ensuring that that use was properly recorded and recharged. Instead Mr Sharratt left Paul, who was hopelessly conflicted, to take responsibility for recording the use of PLC's resources by the Partnership and to decide what should be

charged to the Partnership for that use and how and to notify Mr Sharratt's department what should be charged to the Partnership for that use. Mr Sharratt must have known alternatively ought to have known that Paul was neither recording the use of those resources, nor providing a credit to PLC for their use by the Partnership in a transparent way. As such Mr Sharratt breached his duties under section 175 CA 2006 to PLC and for all those reasons I regard his breach as more serious than that of Mr Ellis who had neither the direct responsibility for ensuring that the use of PLC's resources were properly accounted for that Mr Sharratt had, nor the visibility that Mr Sharratt had that they were not being accounted for properly.

POTATOES

Issue 30 - What were the arrangements for the supply or cultivation of potatoes between PLC, ABF and the Partnership?

547. The terms of the arrangements for the supply and cultivation of potatoes, as between PLC, ABF and the Partnership are not contained in or referred to in any document. Paul accepts that, once it was decided that ABF would grow potatoes, the Partnership would carry out the husbandry work to grow the potatoes and PLC would buy the potatoes, once grown, Paul decided, on behalf of ABF, PLC and the Partnership what the terms of the arrangements between those parties would be (other than the price at which PLC would purchase ABF's potatoes, which was determined by Mr Ellis).

548. Mr Ellis says that he understood that the Partnership would charge ABF "standard rates". Mr Tomkinson says that although he understood who was to do what, as between ABF, PLC and the Partnership, he had no input as to the price that PLC would pay for the potatoes or what the Partnership's charges for the husbandry work would be.

549. In paragraph 172 of his witness statement, Andrew says that: "Over that Christmas [2015] Paul informed me that he was going to be growing hundreds of acres of potatoes to supply to [PLC] mostly on rented land. First he told me 200 acres then it increased to 300 acres and I believe that he in fact planted over 500 acres..... Paul informed me that [the Partnership] would be undertaking husbandry (provision of agricultural services including

ploughing, cultivating, planting, spraying, irrigating, harvesting etc.)... He told me [the Partnership] would be providing all their services at the UK market rates for contractors to [PLC].”

550. I accept Paul’s evidence (supported to a certain extent by that of Mr Ellis, Mr Tomkinson and also by what Andrew says Paul told him) that the arrangements between ABF, PLC and the Partnership for the growing and sale of potatoes were as follows:

- (a) ABF paid rent to the Partnership for the use of fields at Home Farm, to grow potatoes;
- (b) the Partnership carried out the work of planting, cultivating and harvesting potatoes planted at Home Farm, Barn Farm and elsewhere (where ABF rented fields from third parties). (b) the rates that the Partnership would be entitled to charge were the average rate specified by the NAAC for each operation carried out;
- (c) until ABF opened its own credit account with Agrovista, the Partnership acquired the sprays and chemicals which were required to grow the potato crops, and the Partnership recharged the cost of the sprays and chemicals it bought for ABF’s potato crops, to ABF, at cost;
- (d) at least in the early years, the Partnership addressed its invoices for husbandry work carried out and the cost of chemicals and sprays to PLC. PLC then paid these invoices and set these costs off against the price paid by it to ABF for the harvested potatoes ABF supplied to PLC. In later years, the Partnership invoiced ABF although it appears that PLC provided the funds in order to enable ABF to pay these invoices; and
- (e) as to the price charged by ABF to PLC for the harvested potatoes, which ABF sold PLC, Mr Ellis says that he determined what price PLC would pay. In his report dated 1 April 2021, Mr Bell says that PLC paid £313,653 less for the potatoes that it had bought from ABF than it paid on average to third party suppliers for the 4 years to 31 August 2020, and also that ABF made a loss on the sale of potatoes to PLC. The price charged by ABF to PLC, does not therefore appear to be either: (i) the average price that PLC paid to third parties for the supply of potatoes; or (ii) the cost to ABF of growing the potatoes, but instead a price determined by Mr Ellis which was less than the average price paid to third party growers.

Issue 31 - Did the arrangement with the Partnership involve any conflict of interest on the part of Paul and if so what conflict?

551. Paul accepts that he decided, both for the Partnership and ABF, what the Partnership would charge ABF for the husbandry services it provided to ABF. I have accepted that the agreement was that the Partnership would charge published NAAC rates for those husbandry services. Paul made these decisions, for the Partnership and ABF, notwithstanding that he was not a director of ABF until 13 July 2016, and the decision to proceed with the arrangements appears to have been made in February 2016.

552. Mr Zaman pointed out that the NAAC published rates are simply an average of all rates charged by its members to farmers, for particular husbandry services and as such those average rates are simply a starting point for negotiations between the farmer and contractor about what rates will actually be charged for the work, based upon such variables as soil type and the size of the fields. Mr Ellis, in cross examination accepted that the NAAC rates are simply average rates charged by its members to farmers, but his position appeared to be that farmers and contractors would often assume that the average NAAC rates would be charged for the work carried out by the contractor and then there may be some discussion later, whilst the work was in progress or after it had been completed, about whether there was any good reason to vary those average rates, but that the average rates were the “norm”.

553. Regardless however of whether the NAAC rates constitute the “norm”, there is a clear conflict between Paul agreeing on behalf of the Partnership and agreeing on behalf of ABF, what the Partnership would charge for its husbandry services. It was in the Partnership’s financial interests to be paid as much as possible and in ABF’s financial interests to pay the Partnership as little as possible.

554. As for the rent payable by ABF to the Partnership for fields at Home Farm for growing potatoes, there was again a conflict of interest between Paul agreeing on behalf of the Partnership and on behalf of ABF what rent would be paid. The conflict is the same as that in Paul agreeing what rates the Partnership would charge ABF for its husbandry work.

555. As for sprays and chemicals purchased by the Partnership for use on ABF’s potato crops, (in the early years) I am prepared to accept that there was no more than a theoretical conflict-of interest in Paul agreeing, on behalf of ABF that it would reimburse the Partnership, at cost for the sprays and chemicals purchased on its behalf by the Partnership. The Partnership was

merely facilitating the acquisition of these chemicals on credit which ABF could not itself obtain on credit, at that point in time from Agrovista, on credit and charging ABF what it would have paid to Agrovista, had it been able to obtain that credit, the benefit of the arrangement therefore flowed only in ABF's direction.

556. The position so far as conflict of interest is concerned with PLC's interests is more complicated. On the face of it, what the Partnership charged ABF in rent and husbandry charges is of no concern to PLC, given that I have concluded that the price charged by ABF to PLC for its potatoes was not fixed according to the costs incurred by ABF in growing those potatoes. However, in my judgment there was still a conflict of interest between the Partnership (and therefore Paul) and PLC, in that, as part of the arrangements PLC was: (a) in the early years invoiced by the Partnership for rent, husbandry services and sprays and chemicals by the Partnership and paid those invoices (recouping the cost when it later paid for ABF's potatoes); and (b) agreeing to buy all ABF's potatoes once harvested. There was a conflict between the Partnership interest (and therefore Paul's interest) in PLC facilitating the Partnership's arrangements with ABF (from which the Partnership presumably made a profit) and the question of whether it was in the interests of PLC to facilitate those arrangements.

Issue 32 - Did Paul disclose the nature and extent of his interest in the arrangement to the directors of PLC and ABF?

557. The directors of PLC, in early 2016, were the Respondents and Mr Sharratt (Andrew having, on my findings, resigned as a director of PLC in August 2014).

558. The arrangements were that the Partnership would (a) rent fields at Home Farm to ABF; (b) carry out husbandry services for ABF; and (c) recharge the cost of sprays and chemicals to ABF.

559. I am satisfied that each of the Respondents and Mr Sharratt were aware that Paul was a partner in the Partnership before the arrangements were entered into. I am also satisfied that they each knew of (because Paul disclosed it to them) and approved of the basic arrangements, on behalf of PLC, that: (a) ABF would grow potatoes; (b) the Partnership would plant, cultivate and harvest the potatoes and charge ABF for those services; (c) the Partnership would rent fields at Home Farm to ABF; and (d) ABF would sell the grown potatoes to PLC. I am not satisfied that Paul disclosed to the directors of PLC that the Partnership was

paying Agrovista's invoices for chemicals and sprays supplied for and used by the Partnership on ABF's potato crops and the Partnership was recharging ABF for their cost, or that in the early years, the Partnership was invoicing PLC for all the costs of husbandry, sprays and chemicals and rent and PLC was setting off what it paid against the price that it paid to ABF for its potatoes (although I am satisfied that Mr Sharratt knew that this was happening, at an early stage because his department was processing the invoices/payments).

560. In order for Paul to disclose the full nature and extent of his interest, in my judgment, Paul should have disclosed the following to the directors of PLC: -what the Partnership would charge ABF in rent and for its husbandry services; that the Partnership would pay for sprays and chemicals required for ABF's potato crop and recharge them to PLC/ABF; and what profit the Partnership expected to make from charging rent to, and carrying out husbandry services for ABF. I am not satisfied that Paul disclosed to the directors of PLC any of those details, for the following reasons:

(a) in his witness Paul does not assert that he provided any of those details to the directors of PLC;

(b) Mr Tomkinson, in his witness statement says that he had no input into how the price to be paid by PLC for the potatoes was established or the level of charges which the Partnership would charge ABF. In cross-examination Mr Tomkinson confirmed that Paul also did not disclose the Partnership's expected level of profit;

(c) in his witness statement, Mr Ellis says that he was not involved in the decision as to what would be charged by the Partnership, he took it as read that NAAC rates would be charged. In cross-examination Mr Ellis confirmed that he was never told what profit it was expected the Partnership would make; and

(d) in his witness statement, Mr Sharratt says that there was no conversation about charging rates, he understood the Partnership would charge standard rates. He left it to Paul and Mr Ellis to "make it happen".

561. As for ABF, the Partnership had direct arrangements with ABF to rent fields to ABF, carry out husbandry services for ABF and recharge the cost of sprays and chemicals supplied by Agrovista for use on ABF's potato crops. In February 2016, the only directors of ABF were Mr Tomkinson and Mr Sharratt. I have already confirmed what Mr Tomkinson and Mr Sharratt say in their witness statements they were told about the arrangements and it is clear that they were not told: (a) what the Partnership would charge ABF in rent and for its husbandry

services; (b) that the Partnership would pay for sprays and chemicals required for ABF's potato crop and recharge them to PLC/ABF; or (c) what profit the Partnership expected to make from charging rent to, and carrying out husbandry services for ABF. It follows that Paul did not disclose to the directors of ABF the nature and extent of the Partnership's interest in the arrangements, in February 2016.

Issue 33 - Did the arrangement involve any breach of fiduciary duty, or duty under the Companies Act 2006 by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

Paul

562. The decision to enter into the arrangements between ABF and the Partnership, to (a) rent fields at Home Farm to ABF; and (b) carry out husbandry services for ABF, appears to have been made in or about February 2016. At that point Paul was not a director of ABF (he only became a director on 13 July 2016). Paul did not therefore owe a duty under Section 177 CA 2006 to disclose the nature and extent of his interest in those arrangements to the directors of ABF (at that point Mr Tomkinson and Mr Sharratt). However, under Section 182 CA 2006, Paul had a duty, when he became a director of ABF, on 13 July 2016 to disclose the nature and extent of the Partnership's interest in those agreements with ABF to Mr Sharratt who was, at that point in time the only other director of ABF (Mr Tomkinson having resigned as a director of ABF at the same time as Paul was appointed a director of ABF and Mr Ellis not yet having been appointed as a director of ABF). I am satisfied that, by 13 July 2016, Mr Sharratt knew or ought to have known what the Partnership was charging ABF for husbandry services and in rent and that the Partnership was recharging ABF for sprays and chemicals supplied by Agrovista to the Partnership. I am satisfied of this because Mr Sharratt's finance department was responsible for processing Partnership invoices addressed to PLC/ABF. However neither Mr Sharratt, nor Paul suggests that Paul disclosed to Mr Sharratt what profit the Partnership was making and was likely to make going forward from those arrangements (this was not necessary for the recharge of Agrovista invoices because the Partnership was making no profit). The failure of Paul to disclose, to Mr Sharratt, in July 2016, the profit made by the Partnership and that it was likely to make, from what it was charging to ABF for husbandry services and to rent fields at Home Farm was a breach of Section 182 CA 2006, by

Paul. Andrew does not however plead, in his ABF Petition that Paul failed to disclose the nature and extent of his interest in the agreement for the Partnership to provide husbandry services and rent land to ABF (rather Andrew pleads that the whole arrangement was a breach of Paul's fiduciary duties and a breach of the no conflict rule under Section 175 CA 2006).

563. I find that, Paul's failure to disclose to the directors of PLC, the nature and extent of the Partnership's interest in the agreement for it to carry out husbandry services for ABF, to rent fields to ABF and to pay for and then recharge to ABF the cost of chemicals and sprays supplied by Agrovista, was a breach by him of his duties under Section 177 CA 2006, because, although the arrangements were predominantly constituted by agreements between ABF and the Partnership, in the early years the Partnership invoiced PLC and PLC paid the invoices and set what it paid off against what ABF charged PLC for its harvested potatoes and PLC purchased ABF's potatoes. To that extent therefore PLC was a party to those arrangements.

564. Paul's failure to recognise the conflicts of interest identified by me in paragraphs 547-552 above (Issue 31) and agreeing himself, on behalf of the Partnership, ABF and PLC the terms of the arrangements are a breach by Paul of his fiduciary duty to act in the best interests of ABF/PLC by ensuring that independent directors agreed the arrangements between the Partnership and ABF/PLC and between ABF and PLC. I do not find there to be a breach by Paul of his duty under Section 175 CA 2006 to avoid conflicts of interest, because I have found that Paul breached his duties under Sections 182 (ABF) and 177 CA 2006 (PLC) by Paul causing ABF/PLC to enter into the overall arrangements and Section 175(3) CA 2006 makes it clear that the provisions of that section do not apply to a conflict of interest in relation to a transaction or arrangement with the relevant company (see paragraph 445 above, referring to the judgment of David Richards J, as he then was in *Re Corain Limited*).

Mr Tomkinson

565. I am satisfied that Mr Tomkinson breached his duty under Section 173 CA 2006 to exercise independent judgment, as a director of ABF and PLC, in connection with the husbandry services provided by the Partnership to ABF and the renting of fields by the Partnership to ABF:

- (a) Mr Tomkinson knew that the Partnership was entering into arrangements with ABF, under which the Partnership would be providing husbandry services for ABF's potato crops, ABF would be selling its potatoes to PLC and ABF would be renting land from the Partnership on which to grow potatoes (but not the arrangements for the Partnership

to purchase sprays and chemicals from Agrovista for ABF's potato crops and recharge them to ABF) Mr Tomkinson at least went along with all this happening;

(b) Mr Tomkinson accepts that he had no input into what the Partnership would charge for the husbandry services that it provided to ABF and that he was not told what profit the Partnership was likely to make from providing those services to ABF. The position is the same for the rent charged by the Partnership to ABF for the use of its land by ABF to grow potatoes. Mr Tomkinson simply left Paul to decide what the Partnership would charge ABF, when Paul was clearly conflicted and, in February 2016, not even a director of ABF; and

(c) the price to be charged by ABF to PLC for its potatoes was also something that Mr Tomkinson ought to have ensured was independently negotiated on behalf of ABF (Mr Ellis determining on behalf of PLC what it would pay) but did not.

Mr Ellis

566. Mr Ellis was appointed as a director of ABF, for the first time on 26 May 2017, by this time, the arrangements between ABF and the Partnership for husbandry services and the renting of Partnership land to ABF had already been agreed and had been in place for well over a year. In those circumstances, I am not satisfied that Mr Ellis breached any duty he owed to ABF.

567. Given Mr Ellis's position as PLC's Purchasing Director and his evidence (which I accept) that it was he who determined what price PLC would pay for the potatoes grown by ABF and that he ensured that PLC paid market rates for the potatoes (a point supported (from PLC's perspective) by Mr Bell's conclusion that PLC paid ABPT, on average less than the price that it paid to other growers). I am not satisfied that Mr Ellis breached his duty to PLC, under Section 173 CA 2006 by failing to exercise independent judgment in relation to the price charged by ABF to PLC for its potatoes.

Mr Sharratt

568. As for other issues, where the question of breach of fiduciary or statutory duties of directors is raised, I observe that Mr Sharratt, although not a Respondent (because he is not a shareholder of ABPT or ABF) was at all material times a director of both PLC and ABF and therefore the breaches of duty under Section 173 CA 2006 which I attribute to Mr Tomkinson would also be breaches of duty by Mr Sharratt, given that he also approved the general

arrangements on behalf of PLC and ABF, but failed to ensure that someone acting independently on behalf of ABF/PLC negotiated the matters set out in paragraph 558 above.

WATER PURIFICATION SOLUTIONS LIMITED

Issue 34 - Was the incorporation of WPS and subsequent transfer of funds from PLC to WPS in breach of fiduciary duty, or duty under the Companies Act 2006?

569. I am not satisfied, for the reasons that follow, that: (a) the incorporation of WPS; or (b) the transfer by PLC of £623,500, to WPS, on 29 May 2014 were, in either case, a breach of fiduciary duty or of a duty under CA 2006 by any of PLC's directors. Instead I am satisfied that Andrew and all the other directors of PLC were aware and approved of, both the incorporation of WPS and the transfer of £623,500 to WPS by PLC.

570. In the comments I have already made on the honesty and credibility of Andrew, I have found that:

(a) the text exchange between Andrew and Paul on 13 February 2014 in which Andrew agreed that Mr Sharratt should have the same number of shares in a new company, as Mr Tomkinson had in ABPT, was Andrew's informed agreement that Mr Sharratt should have that number of shares in WPS (see paragraph 246 above); and

(b) Andrew's assertion, in cross examination, that causing WPS to make two payments totalling £623,500 to WPS, rather than one on the same day, was an attempt to disguise the payments, was an example of Andrew being too ready to make allegations of fraud on the flimsiest of evidence, given that two payments would no more disguise the payment of £623,500, to WPS, than making it in one payment (see paragraph 245 (b)).

571. I am satisfied that, Andrew would not have agreed to Mr Sharratt having the same number of shares in WPS, as Mr Tomkinson held in ABPT, unless Andrew knew what it was that WPS would do (acquire and hold the AD Plant, Andrew has not even suggested what it was that he thought WPS was going to do, if not that).

572. I accept Mr Sharratt's evidence that the reason why the £623,500 was transferred to WPS, when it was (before a final decision had been made to acquire and operate the AD Plant through WPS) was that it suited Andrew's position in the financial relief proceedings in his divorce, for the liquidity of PLC to be depleted by paying away the £623,500 to WPS I accept this because:

- (a) the transfer took place, on 29 May 2014, a little over a month before the financial relief hearing commenced on 9 July 2014, the funds were not used by WPS and were transferred back to PLC in September 2014. Those timings fit with Mr Sharratt's evidence that the transfer was made, when it was, in order to show a reduced cash position in PLC on 9 July 2014, for the purposes of Andrew's financial relief proceedings;
- (b) I have not accepted that Mr Sharratt was lying when he said, in cross examination that the transfer of the £623,500 was not "inadvertent", in spite of the content of his email to Lloyds Bank of 14 September 2014, in which he said that the transfer was made inadvertently (see paragraphs 308-310 above);
- (c) I have accepted Mr Sharratt's evidence that, at the financial relief hearing he was asked about the transfers of £623,500, from PLC to WPS, by Andrew's former wife's counsel and he confirmed it was to be used to pay the supplier of the AD Plant (I have rejected Andrew's evidence that the transfers were not mentioned, during that hearing, for the reasons already given (see paragraph 246 (c) above)). This shows that the purpose that Mr Sharratt and the Respondents attribute to the transfers, when they were transferred, played out at the hearing on 9/10 July 2014, with PLC's cash being depleted and Mr Sharratt being able to offer what appeared to be a legitimate business explanation for that depletion, in PLC's cash.

573. Mr Tomkinson, in his cross examination was asked about his text to Andrew of 14 May 2017, in which, responding to a text he received from Andrew asking him if he knew anything about Paul incorporating a new company named Water Purification Services Limited, Mr Tomkinson said that he did not know anything about a new company set up by Paul. In his re-examination, Mr Tomkinson said that he understood that KPMG had advised that the AD Plant project should be carried out through a separate limited company and his understanding was that, because there had been no final financial settlement in his divorce, Andrew did not want any shares to be issued in his name, in that new company, and was supportive of PLC's cash reserves being depleted ahead of the final hearing in his financial remedy proceedings, by the transfers to WPS. This was, said Mr Tomkinson, his understanding of why no shares in WPS were issued in Andrew's name and the transfers of £623,500 were made when they were. I am satisfied that that was Mr Tomkinson's understanding of the position at the relevant times and that (just as for ABF) neither Mr Tomkinson, nor Mr Ellis would have been a party to any arrangements by which cash was transferred from PLC to WPS, or the AD Plant project carried

out through WPS, in a way that excluded Andrew from receiving the same benefit from the transfers/AD Plant project as Paul received. In my judgment, their co-operation would be needed to achieve either of those dishonest objectives alleged by Andrew, and they would not have co-operated, and I am satisfied that Paul would have known that they would not co-operate, in achieving any such dishonest object. I prefer the evidence of Paul, Mr Sharratt, Mr Ellis and Mr Tomkinson, to that of Andrew, because, their case is inherently more plausible than Andrew's case and I have found more reason to doubt the honesty of Andrew's evidence than that of any of them (and in particular that of Mr Tomkinson and Mr Ellis).

574. Andrew's case is that the incorporation of WPS and transfer to it of £623,500 was an attempt to take value out of PLC for Paul's own personal benefit. That case is based upon Andrew not knowing about or supporting the incorporation of WPS, WPS taking on the AD Plant project, the transfers of £623,500 to WPS, by PLC, or that shares in WPS should not initially be issued to him, but I have found that Andrew knew about and supported all that happening.

Issue 35 - Was there any conflict of interest on the part of Paul and if so, did Paul disclose the nature and extent of his interest in the arrangement to the directors?

575. Given the findings that I have made, in relation to Issue 34, I am satisfied that Andrew did know about the transfers of £623,500 and Mr Sharratt self-evidently did, because he arranged it. I am satisfied also that each of the Respondents knew of and approved of the transfers and that all the directors of PLC (including Andrew knew what the shareholdings in WPS were to be, including that Paul was holding half of the shares issued to him in WPS, on 18 February 2014, on trust for Andrew. Each director of WPS, therefore knew the nature and extent of the interest of every other director in the transfers and approved of the transfers. Under Section 175 of the CA 2006 however, as beneficial shareholders in WPS, at the time of the transfers, on 29 May 2014, Paul, Mr Tomkinson, Mr Ellis and Andrew should each have disclosed the nature and extent of their interests, as such shareholders in WPS to a board meeting of PLC and sought authorisation for the transfers of £623,500, from that board meeting. There is no evidence that any such board meeting took place or that the appropriate

approval was given at such a board meeting. There is therefore what I would describe as a technical breach of Section 175.

CONTROLLING COSTS

Issue 36 - Were costs savings on monthly expenditure for mechanical and electrical maintenance identified and drawn to the attention of Paul and Mr Sharratt and not acted on?

576. I accept Mr Woolrich's evidence that Eriks made a presentation to Paul and Mr Sharratt (also attended by Mr Woolrich) which included, in substance the information and representations set out in the document identified in Mr Woolrich's witness statement as the document which Eriks handed to him, Paul and Mr Sharratt during that presentation (the Eriks Document"). The Eriks Document included a claim that if PLC made Eriks their sole supplier of mechanical and electrical parts, PLC would make savings of £114,993, on the purchase of electrical and mechanical parts, over 3 years.

577. In his cross-examination, Mr Woolrich said that Paul and Mr Sharratt listened to Eriks' presentation and seemed positive about it, but thereafter, nothing happened. Both Paul and Mr Sharratt say that they cannot recall Eriks making any presentation to them. I prefer the evidence of Mr Woolrich, that Erik's did make a presentation, because:

- (a) Mr Woolrich as PLC's Maintenance Supervisor would be concerned, on a day-to-day basis to ensure that PLC held in stock and/or could obtain rapidly, the mechanical and electrical parts which were required by him and his team to ensure that PLC's machinery at Enterprise House operated smoothly, efficiently and so far as possible free from breakdowns and that if breakdowns did occur these were fixed as soon as possible. Mr Woolrich and his team would be judged upon how well they achieved those objectives and the costs incurred by his team in doing so. As such the reliability of the service that PLC received from its parts suppliers and the cost of the parts they supplied would be of key importance to the success of Mr Woolrich in his role. In contrast those matters did not form part of the day-to-day concerns of either Paul or Mr Sharratt, all of that, in my judgment, makes it more likely that Mr Woolrich would take a keen interest in the choice of parts supplier and in the outcome of any

decisions made by PLC as to the choice of supplier and therefore more likely to recollect presentations from suppliers such as that he says Eriks made;

(b) Mr Woolrich gives positive evidence of his recollection that he sought to introduce Eriks as a parts supplier to PLC and arranged for Eriks to make a presentation to Paul and Mr Sharratt, which Mr Woolrich attended, Paul and Mr Sharratt simply say that they cannot recall it. Importantly Mr Woolrich's recollection is supported by the Eriks Document, which he says was provided by Eriks as part of their presentation; and

(c) I have accepted that Mr Woolrich gave honest evidence. It is highly unlikely that he is mistaken in his recollection that Eriks made a presentation to Mr Woolrich, Paul and Mr Sharratt, particularly as he has produced the Eriks Document that he says Eriks produced at the presentation.

578. I find that the costs savings Eriks purported to be able to provide to PLC, in line with the Eriks Document were brought to the attention of Paul and Mr Sharratt and that neither Paul nor Mr Sharratt pursued the matter any further, after listening to Eriks' presentation. Whether accepting Eriks proposal would have resulted in cost savings for PLC on the purchase of mechanical and electrical parts is another matter which I will address when dealing with issue 37.

Issue 37 - If yes, does this involve any breach of fiduciary duty, or duty under the Companies Act 2006, or amount to gross mismanagement by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

579. I am not satisfied that, what I have found to be, the failure of Paul and Mr Sharratt to act on the Eriks' presentation, by causing PLC to order all of their mechanical and electrical parts from Eriks was a breach of fiduciary duty, of their duties under CA 2006 or gross mismanagement by any of the Respondents, for the following reasons:

(a) Mr Woolrich and the experts accept that the cost of parts is not the only consideration in choosing parts suppliers, the level of service is also important, as is loyalty and having a good long term relationship with the suppliers. Whilst Mr Woolrich suggested that the service which PLC was obtaining from its existing suppliers was unsatisfactory, I cannot be certain that the service which Eriks would have provided would have been better or

worse than PLC's existing suppliers or, more to the point whether Paul and Mr Sharratt might reasonably have been concerned about how good the service from Eriks might have been if they chose to make Eriks PLC's sole supplier of mechanical and electrical parts;

- (b) Eriks would be a new supplier with no existing relationship with PLC, its ability to perform reliably and form a strong long term relationship with PLC would be unknown;
- (c) relying on Eriks as the only supplier of mechanical and electrical parts to PLC would have involved PLC "putting all its eggs in one basket" and thereby taking a risk that Eriks might not achieve the service levels that PLC required (for example delivery of parts needed urgently to keep PLCs production line going);
- (d) whilst Eriks claim, in the Eriks Document that they could achieve cost savings for PLC of £114,993 over 3 years, if PLC ordered all their mechanical and electrical parts from Eriks, the document does not make it clear what these savings are benchmarked against (ie savings of £114,993 compared to what?) or how they would be achieved. The Eriks' Document goes on to say that Eriks would "seek to match or better the last price paid for a part". Whilst this statement is not inconsistent with PLC achieving cost savings of £114,993 over 3 years, if they ordered all their mechanical and electrical parts from Eriks, the mere matching or bettering of the last price paid for a part alone does not explain how PLC would achieve costs savings of £114,993 over 3 years. It is by no means clear therefore that ordering all PLC's mechanical and electrical parts from Eriks would have enabled PLC to achieve the cost saving of £114,993 over 3 years which the Eriks Document suggest it would achieve and Paul and Mr Sharratt would be entitled not to be convinced by that claim;
- (e) ordering only from Eriks might lead to PLC paying more for parts in the long run than they would pay by ordering from a panel of suppliers, which enabled PLC to price compare, between suppliers and purchase from the supplier who offered the best price for the relevant part, or perhaps the swiftest delivery if this was more important;
- (f) Mr Woolrich accepted the decision as to which suppliers PLC ordered parts from was a decision for the directors of PLC and not his decision and that those directors were entitled to disagree with him about whether ordering all PLC's mechanical and electrical parts from Eriks was in the best interests of PLC. Insofar therefore as Mr Woolrich suggests, by his evidence, that PLC ought to have ordered all of its mechanical and

electrical parts from Eriks, the directors of PLC were entitled to disagree with that opinion, acting in what they believed, in good faith to be in the best interests of PLC (their duty under Section 172 CA 2006);

- (g) notwithstanding therefore that the Respondents have not put forward a positive case as to why they did not follow up on the apparent opportunity to purchase mechanical electrical parts more cheaply from Eriks (because Paul and Mr Sharratt say they cannot recall Eriks making a presentation to them and they cannot therefore say why they did not pursue that opportunity) the advantages to PLC, of ordering all its mechanical and electrical parts from Eriks (whether in cost savings or otherwise) are too uncertain for me to conclude that Paul and Mr Sharratt were wrong not to follow up on that opportunity;
- (h) unless I am able to conclude that Paul and Mr Sharratt were clearly wrong not to follow up on the opportunity to purchase all PLC's mechanical and electrical parts from Eriks, I cannot say that that failure amounts to gross mismanagement or a breach of any fiduciary or statutory duty by them (see *Re Macro (Ipswich) Limited [1994] 2 BCLC 354 at page 405* where Arden J (as she then was) said "With respect to alleged mismanagement, the court does not interfere in questions of commercial judgment, such as would arise here if (for example) it were alleged that the companies should invest in commercial properties rather than residential properties. However, in cases where what is shown is mismanagement, rather than a difference of opinion on the desirability of particular commercial decisions, and the mismanagement is sufficiently serious to justify the intervention by the court, a remedy is available under section 459." [of the Companies Act 1985, the predecessor to Section [997] CA 2006]; and
- (i) for completeness, I will say that, even if I had found that the failure by Paul and/or Mr Sharratt to follow up on the Eriks opportunity was gross mismanagement or a breach of fiduciary or statutory duty, I could not, in any event, have made the same finding in relation to Mr Ellis or Mr Tomkinson, because there is no evidence that they were ever made aware of the Eriks opportunity and absent such knowledge, there is no basis upon which I could have found that there had been gross mismanagement/a breach of fiduciary duty/a breach of statutory duty by them.

Issue 38 - Did PLC in June 2017 retain analysts to undertake a costs reduction analysis which was implemented in 2018?

580. Given my finding on issue 37, it is not strictly necessary for me to answer issue 38 which Mr Zaman says I should not answer in any event, because it is not an issue arising from the parties' statements of case. I will however briefly deal with Issue 38 because, if I had found that there had been gross mismanagement or a breach of fiduciary or statutory duty by Paul/Mr Sharratt, in not choosing Eriks as PLC's sole supplier of mechanical/electrical parts, then it would have been relevant to consider whether any cost reductions that PLC implemented after it could have appointed Eriks as sole supplier of mechanical and electrical parts would have reduced any cost saving which I found PLC would have achieved as a result of using Eriks as sole supplier.

581. I am satisfied that PLC retained Expenses Reduction Analyst (UK) Ltd ("ERA") to undertake a cost reduction analysis because the Respondents have produced a copy of a signed non-disclosure agreement dated 1 February 2017 between PLC and ERA. I am satisfied that ERA made recommendations to PLC for reducing costs (including prices paid for mechanical and electrical parts) in 2018, as appears to be common ground between Mr Bell and Mr Lewis. In their reports, Mr Bell and Mr Lewis calculate how, if I decided that PLC should have contracted with Eriks to supply all its mechanical and electrical parts, promptly following their presentation, the costs savings of £114,993 claimed in the Eriks Document would have been reduced by PLC implementing the recommendations of ERA. It is unnecessary for me to consider those figures, in light of my finding that Andrew has not proved that Paul/Mr Sharratt's decision not to take forward Eriks' proposal that they should supply all of PLC's mechanical and electrical parts, amounted to gross mismanagement/ breach of duty.

THE WILLOWS

Issue 39 - Did Paul procure the hire of the Telehandler for the use of the Partnership and paid for by BIL?

582. Andrew relies upon the evidence of Mr Bridges to support his case that Paul caused BIL to pay for the hire of the Telehandler, which was used by Partnership for its own purposes. I have rejected Mr Bridge's evidence, for the reasons set out in paragraphs 253-254 above.

Further I note that Mr Lewis and Mr Bell conclude that there is no evidence of BIL paying for the hire of the Telehandler. For those reasons, I conclude that Andrew has not proved that Paul procured that BIL paid for the hire of the Telehandler, which was used by the Partnership for its own purposes.

Issue 40 - Were charges in relation to the Telehandler appropriately accounted for?

583. As just noted, Mr Lewis and Mr Bell conclude that there is no evidence that the charges for the Telehandler were paid by BIL and therefore not appropriately accounted for.

Issue 41 - Did this involve any breach of fiduciary duty, or duty under the Companies Act 2006 by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

584. There was no breach of duty

MANAGEMENT CHARGES

585. Mr Sharratt says the management charges were charged by PLC to BIL, because PLC was bearing all of the costs of employing management, some of whose time was spent in managing the affairs of BIL and it was considered appropriate therefore to make a reasonable charge to BIL for such management time. Mr Tomkinson says he considers recharging management time between group companies to be standard practice and that the recharges by PLC to BIL are reasonable.

586. Mr Bell and Mr Lewis agree that management charges levied by PLC to BIL are neutral so far as the shareholders of those companies are concerned because the shareholders hold the shares in ABPT (PLC's parent company) and BIL in similar proportions.

Issue 42 - Have management charges been applied to BIL from 2017;

587. My understanding is that it is common ground that management charges have been applied by PLC to BIL, from 2017. Mr Bell and Mr Lewis both proceeded to give their opinions on that basis. I am therefore satisfied that PLC applied management charges to BIL from 2017.

Issue 43 - If so, did any of the matters above involve any breach of fiduciary duty, or statutory duty by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

588. I am satisfied that the application of management charges by PLC to the BIL is not a breach of fiduciary or statutory duty by any of the Respondents (or Mr Sharratt) as directors of BIL because:

- (a) I accept Mr Tomkinson's evidence that the application of management charges between group companies, so that the group company which bears the cost of management salaries recharges part of the cost of those salaries to group companies on whose affairs the management spend part of their time, is standard accounting practice and on the face of it fair and equitable;
- (b) although PLC and BIL do not form part of a formal group structure, their ultimate shareholders are the same and I see no reason why PLC should not charge BIL for the time spent by its employees in managing the affairs of BIL. In fact, in my judgment, it could be said to be a breach of duty by the directors of PLC if they did not ensure that PLC made a reasonable charge to BIL for BIL's use of PLC's employees time, for the purposes of its business; and
- (c) Andrew has not suggested that the management charges applied by PLC to BIL are not reasonable nor were any of the Respondents' witnesses challenged, by Mr Zaman, on the basis that such charges were not reasonable (including Mr Sharratt who asserted that the charges were reasonable, given the amount of management time consumed for example in respect of the AD Plant project). For those reasons I am satisfied that the management charges were reasonable.

AGROVISTA

589. Agrovista is a supplier of chemicals for crops and it provides advice upon which chemicals should be used for the appropriate crop.

590. Andrew says that, in late April 2018, he went to Enterprise House on a weekend and he saw, paperwork to open a credit account for ABF with Agrovista. The credit account opening form identifies Home Farm, which is owned and operated by the Partnership, as the address for the delivery of chemicals, by Agrovista. Andrew took a photograph of the credit account application form on his mobile phone, which he produces in these proceedings, as evidence

that, on his case, Paul was intending to cause ABF to pay for chemicals which would be used by the Partnership, on the Partnership's crops.

591. Paul says that there is a chemical store at Home Farm where chemicals for use on both the Partnership's cereal crops and ABF's potato crops are stored. Paul, says that the chemicals delivered by Agrovista to Home Farm and paid for by ABF on its account with Agrovista (opened following submission of the credit account opening form) were for use on ABF's potato crops and not for use by the Partnership on its cereal crops.

Issue 44 - Did ABF pay for goods/services provided by Agrovista UK Limited to the Partnership at Home Farm?

592. I am not satisfied that the Partnership has used, for its cereal crops, or otherwise, chemicals or services supplied by Agrovista, which were paid for by ABF:

- (a) Andrew's only evidence that Paul has procured or intended to procure that ABF would pay for chemicals and services supplied by Agrovista, to be used on the Partnership's crops, is that ABF was applying to Agrovista to open a credit account in its own name, for delivery of chemicals to Home Farm and that Home Farm is owned and operated by the Partnership;
- (b) I have already accepted Paul's assertion that initially, the Partnership purchased services and chemicals from Agrovista for ABF's potato crops, because the Partnership already had a credit account with Agrovista and ABF, as a new company, could not obtain credit from Agrovista for itself. Paul says that the Partnership then recharged to ABF the cost of chemicals and services that it paid Agrovista for, but which were used for the purposes of ABF's potato crops (although the RSM Report suggests that the Partnership undercharged ABF by £34,519 for those chemicals/services). Paul says that, once ABF successfully applied to open a credit account with Agrovista in its own name (pursuant to the application form that Andrew photographed) ABF ordered and paid for its own chemicals and services, for its potato crops, from Agrovista;
- (c) Paul's evidence, that the Partnership has only grown cereal crops and not potatoes on its own account, since 2016 was not challenged and I accept it; and

(d) the production by Andrew of his photograph of the credit account opening form creates a mere suspicion that ABF might (after its credit account was opened with Agrovista) have purchased chemicals from Agrovista which were used by the Partnership on its own cereal crops. That suspicion requires a credible explanation from Paul, as to why chemicals which would be used on ABF's potato crops would be delivered to Home Farm which is owned and operated by the Partnership. I am satisfied that Paul has given a credible explanation which I accept, which is that: (i) the Partnership was employed by ABF to plant, cultivate and harvest its potato crops. Andrew says the Partnership should not have been used to do this, but he does not dispute that it was; (ii) only a small proportion of those potato crops were planted at Barn Farm (owned by ABF) therefore delivering the potato chemicals to Barn Farm would not have placed them adjacent to the majority of ABF's potato crops; and (iii) Paul says that there is no secure chemical store at Barn Farm, and the Partnership grew cereal crops and not potatoes, which uses different services and chemicals, so Paul said, in cross examination, the lad dealing with the spraying of chemicals for ABF and the Partnership was able to distinguish between the two types of chemicals for use on ABF's potatoes and the Partnership's cereals.

Issue 45 - Were any services provided by Agrovista correctly accounted for?

593. Mr Auld, for the Respondents suggested that this issues does not arise for consideration, on the pleadings. However, given that I am not satisfied that ABF paid for any goods or services supplied by Agrovista, which were used on the Partnership's cereal crops, it is an easy point to deal with. I am not satisfied that any goods or services ordered by ABF, from Agrovista were not correctly accounted for.

Issue 46 - Did any of the matters above involve any breach of fiduciary duty, or duty under the Companies Act 2006 by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

594. Given my findings on issues 44 and 45, I am not satisfied that there has been any breach of fiduciary duty or statutory duty under CA 2006 by any of the Respondents in respect of the matters addressed in issues 44 and 45.

DIESEL GENERATOR

595. Prior to the AD Plant being installed at Enterprise House, the Diesel Generator was used by PLC as a back-up generator, to power Enterprise House, in the event that the supply of electricity from the Grid to Enterprise House failed. The Diesel Generator was retained alongside the AD Plant and Andrew's pleaded case is that, once the AD Plant was up and running, the Diesel Generator should have been used to export electricity to the Grid, when the supply of electricity from the Grid failed, thereby earning revenue for PLC. In Mr Zaman's closing argument, Andrew's case shifted somewhat to a case that the Respondents should have used the Diesel Generator to export electricity to the Grid generally (not just when the Grid failed) in order to generate revenue for PLC.

Issue 47 - Can electricity be exported from the Diesel Generator to the Grid?

596. I am satisfied that the Diesel Generator cannot export electricity to the Grid. Both Mr Parker (Andrew's witness) who was responsible for project managing the installation of the AD Plant, until he resigned in July 2017 and Mr Snipe (the Respondent's witness) who was employed by BIL to provide technical assistance in making proposals to WPD to connect the AD Plant to the Grid, say that the Diesel Generator can operate only in what they call "Island mode". That is that the Diesel Generator: (a) cannot export electricity to the Grid, whether or not the Grid is supplying electricity to Enterprise House; and (b) can only operate if the AD Plant is not generating electricity, so it can only operate purely as a back-up generator, to supply electricity for the needs only of Enterprise House, if the AD Plant is not working.

Issue 48 - Were there any steps which could have been taken to pursue revenue or have it accounted for in these circumstances and if so what steps?

597. Mr Auld argued that Issue 49 does not arise on Andrew's pleaded case. It seems to me that, on Andrew's pleaded case (once the AD Plant was up and running the Diesel Generator should have been used to export electricity to the Grid, when the supply of electricity from the Grid failed, thereby earning revenue for PLC) Issue 48 only arises in relation to steps that

could have been taken to pursue revenue for electricity exported to the Grid, when the Grid failed, and not more generally.

598. I do not consider that any steps could have been taken to pursue revenue from the export of electricity to the Grid, by the Diesel Generator when the Grid failed, because both Mr Parker and Mr Snipe were clear that WPD would not agree to the Diesel Generator exporting electricity to the Grid, when the Grid failed, because this would make it dangerous for engineers to work on the Grid to try to restore power, if the Grid was “live” with electricity exported to it from the Diesel Generator. I accept their evidence.

599. As Mr Auld did not assert that Issue 48 should be confined in that way (he said it does not arise at all) I will deal with it on the basis that it applies to the Diesel Generator exporting electricity to the Grid, whether or not the Grid has failed although, as I have said that is not Andrew’s pleaded case.

600. The steps that could have been taken to pursue revenue from the export of electricity, by the Diesel Generator to the Grid were: (a) to review the question of whether PLC should seek WPD’s agreement that the Diesel Generator should be allowed to export electricity to the Grid; (b) if it was thought, on that review that WPD would agree to this and that, if it did agree, PLC stood at least a reasonable chance of earning some material revenue from the Diesel Generator exporting electricity to the Grid, to seek WPD’s agreement to the Diesel Generator exporting electricity to the Grid; and (d) if WPD gave permission and it was still considered (after taking into account any requirements that WPD imposed for allowing the Diesel Generator to export electricity to the Grid) that PLC would earn material revenue from exporting electricity generated by the Diesel Generator to the Grid, net of the costs of complying with any WPD requirements, then to proceed to satisfy those requirements, so that the Diesel Generator could be used to export electricity to the Grid.

Issue 49 - Was there a failure to collect and pursue revenue from the provision of reserve electricity supply to the National Grid?

601. Mr Auld does not agree that this issue arises, based upon the content of Andrew’s PLC Petition which, as I have already noted pleads that the Diesel Generator should have been used to export electricity to the Grid, when the supply of electricity from the Grid failed, thereby earning revenue for PLC. On the basis that “provision of reserve electricity to the

Grid” means supplying electricity when the Grid is not carrying its own electricity, it appears to me that Issue 49 is a relevant issue, based upon Andrew’s pleaded case.

602. Mr Zaman says that the Diesel Generator meter shows that it ran for a total of 105 hours in the period up to 8 June 2021, whereas in previous periods it had only run for a much small number of hours. Mr Zaman suggests that this may be evidence of the Diesel Generator exporting electricity to the Grid. Notwithstanding that the Respondents have offered no explanation for the Diesel Generator’s meter showing that it ran for 105 hours in the period up to 8 June 2021, given the very clear evidence of Mr Parker and Mr Snipe that the Diesel Generator cannot export electricity to the Grid under any circumstances (and that WPD would not, for safety reasons, want electricity to be exported to the Grid, if the supply of electricity from the Grid failed) I am not satisfied that the explanation for the Diesel Generator’s meter recording that it had operated 105 hours in the period up to 8 June 2021, is as a result of it exporting electricity to the Grid (the explanation may be that it has been used as a back-up generator to power Enterprise House). I am not therefore satisfied that there has been any failure to collect or pursue revenue for the supply of electricity to the Grid, whether as a reserve supply or otherwise.

Issue 50 - Did any of the matters above involve any breach of fiduciary duty or gross mismanagement by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

603. It follows from my findings on Issues 47-49 that there has been no breach of fiduciary duty and no gross mismanagement by any of the Respondents in failing to collect revenue for the export of electricity to the Grid, by the Diesel Generator when the Grid failed, which is Andrew’s pleaded case.

604. Even if Andrew’s pleaded case were taken to extend to a failure to earn revenue from the export of electricity to the Grid by the Diesel Generator, when the Grid had not failed, I find that this would not involve any breach of fiduciary duty or gross mismanagement by any of the Respondents because:

- (a) during his cross-examination, Mr Snipe said that he had told PLC that it could review the question of whether PLC should seek to agree with WPD that the Diesel Generator be allowed to export electricity to the Grid, after the AD Plant had been up and running for a few years, but Mr Snipe also said that the AD Plant appeared to be performing well

and it was not likely to be worthwhile to seek the agreement of WPD to allow electricity to be exported to the Grid by the Diesel Generator, because there is an overall limit in place for exporting electricity to the Grid, from Enterprise House of 860 kWm which the AD Plant and solar panels may achieve, or nearly achieve by themselves;

(b) Mr Snipe said that he was highly sceptical that WPD would agree to the Diesel Generator exporting electricity to the Grid. One problem he highlighted was that Ofgem would be concerned to ensure that any FIT payments that they made for generating or exporting “green” electricity were not paid for electricity generated by a diesel generator and so Ofgem wanted to see an agreement in place that did not allow this to happen. Mr Parker deferred to Mr Snipe’s greater expertise in relation to dealing with WPD (whilst agreeing with Mr Snipe that WPD were often unhelpful, not indicating what they required, but rather simply waiting for proposals to be made to them and rejecting them, if they did not meet WPD’s requirements). I accept that WPD would be likely not agree to the Diesel Generator exporting electricity to the Grid, and that, if it did agree, this may cause problems with BIL recovering FIT generation and FIT export payments, funded (or in the latter case partly) by Ofgem, given that Ofgem wanted the agreement not to allow this;

(c) in re-examination, Mr Snipe said that, in order to seek permission from WPD to allow the Diesel Generator to export electricity to the Grid it would be necessary for PLC to propose to WPD a new earthing strategy for the Diesel Generator and the cost of implementing such a new earthing strategy may well be in the region of £500,000. Mr Snipe said that he was highly sceptical that (even if WPD did agree to the Diesel Generator exporting electricity to the Grid) PLC would derive any overall benefit from entering into the necessary arrangements to obtain WPD’s agreement to the Diesel Generator exporting electricity to the Grid; and

(d) based on the evidence of Mr Parker and Mr Snipe, which was not challenged on this point I conclude that, whilst the directors of PLC could have caused PLC to review the possibility of seeking to agree with WPD that the Diesel Generator could be connected to the Grid, in order to export electricity to the Grid (no such review having been carried out) it is very unlikely that the result of any such review would be that an attempt should be made to try to persuade WPD to agree to the Diesel Generator exporting electricity to the Grid because: (i) both Mr Parker and Mr Snipe agreed that seeking WPD’s

agreement to anything was a long drawn-out and difficult process; (ii) it is more likely than not that WPD would refuse to agree to allow the Diesel Generator to export electricity to the Grid and if permission were obtained, this may put the recovery of generating and export FIT's from Ofgem at risk; (iii) it is unlikely that there would be any net benefit to PLC in pursuing such an agreement, given the likely cost of complying with WPD requirements, compared to any likely increase in revenue from using the Diesel Generator to export electricity to the Grid alongside the AD Plant; (iv) pursuing WPD's agreement would be likely to consume a significant amount of management time, which I am satisfied is in short supply, given that management has had to deal with such issues as the covid pandemic and this litigation; and (v) for all of those reasons, I cannot, in the circumstances say that the Respondents failure to embark upon the steps outlined by me in paragraph 600 above amounts to gross mismanagement or a breach of fiduciary duty.

RENEWABLE ENERGY

Issue 51 - Was there failure to collect and/or to maximise revenue from the renewable energy projects and if so a failure by whom?

605. The renewable energy projects are the Solar Panels and the AD Plant/CHPs installed at Enterprise House and owned and operated by BIL, which generate electricity. The AD Plant produces methane from organic waste and the CHP's generate electricity using that methane.

606. In his report dated 1 April 2021, Mr Bell dealt with an issue which did not, at that point in time, form part of Andrew's pleaded case in the BIL Petition. The issue was that no revenue had been collected by BIL from the export of electricity to the Grid by the renewable energy projects.

607. On 25 May 2021, District Judge Rich TD gave permission to Andrew to amend the BIL Petition to include only those allegations set out in the draft amended petition attached to that order which asserted that the failure of BIL to receive revenue for the export of electricity to the Grid for over 6 years was a breach of fiduciary duty by the directors of BIL, alternatively serious mismanagement and that the losses suffered by BIL as a result of those breaches of

fiduciary duty/serious mismanagement were as set out in Mr Bell's report of 1 April 2021 (Mr Bell's calculation of the revenue that BIL should have received for all the electricity recorded on export meters located at Enterprise House as having been exported to the Grid, from May 2015-November 2018 and from November 2018-March 2021).

608. In the Respondents' Amended Defence to the Amended BIL Petition, the Respondents said, amongst other things, that the requirements imposed by WPD, for BIL to be allowed to export electricity to the Grid from its 2 CHPs were not met until 17 November 2018 and BIL was therefore unable to recover any payment for electricity exported to the Grid up to that date. The Respondents also said that BIL had received £1.97 million from Ofgem up to 22 March 2021 in FIT generation payments (for the generation of green energy by the Solar Panels and CHPs) and had saved approximately £1 million on the purchase of electricity by generating its own electricity. It was admitted that no FIT export payments had been received (for the export of green energy to the Grid) but denied that BIL was not entitled to receive those payments. Mr Bell's calculations of the amount of revenue due to BIL for electricity exported to the Grid was disputed on various grounds, including that it included electricity exported to the Grid before 17 November 2018, which BIL was unable to recover payment for.

609. In his second report dated 7 October 2021, Mr Bell recalculated his figures for revenue that he said was lost as a result of BIL not recovering payment for the export of electricity to the Grid. He calculated the lost revenue, both for the period May 2015-November 2018 and November 2018 - March 2021, in doing so he included additional revenue that Mr Bell said BIL would have earned, had BIL operated the AD Plant and 2 CHPs at 90% of their maximum capacity. In order to do this, BIL would, Mr Bell conceded, have to purchase organic fuel to be processed by the AD Plant, to supplement the waste product produced from PLC's production process, which is all (or substantially all) that BIL has been feeding into the AD Plant, to produce methane to fuel the 2 CHPs.

610. In his report of 8 October 2021, Mr Lewis calculated uncollected revenue from the export of electricity to the Grid, from 17 November 2018 to March 2021 at £338,865, if BIL claimed revenue for exported electricity pursuant to a PPA (direct agreement with an electricity supplier) and at £363,512, if BIL claimed for the electricity exported as a FIT export payment (payment claimed from an electricity supplier, but at least partly funded by Ofgem) based, in

both cases, on meter readings. Mr Lewis did not include any calculation of what revenue BIL would have earned, had it operated the AD Plant/2 CHPs at 90% of their capacity.

611. I will deal firstly with the point made in Mr Bell's second report that BIL's AD Plant/CHPs should have been operated at 90% of their full capacity and that BIL has lost revenue as a result of them being operated at a lesser proportion of their full capacity. I find that this part of Andrew's claim fails for two reasons: (a) this case, is not, in my judgment, pleaded in the amended BIL Petition; and (b) in any event, I am not satisfied that Andrew has proved, on the balance of probabilities, that BIL's AD Plant and CHPs could have been operated permanently at 90% of their capacity or that if they could, the additional profit that Mr Bell suggests BIL would thereby have earned (or any profit) would have been earned, for reasons that I explain below.

612. The pleading of Andrew's claim in respect of recovery of revenue for electricity exported to the Grid is set out at paragraphs 26A – 26L of the Amended BIL Petition:

(a) paragraph 26D provides details of electricity actually exported to the Grid, according to the export meters;

(b) paragraph 26G calculates lost revenue based upon those meter readings (I note that there is no claim for additional historic revenue had the AD Plant/CHPs operated at 90% of their capacity);

(c) paragraphs 26 H-J calculate a claim for future lost revenue, based upon BIL exporting to the Grid, the maximum amount of 860 kWh of electricity which it is allowed to export. However the use of the 860 kWh limit is merely the basis used by Mr Bell, in his first report, for calculating future loss of revenue. It does not amount to a pleading that: (i) the directors of BIL ought to have ensured that the AD Plant/CHPs operated at a higher level of capacity than they had done in the past; (ii) that the directors should ensure that the AD Plant/CHPs operate at a higher capacity in the future; and (iii) 860 kWh does not in any event equate to the figure of 90% of the total capacity of the AD Plant/CHPs used by Mr Bell in his second report to calculate what he suggests BIL has lost in revenue in the past and will lose in revenue in the future as a result of not operating the AD Plant/CHPs at 90% of their capacity. In fact, Andrew pleads in paragraph 26J of the BIL amended petition that his calculation of loss of future income is based upon the AD Plant operating at 80% of capacity, not the 90% that Mr Bell uses in his second report

to calculate the loss that he says has been incurred as a result of the AD Plant being operated at less than its optimal profit making capacity;

(d) paragraph 26K pleads that the matters pleaded in paragraphs 26A-26J are a breach of directors duties, alternatively serious mismanagement in that they failed to collect and pursue revenue; and failed to maximise the return on the investment in the AD Plant; and

(e) the third claim, that the directors breached their fiduciary duties/were responsible for serious mismanagement because they took no, or no adequate steps to maximise the return on the investment in the AD Plant/CHPs, in my judgment is too vague to support a claim that the directors of BIL breached their fiduciary duties/were responsible for serious mismanagement, by not importing biofuel (such as maize) to increase the production of methane by the AD Plant, fed into the two CHPs in order to ensure that they were operating at 90% of their capacity, rather than relying only on the waste from PLC's production process as the only biofuel for the AD Plant and running it and the CHPs at a lesser percentage of their full capacity.

613. The reasons why I am not satisfied that Andrew has proved, on the balance of probabilities that the directors of BIL ought to have ensured that the CHPs operated at 90% of their capacity are:

(a) in calculating BIL's loss of revenue from operating its AD Plant/CHPs at less than 90% of their full capacity, Mr Bell refers to conversations he says he has had with Mr Philip Gibb of Syrus Energy. Mr Bell says that Syrus Energy runs a power generation business which earns revenue from generating electricity produced by its AD Plant and that Mr Gibb has told him that Syrus Energy's AD Plant is run at 90-95% of its full capacity, in order to maximise its profit;

(b) Mr Bell proceeds on the basis that Mr Gibb is an expert on the most profitable operating capacity at which an AD Plant/CHPs can be used to generate electricity and upon the costs associated with achieving that profit;

(c) Mr Gibb may well be an expert, but I have no expert report from Mr Gibb before me explaining his expertise, his opinion, or containing an experts declaration from him pursuant to CPR 35. It is not appropriate therefore for me to treat the opinions expressed by Mr Gibb, as reported by Mr Bell, in his report, as authoritative expert opinion as to the most profitable capacity at which BIL's CHPs could be run or on the

price at which biofuel can be purchased to feed into BIL's AD Plant, to increase the production of methane;

(d) Syrus Energy is, according to Mr Bell, a company which, unlike BIL, imports all of the biofuel which it loads into its AD Plant to produce methane to drive its CHPs (Mr Bell mentions Maize as one form of fuel that Syrus uses). In contrast, BIL's AD Plant is fed only (or substantially only) with the waste product produced by PLC's production process, potato and vegetable matter. Even if Mr Gibb is an expert on the optimum level at which to run an AD Plant fed with bio fuel purchased only from external sources and the cost of making such purchases when they make up all of the biofuel for the AD Plant, this does not mean that he is an expert on the optimum level at which to run BIL's AD Plant which uses vegetable matter produced by PLC's production process as biofuel, at no cost to BIL. Mr Bell does not even suggest that he asked Mr Gibb whether he had the expertise to express an opinion on the optimum level at which to run such an AD Plant or that he even told Mr Gibb that such was the type of AD Plant which Mr Bell was concerned with; and

(e) I have already found that paragraph 26 of the Amended BIL Petition does not plead that BIL's directors breached their fiduciary duties/were guilty of serious mismanagement in running BIL's CHPs at less than 90% of their capacity. One consequence of the BIL Amended Petition not making that allegation is that the Respondents and their expert, Mr Lewis were not alerted to the need for Mr Lewis to deal with this point in his second expert report, prepared before the Respondents or Mr Lewis saw Mr Bell's second expert report which contained Mr Bell's assertion that BIL should have operated its CHPs at 90% of their capacity, in order to maximise profit. The Respondents have therefore been denied any fair opportunity to deal with these assertions made in Mr Bell's second report with their own expert evidence, or to challenge those assertions at trial.

614. This leaves Andrew's claim that there has been a failure to collect revenue from the export of electricity to the Grid. It is common ground that electricity has been exported to the Grid which was generated by the solar panels/CHPs owned and operated by BIL at Enterprise House and that no revenue has been received by BIL for the export of that electricity. The answer to this part of issue 51, is therefore that there has been a failure, to date, to collect revenue from the export of electricity to the Grid by the renewable energy projects.

Issue 52 - Did any of the matters in Issue 51 above involve any breach of fiduciary duty or gross mismanagement by (a) Paul and/or (b) Mr Tomkinson and/or (c) Mr Ellis?

615. Given my findings that Andrew cannot pursue/prove his claim that there has been a failure to maximise revenue from the renewable energy projects, I will consider only whether there has been a breach of fiduciary duty or gross mismanagement by the Respondents, or any of them, in failing to collect revenue for the actual export of electricity, by the renewable energy projects, to the Grid.

616. There is no suggestion that any of the Respondents deliberately chose not to pursue the recovery of revenue for the export of electricity to the Grid. Andrew's case is, in substance that the Respondents ought to have acted sooner and more aggressively than they have done, to recover that revenue and that their failure to do so amounts to a breach of their fiduciary duties to BIL/gross mismanagement.

617. I do not see that there is a difference, in this case, on this issue, between the pleading of breach of fiduciary duty and gross mismanagement. In my judgment, in order to make out his case, that the Respondents' failure to pursue the collection of revenue for the export of electricity to the Grid amounts to a breach of the Respondents' fiduciary duties to BIL or gross mismanagement, Andrew must prove, on the balance of probabilities (per the guidance given by Arden J in *Re Macro* (see paragraph 579 (h) above) that the failures by the Respondents amount to clear mismanagement by the Respondents, not questions of commercial judgment, which is sufficiently serious to justify my granting Andrew a remedy under Section 996 CA 2006.

618. Mr Zaman says:

- (a) it is common ground that revenue can only be received by BIL for the export of electricity to the Grid in the form of either: (i) a payment from an energy supplier, funded by that energy supplier, if a PPA has been entered into with that supplier; or (ii) a FIT export payment funded in whole or in part by Ofgem, but paid to BIL by an energy supplier, for which there needs to be an agreement in place to pay FIT export payments to BIL;

(b) BIL has no PPA in place with an energy supplier, other than a PPA with E.on which only covered the six month period from 1 April 2018 - 30 September 2018. BIL cannot therefore recover any revenue for the supply of electricity to the Grid pursuant to a PPA with an energy supplier, other than for that 6 month period;

(c) there is no agreement in place for BIL to receive FIT export payments for electricity exported to the Grid;

(d) in an email dated 3 December 2020, sent by Mr Sohata of E.on to Mr Sharratt (responding to an email sent to Mr Sohata, by Mr Sharratt saying that he wanted to pursue payment for electricity exported to the Grid) Mr Sohata said that any agreement that E.on entered into to pay for electricity exported to the Grid would only relate to electricity exported to the Grid, after that agreement had been entered into;

(e) so, says Mr Zaman, there is no agreement allowing BIL to recover payment for electricity exported by the renewable energy schemes to the Grid and this revenue has been lost through the failure of the Respondents to ensure that such an agreement was in place;

(f) Mr Snipe was not instructed to pursue recovery of revenue from the export of electricity to the Grid, until May 2021, after Andrew sought permission to amend the BIL Petition to include a claim for the failure of the Respondents to recover this revenue;

(g) Mr Snipe has not even contacted E.on about the claim and he has not been provided with the PPA agreement with E.on (which only covers the six month period from 1 April 2018 - 30 September 2018) or Mr Sohata's email of 2 December 2020, in which Mr Sohata says that E.on will not pay for electricity exported before an agreement is entered into with E.on, so in expressing confidence, in his witness statement, that he will be able to recover payment for the electricity exported to the Grid, Mr Snipe was not aware that there is no agreement in place that allows this to happen; and

(h) all of that amounts to gross mismanagement, by the Respondents, in accordance with the guidance given by Arden J (as she then was) in *Re Macro*.

619. Mr Auld says:

(a) BIL cannot claim for electricity exported to the Grid before 17 November 2018, in any event, because WPD only approved the connection of the second CHP to the Grid, on that date;

(b) BIL entered into a FIT Acceptance Plan for the AD Plant on 1 September 2017 which allows BIL to recover both generation FIT payments and export FIT payments for 20 years from 16 September 2016;

(c) BIL has recovered FIT generation payments pursuant to the FIT Acceptance Plan and there is no reason to suppose that BIL cannot recover FIT export payments pursuant to the same FIT Acceptance Plan;

(d) in March 2020, Mr Sharratt contacted New Stream (renewable energy specialist) and asked for their assistance in recovering revenue for the export of electricity to the Grid. New Stream approached E.on and asked it to supply data that E.on had received from the export meters at Enterprise House for the export of electricity to the Grid, in order to enable New Stream to progress the claim. E.on eventually responded to New Stream's request in January 2021, but E.on's position was that it has not received such data from the export meters;

(e) Mr Snipe was then instructed, in April 2021, to provide evidence to E.on to support BIL's claim for payment for electricity exported to the Grid. Mr Snipe has asked BIL/PLC to provide him with paperwork to support the claim which includes E.on invoices to PLC dating back to 2014 ;

(f) Mr Snipe is confident of succeeding in obtaining payment for electricity exported to the Grid and Mr Parker who appears more pessimistic (Andrew's witness) accepts that Mr Snipe has more experience than he has in recovering payments for renewable energy exported to the Grid ; and

(g) the revenue for the export of electricity to the Grid has not therefore been lost, its receipt, at worst, has merely been delayed, that delay, to the extent that the Respondents could be considered culpable for it, does not amount to gross or serious mismanagement by any of the Respondents.

620. I am not satisfied, on the balance of probabilities, that BIL's ability to recover revenue for electricity that the renewable energy schemes have exported to the Grid has been permanently lost, for the following reasons:

(a) I accept that BIL does not have a PPA in place that would enable it to recover payment for electricity exported to the Grid, because the only PPA agreement in place covers the 6 month period from 1 April 2018 - 30 September 2018 and on the available

evidence WPD did not provide a final approval to allow payment to be recovered for exports of electricity to the Grid, by the CHPs until 17 November 2018;

(b) on 1 September 2016, Mr Sharratt signed, on behalf of the BIL, a document entitled “your FIT plan”. This document provided that: (i) BIL would be eligible to receive FIT payments from 16 September 2016 - 15 September 2036; (ii) BIL was registered on the central FIT register on 24 August 2017; (iii) the FIT tariff for generating electricity would be 9p per unit and the tariff for electricity exported would be 5.03p per unit; and (iv) meter readings would be taken quarterly;

(c) it is common ground that BIL has received FIT generation payments. In order to receive FIT generation payments there must be a FIT agreement in place which entitles BIL to receive them. No other FIT agreement has been produced and it is reasonable to conclude, in the circumstances, that: (i) BIL has received FIT generation payments pursuant to the agreement signed by Mr Sharratt on 1 September 2016; and (ii) BIL is therefore contractually entitled to receive FIT export payments pursuant to that agreement, subject to proving what it has exported to the Grid;

(d) Mr Sohata’s email of 3 December 2020 which says that E.on will only pay for electricity exported to the Grid after an agreement has been entered into does not assert that no agreement (FIT or PPA) has been entered into, or that he has looked into the question of whether such an agreement is already in place, so that email is not evidence that the document signed by Mr Sharratt on 1 September 2018 is not a valid agreement, pursuant to which BIL is entitled to receive FIT export payments;

(e) Mr Snipe was asked whether he had seen Mr Sohata’s email of 3 December 2020, or the document signed by Mr Sharratt on 1 September 2018, he said he could not recall having been shown either of them. Whilst this is surprising, Mr Snipe appears to see his role as being to prove, to E.on’s satisfaction, the amount of electricity exported from the renewable energy projects to the Grid, not to deal with the issue of contractual entitlement, and (what I accept to be) the fact that Mr Snipe was not shown either of these documents, does not point one way or the other on the issue of whether BIL has a contractual entitlement to recover export FIT payments for electricity that it can prove was exported to the Grid after 17 November 2018, by the renewable energy schemes;

(f) I asked Mr Snipe why the amount of electricity recorded on the meters at Enterprise House would not be regarded as conclusive as to the amount of electricity exported by

the renewable energy schemes to the Grid, given that they were installed to record precisely that. Mr Snipe said that the data from the meters ought to be conclusive, but there appeared to be a problem, in that the data from the meters had not been forwarded on a regular basis to E.on, as it should have been, which Mr Snipe believed that Siemens, the manufacturers of the meters ought to have ensured was happening. It seems to me that the figures recorded on the meters as to the aggregate amount of electricity exported to the Grid ought to be, at the very least strong evidence of what electricity has been exported to the Grid and if, as I have found to be the case, BIL has in place an agreement entitling it to claim export FIT payments, there seems to me to be no reason, other than the delay by BIL in pursuing the claim, why BIL should not be paid. Andrew does not assert that the delay in pursuing the claim acts, of itself as a bar (contractually or otherwise) to BIL recovering payment for electricity exported to the Grid;

(g) what Mr Snipe appears to be engaged in is an exercise in compiling evidence to support the figures which are recorded on the export metres, for example by obtaining historic details of electricity usage at Enterprise House before the AD Plant/CHPs became operational as an indication of the proportion of the electricity generated by the solar panels/CHPs (for which BIL has received FIT generation payments) is likely to have been utilised at Enterprise House, the balance therefore being likely to be the amount exported to the Grid;

(h) whilst Mr Snipe did describe the claim as “challenging”, he gave evidence, at trial, that he remained confident of success. He also referred to being involved in a previous case, in which payments for electricity exported to the Grid had been recovered 4-5 years after it was first exported. Mr Parker, who was more pessimistic about the prospects of recovering payment for electricity exported to the Grid by the renewable energy schemes also accepted that there could be a delay in recovering export payments for electricity exported to the Grid but said his experience was that delays were no longer than 6 - 12 months. Mr Parker accepted, nonetheless, that Mr Snipe had more experience than he had in recovering payments for exporting renewable energy to the Grid and Mr Snipe was likely therefore to be better placed to comment upon the likelihood of recovering export payments for older claims than he was; and

(i) the combination of: (i) the existence of a contract, on my findings which enables BIL to recover payment for electricity exported to the Grid as export FIT payments; (ii) the availability of meter readings of what electricity has been exported to the Grid in aggregate (albeit not received regularly by E.on); (iii) receipt by BIL of FIT generation payments which evidence what electricity BIL has generated from the renewable energy schemes; (iv) the likelihood that Mr Snipe will be able to show what Enterprise House's energy use for a period prior to the CHPs becoming operative was, which can be deducted from electricity generated by the renewable energy schemes, as a means of confirming the figures recorded by the export meters, for electricity exported to the Grid; (v) there being no evidence that BIL's delay in pursuing the claim is of itself a bar to recovery; and (vi) Mr Snipe's experience of recovering payment for old claims and his optimism that he will make a recovery in this case, cause me to conclude that, Andrew has not proved, on the balance of probabilities that recovery of a payment for the renewable schemes exporting electricity to the Grid has been permanently lost.

621. Notwithstanding that I am not satisfied that recovery of payment for the export of electricity to the Grid by BIL has been permanently lost, it might still be a breach of fiduciary duty/gross mismanagement by the Respondents or some of them not to have acted more swiftly or decisively to recover those payments, which has at least delayed receipt of payment for the export of electricity to the Grid and will have made it more difficult to recover it.

622. Mr Sharratt accepted that, after Mr Parker left, in July 2017, he took over responsibility for collecting revenue for electricity generated by the renewable energy schemes.

623. There is no evidence of Mr Sharratt pursuing payment for electricity exported to the Grid, after 17 November 2018 (the date on which I have accepted BIL became entitled to receive payment for electricity exported to the Grid) before he instructed New Stream, in March 2020 (about 16 months after BIL first became entitled to receive payment for exports of electricity to the Grid) to attempt to recover payment for electricity exported to the Grid.

Thereafter the relevant chronology of events is as follows:

(a) New Stream contacted E.on, in around March 2020 and asked for 30 minute data of electricity exported to the Grid by the CHPs which it clearly believed would be held by E.on. After a long delay, in January 2021, E.on responded to New Stream by indicating that it had no data for electricity exported to the Grid;

(b) Mr Sharratt asked Mr Sohata of E.on about payment for electricity exported to the Grid, at the end of November 2020, which led, as I have already mentioned, to Mr Sohata responding on 3 December 2020 that E.on would only pay for electricity exported to the Grid, after an agreement had been entered into, for such payments to be made;

(c) Mr Sharratt approached Mr Snipe, in April 2021 (who had helped BIL to obtain approval from WPD, for it to connect the CHPs to the Grid) to assist BIL with recovering payments for exports of electricity to the Grid. Mr Snipe made a fee proposal in May 2021 and in the same month, Mr Snipe was instructed to proceed to assist with the recovery of payments for electricity exported to the Grid; and

(d) in his witness statement of 2 September 2021, Mr Snipe says that he expected to be in a position to put a claim to E.on in the next 2-3 weeks, but by the time Mr Snipe was cross-examined, on 23 November 2021, he had still not submitted a claim to E.on. Mr Snipe said that he was waiting for PLC/BIL to supply him with copies of E.on invoices from 2014 to support the claim.

624. Given that Mr Sharratt accepts that he took responsibility, after the departure of Mr Parker, for collecting revenue for BIL, earned from the export of electricity to the Grid, on the face of it, Mr Sharratt is primarily responsible for any unreasonable delay in progressing that claim, Mr Sharratt is not a respondent to the BIL Petition. I propose therefore to decide whether any failures on the part of Mr Sharratt to progress the claim involves any gross mismanagement by him, before going on to consider whether there is any gross mismanagement by the Respondents.

625. I am not satisfied that any failures on the part of Mr Sharratt to pursue the receipt of revenue for the export electricity to the Grid by BIL amounts to gross mismanagement, by Mr Sharratt, for the following reasons:

(a) Mr Sharratt says that, in his view, the recovery of revenue for the export of electricity to the Grid is “guaranteed” (that is that there is no risk that it will not be recovered) and that he approached the matter on that basis. Whilst I consider that such a view is overly optimistic, I accept that Mr Sharratt is and has at all relevant times been at least very confident that the revenue will be received (and I have accepted that Mr Snipe is right to be confident that payment for the export of electricity to the Grid will be received) and that its receipt is simply delayed. Had I found otherwise, then I may have taken a

different view regarding the appropriateness of the priority that Mr Sharratt has afforded to this task;

(b) I accept that inaction (even if, as I have found, on the balance of probabilities, that inaction has not resulted in a loss of revenue for the export of electricity to the Grid for BIL, but has simply delayed its receipt) as opposed to positive decisions can amount to gross mismanagement by a director. I consider, however, that such inaction must go well beyond the type of delay in dealing with particular matters, that any busy director is apt to be guilty of and that Mr Sharratt's delay has to be assessed, taking into account the other calls on Mr Sharratt's time and the priority that Mr Sharratt ought reasonably to have afforded to the collection of the revenue, in light of those other matters;

(c) I accept that, in normal circumstances, Mr Sharratt, as the Finance Director of the Group would have a significant number of issues to deal with. The circumstances faced by Mr Sharratt, immediately before November 2018 and in the 14 months from then, up to January 2020 were not however normal circumstance: (i) from October 2017 onwards, Andrew made reports to the Police, the auditors, KPMG and Lloyds Bank of a substantial fraud, which the Group had to answer and I accept that Mr Sharratt as Finance Director would have to commit substantially more time to dealing with those issues than any other director, given the nature of the allegations. This led in due course to the directors instructing RSM, in February 2019, to prepare a report on Andrew's allegations, and Mr Sharratt seems to have taken the lead role (appropriately in my judgment, given that the report was a review of allegations of a financial fraud) in instructing RSM and assisting them in producing their report; and (ii) these proceedings were issued in November 2018, and in the run up to the issue of these proceedings substantial correspondence was entered into between solicitors for Andrew and the Respondents. Although Mr Sharratt is not a Respondent, providing the financial information required for that correspondence and for these proceedings has, I am satisfied involved a substantial commitment of time from Mr Sharratt;

(d) I cannot say that Mr Sharratt's delay in pursuing export FIT payments for the 14 months between November and January 2020 is gross mismanagement, by Mr Sharratt, considered alongside the other issues that Mr Sharratt had to deal with in this period, particularly when BIL was receiving FIT generation payments (which are significantly higher than FIT export payments) and at that point in time, I cannot see

that there was any reason, objectively to suppose that there would be any difficulty in recovering FIT export payments (there is no evidence that Mr Sharratt would have known that there were difficulties with E.on receiving 30 minute data form the export meters) and FIT export payments were being received;

(e) in January 2020, Mr Sharratt caused New Stream to be instructed to pursue the recovery of export FIT revenue. I have no reason to suppose that New Stream did not appear to have the appropriate expertise to assist BIL in recovering the export FIT revenue or that it was not appropriate to instruct and rely upon them to pursue the recovery of that revenue (and Andrew makes no allegation that it was). New Stream sought export data from E.on in March 2020, but E.on did not respond until January 2021 to say that they did not have that data. Again I see no reason to criticise Mr Sharratt for his reliance upon New Stream until at least January 2021 to pursue the FIT export revenue;

(f) Mr Sharratt raised the issue, at the end of November 2020 with Mr Sohata of E.on about obtaining payment for the export of electricity to the Grid, who simply responded, on 2 December 2020, that E.on would not pay for electricity exported to the Grid, before an agreement to pay for it was in place;

(g) Mr Sharratt approached Mr Snipe, in April 2020 to assist in collecting the export revenue, New Stream apparently having, as Mr Sharratt puts it ground to a halt. Mr Snipe's fee proposal was accepted in May 2021, when he was instructed to proceed. As with New Stream, there is no suggestion that involving Mr Snipe in pursuing the recovery of payment for the export of electricity to the Grid, or relying on his expertise was inappropriate (Mr Parker accepted that Mr Snipe has the appropriate expertise). I am not satisfied that Mr Sharratt's delay of 3 months in instructing Mr Snipe, after New Stream appeared to grind to a halt in January 2021, is gross mismanagement, by Mr Sharratt. In saying this, I accept that New Stream had now identified a problem with recovering FIT export payments (E.on not having the 30 minute export data) but I also accept that Mr Sharratt remained confident that payments for electricity exported would be received and prioritised his time accordingly. I accept also that the report of Mr Bell, dated 1 April 2021, which raised the issue of the failure to collect payments for electricity exported to the Grid, may have caused Mr Sharratt to act, in April 2021, by instructing Mr Snipe, but I also bear in mind that March 2020 was substantially the start

of the Covid pandemic in the UK and of lock down restrictions being imposed which, I accept will have posed a substantial threat to the financial well-being of the Group and have imposed yet further burdens on Mr Sharratt's time;

(g) there has also been a delay in Mr Snipe collating and submitting information to E.on, after he was instructed, in May 2021 to assist in making BIL's claim to E.on. Mr Snipe says that he is still seeking, from BIL/PLC historic paperwork (the E.on bills to PLC, from 2014). I am not satisfied that any delay since May 2021 amounts to gross mismanagement by Mr Sharratt because I accept that it may well have been difficult for BIL/PLC staff to recover such historic paperwork, particularly during the coronavirus pandemic. This delay has, in any event occurred after the Amended BIL Petition was served and cannot form part of the allegations of breach of fiduciary duty/gross mismanagement pleaded in paragraph 26 of that amended petition; and

(h) stepping back and looking at the position, overall, the priority that Mr Sharratt has attributed to pursuing the recovery of revenue for the export of electricity to the Grid, compared to his other tasks and responsibilities, is a matter of commercial judgment. As Arden J, as she then was, observed, *in Re Macro* the court does not interfere in questions of commercial judgment. Of course if that commercial judgment is clearly wrong, then that is a different matter, but I am not satisfied that the priority which Mr Sharratt attributed to the collection of revenue for the export of electricity to the Grid by the renewable energy schemes was clearly wrong, in the circumstances which I confirm that I have accepted in paragraph 625(d) above and having regard to the other issues that Mr Sharratt was dealing with as set out in paragraphs 625 (b)-(g) above.

626. Directors are entitled to delegate to one of their number responsibility for a particular function or task, provided that they have no reason to believe that the director to whom they delegate that responsibility is incapable of carrying it out competently. The Respondents appear to have delegated to Mr Sharratt responsibility for the collection of revenue for the export of electricity to the Grid by the renewable energy schemes (or at least to have acquiesced in him taking on that responsibility). There is no evidence before me that the Respondents were not entitled to conclude that Mr Sharratt, the Finance Director of BIL and the other Group companies was not capable of carrying out that task. In those circumstances, I am not satisfied that the Respondents were guilty of gross mismanagement in delegating this task to Mr Sharratt.

627. Having delegated that task to Mr Sharratt, the Respondents were not thereby absolved of all responsibility for the recovery of, what I find to be, export FITs, they had a continuing responsibility to monitor the carrying out of that task by Mr Sharratt and to hold him to account for carrying it out. Breach of that obligation can be regarded as a breach of fiduciary duty or serious mismanagement, or both, it is not a primary responsibility to recover revenue for the export of electricity to the Grid, but a responsibility to monitor and hold Mr Sharratt to account for his performance of that role.

628. I am not satisfied that, in discharging their continuing obligation to monitor Mr Sharratt's progress in recovering export FITs and to hold Mr Sharratt to account, the Respondents breached their fiduciary duties to BIL or were guilty of serious mismanagement because:

(a) although I accept that, even though I have found that there was no gross mismanagement by Mr Sharratt, in pursuing the recovery of export FITs, nonetheless the Respondents or some of them might be in breach of their fiduciary duties/guilty of gross mismanagement because they did not discharge their duty to monitor Mr Sharratt and hold him to account, I consider it less likely that, in those circumstances the Respondents can be held to have breached their fiduciary duties/be held to be guilty of serious mismanagement;

(b) on the evidence before me, Mr Sharratt never told any of the Respondents he was having any difficulties in recovering export FIT payments, or that he had not done so, such as to alert the Respondents to any need to require Mr Sharratt to provide them with details of the difficulties that he was encountering and his plan to overcome them, particularly when BIL had recovered the larger FIT electricity generation payments;

(c) whilst there is no evidence that the Respondents ever required Mr Sharratt to account for his attempts to recover FIT export payments, the Respondents were subject to the same pressures on their time and were having to deal with the same issues as Mr Sharratt was (as detailed by me in paragraph 618 (c)- (g) above) from around November 2018 onwards and absent Mr Sharratt alerting the Respondents to any difficulties he was encountering in recovering FIT export payments (and BIL having recovered the larger FIT generation payments) in my judgment, the Respondents should, in those circumstances be allowed a degree of latitude in monitoring and challenging Mr Sharratt about his progress in recovering export FIT payments, given the other issues and pressures that the Group faced during the relevant period;

(d) even if the Respondents should have monitored Mr Sharratt more closely and held him to account for his progress towards recovering the export FIT payments, I am not satisfied that, had they done so, they would have concluded that Mr Sharratt was not affording sufficient priority to the recovery of the export FIT payments compared with the other issues that he was having to deal with. I find this, for the same reasons as I have concluded that I am not satisfied that Mr Sharratt was not affording sufficient priority to the recovery of export FIT payments; and

(e) in my judgment, in circumstances where: (i) I am not satisfied that BIL has suffered a permanent loss of FIT export revenue, only a delay in its receipt; (ii) had the Respondents challenged Mr Sharratt about his progress in recovering export FIT payments, I am not satisfied that the Respondents would reasonably have concluded that Mr Sharratt was not affording FIT payments enough priority, when compared with his other responsibilities, or that he was pursuing the wrong strategy in attempting to recover them; and (iii) even if the failure of the Respondents to challenge Mr Sharratt was mismanagement by them, it is not in my judgment, mismanagement of sufficient seriousness to justify intervention by the court by granting a remedy under Section 996 CA 2006 (in accordance with the guidance given by Arden J in *Re Macro*).

Issue 53 - In respect of such findings as the Court makes in respect of each of the issues set out above:

- (1) Have the Companies suffered a loss (which can be quantified now or at a remedies hearing); or**
- (2) Do the Companies have a right to an account of profits in respect the arrangements with Paul (which can be quantified now or at a remedies hearing).**

THE BREACHES OF DUTY

629. I have found, in summary, that the Respondents have breached the duties that they owed to PLC and ABF (but not BIL) in the following respects:

- (a) in connection with the loan by PLC to ABF of £1,006,000 to purchase Barn Farm:
- (i) each of the Respondents breached their duties under Section 175 CA 2006, by not disclosing to the board of PLC, their interests as shareholders in ABF, in the loan of £1,006,000 advanced by PLC to ABF (this breach is not pleaded in the PLC Petition);
 - (ii) a failure by the Respondents to act with reasonable skill and care in failing to agree or document the terms upon which the loan of £1,006,000 was advanced by PLC to ABF (this is not pleaded in the PLC Petition); and
 - (iii) a breach by Paul (and Mr Sharratt) of their duties to PLC and ABF by backdating a written agreement purporting to record the terms upon which PLC advanced the £1,006,000 to ABF (this is not pleaded in the PLC Petition);
- (b) for the sub contract arrangements between PLC and the Partnership, in relation to the Cemex and Biffa Sites:
- (i) Paul breached his duty under section 177 CA 2006 to disclose to the directors of PLC, the nature and extent of the Partnership's interest in the Cemex and Biffa sub-contracts and he breached the fiduciary duty he owed to PLC, by deciding, both on behalf of the Partnership and PLC, what the Partnership would charge PLC for the work it carried out under those sub-contracts;
 - (ii) Paul breached his duties under Sections 172 and 175 CA 2006 in causing or allowing PLC's resources to be used by the Partnership in connection with its performance of the Cemex and Biffa sub-contracts and PLC to pay the road tax and insurance on Partnership vehicles engaged in performing the Cemex sub-contract, whilst those vehicles were included on PLC's Operator's Licence; and
 - (ii) Mr Ellis and Mr Tomkinson breached their duties under Section 173 CA 2006 to act independently by allowing Paul to decide how much the Partnership would charge PLC for the work that it carried out under the sub-contracts (save for the second Biffa sub-contract for transporting liquid waste);
- (c) using PLC's employees, to carry out work for the Partnership, repairing and maintaining Partnership vehicles, machinery and equipment at the expense of PLC, and using PLC's fuel for the Partnership's vehicles, plant and machinery was:
- (i) a breach by Paul of the fiduciary duties that he owed to PLC/ Section 172 CA 2006 (duty to act in good faith in the way that he considered would be most

likely to promote the success of PLC) because those resources were used without the informed agreement of the directors of PLC, without keeping proper records of the resources of PLC which were being used for the benefit of the Partnership and without PLC receiving proper compensation for the use of those resources and a breach of Paul's duty under Section 175 CA 2006 to avoid conflicts of interest; and

(ii) a breach by Mr Ellis of his duty under Section 173 CA 2006 to act independently in relation to the use of employees and the fuel of PLC, which Mr Ellis knew or ought to have known were being used for the purposes of the Partnership;

(d) the arrangements for the Partnership to:- provide husbandry services to ABF and rent fields at Home Farm from the Partnership, for ABF to plant potatoes in was:

(i) a breach by Paul of his duty under section 182 CA 2006 to inform the directors of ABF, on his appointment as a director of ABF, on 13 July 2016, of the nature and extent of the Partnership's interest in those arrangements. This breach is not pleaded in the ABF Petition;

(ii) a breach of Paul's duty under section 177 CA 2006 to inform the directors of PLC of the nature and extent of the Partnership's interest in those arrangements;

(iii) a breach by Paul of his fiduciary duty owed to ABF, by deciding, both on behalf of the Partnership and ABF, what the Partnership would charge ABF; and

(iv) a breach by Mr Tomkinson of the duty that he owed under Section 173 CA 2006 to act independently in the interests of PLC/ABF, by allowing Paul to agree those arrangements between the Partnership and ABF and between ABF and PLC; and

(e) each of the Respondents breached their duties under Section 175 CA 2006, by not disclosing to the board of PLC, their interests as the beneficial holders of the shares in WPS in the loan of £623,500 advanced by PLC to WPS.

HAVE THE COMPANIES SUFFERED A LOSS (WHICH CAN BE QUANTIFIED NOW OR AT A REMEDIES HEARING)

630. Mr Zaman suggests that the assessment of the losses that the Group companies have suffered as a result of the breaches of duty that I have found the Respondents have

committed is something that can be left to the remedies hearing. That presupposes of course that I find that the affairs of ABPT and/or ABF (I have not found that there have been any breaches of duty in respect of BIL) have been conducted (as a result of the breaches of duty that I have found that the Respondents have committed) in a manner that is unfairly prejudicial to Andrew as a member of those companies, or one or more of them, because if I do not find that, there will be no remedies hearing. Mr Auld says that, if Andrew cannot show now that the relevant Group company has suffered a loss, he cannot prove that any breaches of duty are unfair and/or prejudicial to Andrew and so he has not proved his case.

631. I accept that I am unable at this point in time to calculate precisely what losses Group companies have suffered as a result of the breaches of duty that I have found the Respondents have committed (as summarised in paragraph 629 above). However, in order to: (a) decide whether the conduct that amounts to a breach or breaches of duty by the Respondents is unfairly prejudicial to Andrew it may be relevant to come to a view as to the scale of the losses likely to have been suffered, as a result by the relevant company (and in particular whether they are minimal); and (b) whilst, if I find that there is unfairly prejudicial conduct, I can and will ask the experts to provide opinions as to the losses suffered by the relevant company, for the purposes of the remedies hearing, I will need to give them some assistance to do so, by setting out the basis upon which those losses are to be calculated.

632. I will therefore set out what findings or conclusions I am able to make or come to about the losses that have been suffered and will, if I find there is unfair prejudice to Andrew, provide such guidance as I can to the experts about how the losses are to be calculated. In doing this I will, where necessary (and due to the lack of records it generally is necessary) use the "broad axe" approach advocated in *MasterCard Inc.*

Loan PLC to ABF

633. I have already concluded that no loss has been suffered by PLC as a result of the breaches of duty by the Respondents, because the written loan agreement which was backdated to 14 November 2015 reflects an appropriate commercial basis for the advance of that loan.

Cemex

634. Based on a sample of 13 Gilbert (sub-contractor on the Cemex contract) invoices addressed to PLC, PLC, according to Mr Bell, made a greater margin when Gilbert transported

waste from the Cemex site (8%) (ie the difference between what Gilbert charged PLC and what PLC charged Bi-Products/4R) than PLC made when the Partnership transported waste from the Cemex Site. Mr Bell suggests, therefore, that PLC could have made more profit by sub-contracting all of the work on both the Cemex and the Biffa contracts to third party contractors, rather than using the Partnership. On an assumed margin of 8% on all invoices sent by the Partnership to PLC, Mr Bell suggests that, if PLC had made a margin of 8% on all the work carried out for it, by the Partnership, PLC would have made an additional profit of £104,183 on Cemex and Biffa. Mr Bell suggests that this profit was lost to PLC as a result of PLC using the Partnership, rather than a third party contractor to carry out the work.

635. Mr Lewis says that Mr Bell's analysis of only 13 Gilbert invoices is insufficient to support a conclusion that 8% profit was made by PLC on the work done by Gilbert. Mr Lewis refers to work carried out on the Cemex contract by the Partnership not having been charged for by the Partnership, but PLC having charged Bi-Products/4R for that work, and he says that the Partnership charged, for waste collected from the Cemex site by its 8 wheeler tipper truck, at the same rate as Gilbert charged for its 8 wheeler tipper truck. Mr Lewis goes on to say that PLC made a margin of £20,889, on all invoices sent to it by the Partnership to PLC, for work that the Partnership carried out on the Cemex and Biffa contracts.

636. Paul says that the Partnership charged Bi-Products/4R £230 plus VAT for loads transported from the Cemex Site, the same as Gilbert and PLC made the same margin on transport work sub-contracted to Gilbert as it did on work sub-contracted to the Partnership. Paul also says that the Partnership did not charge for some of the transport work that it carried out on the Cemex contract, but PLC still charged Bi-Products/4R. Mr Lewis has not set out to calculate the difference, if any, between what Gilbert charged PLC and what the Partnership charged PLC, for transporting waste from the Cemex Site.

637. Given that Paul breached his duty to PLC by agreeing himself, both on behalf of the Partnership and PLC, what the partnership would charge PLC, for the transport work that it carried out on the Cemex contract, and that Paul suggests that the price that the Partnership was charging PLC to transport waste away from the Cemex Site was the same as the price charged by Gilbert, I consider that it is fair to approach the calculation of any loss that PLC suffered as a result of Paul agreeing the sub-contract for the Partnership and PLC, by seeking to calculate what an independent third party contractor would have charged PLC for the same

work (removing waste from the Cemex Site) as the Partnership carried out. This is what Mr Bell purports to have done for both the Cemex and Biffa sub-contracts.

638. I do not agree that Mr Bell's approach, of calculating the margin or profit that PLC made when it charged By Products/4R for the transport work carried out by Gilbert as reflected in 13 Gilbert invoices is correct because: (a) I accept Mr Lewis's point that merely considering 13 Gilbert invoices is insufficient to draw the conclusion that Mr Bell has, as to the level of profit made by PLC (8%) when it invoiced 4R for the transport work that Gilbert had done; and (b) it is difficult to see why it should be assumed that PLC would have made a margin of 8% on the Biffa sub-contracts by employing an independent contractor, even if PLC did make a margin of 8%, when employing Gilbert on the Cemex sub-contract.

639. In my judgment the correct approach to calculating any loss that PLC suffered as a result of using the Partnership rather than a third party contractor to transport waste away from the Cemex Site is to:

- (a) treat what Gilbert charged PLC for transporting waste away from the Cemex Site as what a third party contractor would have charged for that work (I have no better evidence of what that charge would be);
- (b) compare, on average what Gilbert charged per tonne (or other convenient weight) for transporting waste away from the Cemex Site and what the Partnership charged for the same weight and apply that average price to all waste transported away from the Cemex site to see if there is any difference; and
- (c) deduct from the costs charged by the Partnership, the value of the occasions on which the Partnership did not charge for transporting waste away from the Cemex site, but PLC charged By Product/4R.

640. It is open to me to say, as Mr Auld suggests that I should, that Andrew has simply failed to prove that there is a difference between what Gilbert charged PLC and what the Partnership charged PLC, because I have not accepted Mr Bell's approach to calculating the difference. I have however concluded that there have been breaches of duty by Paul and Mr Ellis (see paragraphs 542 and 547) in connection with the use of PLC's resources by the Partnership in performing the Cemex sub-contract and I have asked the experts (see paragraphs 646-656 below) to provide further opinions on the loss caused to PLC by the Partnership's use of PLC's resources. In those circumstances I consider it appropriate to give the experts a further opportunity to calculate any difference between what Gilbert charged

PLC and what the Partnership charged PLC pursuant to their respective sub-contracts in order to assist me in determining whether PLC has suffered an additional loss as a result of the Respondents' breaches of duty (additional that is to the loss caused by the Partnership using PLC's resources to assist it in performing its Cemex sub-contract). I will invite the experts to calculate, in accordance with the approach outlined by me in paragraph 638 above any loss that PLC may have suffered as a result of using the Partnership, rather than a third party contractor (based on Gilbert's charges) to transport waste away from the Cemex Site.

Biffa

641. Paul says that: (a) the initial part of the sub-contract to remove solid waste from the Biffa site was sub-contracted by the Partnership to a third party and charged on by the Partnership to PLC at little or no margin, for the Partnership; and (b) the second part of the Biffa contract which was to remove liquid waste from the Biffa Site, was carried out by PLC and another contractor. For PLC's part of the contract, PLC transported the liquid waste away from the Biffa Site and the waste was then spread on fields by Prestons. In 2014, PLC took over the rest of the contract to remove liquid waste from the Biffa site, from which point both Prestons and the Partnership spread the liquid waste.

642. There seems to me to be no reason why PLC would employ the Partnership to remove solid waste from the Biffa Site, who in turn employed a third party, rather than PLC employing the third party contractor direct (no reason was suggested). Any difference between what the third party charged the Partnership and what the Partnership charged PLC, therefore seems to me to be a loss incurred by PLC in employing the Partnership to remove the solid waste from the Biffa Site and a loss flowing from the Respondents' breaches of duty. I will invite the experts to calculate that difference (if any) (Paul suggests that there was little or no margin)

643. As I have already mentioned: (a) Mr Bell suggests that an extra £104,183 in profit would have been made by PLC on both the Cemex and the Biffa contracts if it had contracted with a third party contractor, rather than the Partnership (based on an 8% margin); and (b) Mr Lewis says that Mr Bell's calculation of an 8% margin is misconceived and that the amount PLC invoiced Bi-Products/4R, on both the Cemex and the Biffa contracts, for transport work carried out by Partnership, was always greater than the amount that the Partnership invoiced to PLC and that PLC made a total profit of £20,889 on work carried out by the Partnership on the Cemex and Biffa contracts.

644. In line with my approach on the Cemex sub-contract, I will ask the experts to compare what Prestons charged PLC for spreading liquid waste on the Biffa sub-contract with what the Partnership charged PLC. Paul suggests that the Partnership charged PLC less for spreading liquid waste to take into account the fact that the Partnership was using PLC's tankers and boom, towed behind the Partnership's tractors to do the spreading. The Partnership should therefore have been charging less than Prestons by a margin. I have found (paragraph 539 (b) above) that the Partnership used PLC's fuel for its tractors which were engaged in spreading liquid waste which came from the Biffa Site and I have asked the experts to calculate the value of that use, for the purposes of the remedies hearing. It is appropriate in my judgment, in those circumstances, to allow the experts an opportunity for the purposes of the remedies hearing to calculate (if they can): (a) any difference between what the third party contractor charged the Partnership to transport solid waste from the Biffa Site and what the Partnership charged PLC; and (b) to compare what the Partnership charged PLC to what Preston's charged PLC for spreading liquid waste which came from the Biffa Site taking into account the matters mentioned by me in paragraph 645 below. No account should be taken of the Volvo which was hired by the Partnership to PLC, for PLC's use on the Biffa contract because I am not satisfied that the hire agreement between the Partnership and PLC for the Volvo either: (a) forms part of the allegation of unfair prejudice set out in the PLC Petition; or (b) that PLC was overcharged by the Partnership for the hire of the Volvo compared to what it would have had to pay to hire an alternative vehicle from a commercial hirer.

645. Any amount by which, what the Partnership charged PLC for spreading liquid waste from the Biffa Site exceeded what Prestons charged PLC for spreading liquid digestate from the Biffa Site, taking into account the fact that the Partnership was using PLC's tankers and boom will be regarded by me as an additional loss suffered by PLC from using the Partnership for this work, rather than an independent third party contractor (additional that is to the value of PLC's fuel used by the Partnership tractors engaged in spreading liquid waste). I will invite the experts to calculate that figure and if they can, some allowance for the Partnership using PLC's tankers and boom, to be added to the Partnership charges.

Use of PLC's Employees

646. PLC has suffered loss as a result of the Partnership using PLC's employees, for the Partnership's benefit. I have assessed, in response to issue 25, which of PLC's employees were

used for the benefit of the Partnership and for what periods. The experts should calculate, at their normal salaries, the cost to PLC of employing each of those employees for the periods specified by me which I consider to be the loss suffered by PLC from the Partnership using its employees.

647. Paul says that he deliberately made adjustments to the price that the Partnership charged for husbandry work that the Partnership carried out to ABF's potato crops, in order to make allowance for the fact that the Partnership was using PLC's fuel for the Partnership vehicles, machinery and equipment engaged in that work and that PLC's employees sometimes drove the Partnership's vehicles, when carrying out that husbandry work (paragraph 180 of Paul's first witness statement). Paul refers to the RSM Report which concluded that the Partnership undercharged against NAAC rates for its husbandry (charging for the area of the fields planted rather than the whole area of the fields as it was entitled to, in accordance with NAAC rates, not charging for irrigation work or carting away (paragraphs 178 and 179 of Paul's first witness statement)).

648. The problem, however, is that Paul making allowances in the amount that the Partnership charged ABF for the use of PLC's assets by the Partnership, does not compensate PLC for that use. It would be different if the arrangements between PLC/ABF/the Partnership were that PLC would pay all of ABF's costs of growing potatoes (which would then mean that PLC would benefit from any allowances made by the Partnership to ABF). It is clear however that this is not the case because:

- (a) although it appears that, for the earlier potato crops, the Partnership invoiced PLC for the husbandry work that it carried out to those crops, those invoices are said to have been then set off by PLC against the price that it paid ABF to purchase ABF's harvested potatoes;
- (b) ABF is making losses from growing potatoes (it would break even if PLC were paying all of the cost of growing those potatoes);
- (c) Mr Ellis says that he caused PLC to pay the market rate for ABF's harvested potatoes, not some other figure based on the cost of growing the potatoes; and
- (d) Mr Bell says that PLC paid ABF, for its potatoes, less than the average price which PLC paid to other suppliers of potatoes.

649. for those reasons there should be no deduction from the calculation of the loss suffered by PLC as a result of the Partnership using its employees, to reflect the adjustments that Paul says he made to the price charged by the Partnership to ABF for husbandry work.

Repair and maintenance of Partnership vehicles, plant and machinery by PLC/insuring and road taxing Partnership vehicles

650. I have found (issue 26 paragraph 536 above) that PLC carried out some, but not all of the repair and maintenance work which was required to be carried out to the Partnership's machinery, equipment and vehicles, from January 2009. There is no material assistance as to what that amount of maintenance and repair work is in the evidence before me. The experts should therefore attempt to estimate the likely cost of maintaining and repairing the Partnerships vehicles, machinery and equipment from January 2009 to date which would not be covered by manufacturers/suppliers warranties . I will then decide what proportion of those costs should be borne by the Partnership. In addition I have found (paragraph 536 (b)) that all trailers used by the Partnership for its Cemex sub-contract were repaired and maintained by PLC. I have also found (paragraph 540) that the Partnership vehicles which were included on PLC's Operator's Licence were taxed and insured by PLC whilst they appeared on PLC's Operator's Licence and this is also a loss to PLC arising from breach of duty by Paul in allowing that to happen.

Fuel

651. In response to issue 27, in paragraph 539 I made findings about the use of PLC's fuel by the Partnership.

652. In addition to the use, by Partnership vehicles of PLC fuel on the Cemex and Biffa contracts, I have found that the Partnership used PLC fuel:

- (a) when spreading liquid waste removed from Enterprise House (paragraph 539 (c));
- (b) when planting, cultivating and harvesting ABF's potatoes (paragraph 539 (d)); and
- (c) at other times (paragraph 539 (e)).

653. The experts have not dealt, in their reports, with the removal of liquid waste from Enterprise House, nor is it pleaded in the PLC Petition, that the arrangements between the Partnership and PLC for the removal of liquid waste from Enterprise House amounts to the affairs of PLC being conducted in a manner which is unfairly prejudicial to Andrew, as a

shareholder of PLC. Paul says, at paragraph 163 of his second witness statement that, if a Partnership tractor and tanker carried liquid waste from Enterprise House it charged £40 an hour which he says is “less than NAAC rates and reasonable even if [PLC] fuel has been used, which it sometimes may have been”.

654. I am not satisfied that PLC has incurred a loss as a result of the Partnership using PLC fuel when removing the liquid waste from Enterprise House and spreading it. Paul asserts that the rate charged for doing this is reasonable (less than NAAC rates) even if PLC fuel is used, this assertion was not challenged in cross examination and I have no evidence before me that the charge of £40 per hour was unreasonable taking into account the Partnership using PLC fuel for the vehicles removing liquid waste from Enterprise House. Fuel used by Partnership vehicles in carting away liquid waste from Enterprise House should not therefore be included in the losses incurred by PLC as a result of the Partnership using its fuel.

655. In paragraph 539 (d) I concluded that PLC fuel had been used by all of the Partnership vehicles, plant and machinery involved in planting, cultivating and harvesting ABF’s potatoes. I have already noted (when dealing with the use of PLC’s employees by the Partnership) that Paul says that he deliberately adjusted downwards the charge that the Partnership made for husbandry work carried out for ABF to reflect the fact that PLC’s employees and fuel were used as part of that husbandry work. I have explained why this does not compensate PLC for the use of its employees. For the same reason it does not compensate PLC for the use of its fuel either and there should be no deduction from the loss caused to PLC by the Partnership using its fuel for planting, cultivating and harvesting potatoes from the 2016 season to date for any undercharging of ABF by the Partnership.

656. I have found that PLC incurred a loss as a result of the Partnership using its fuel, since February 2016, when not working for either ABF, or PLC (see paragraph 539 (e) above). There is no assistance in the evidence as to what the quantity of fuel involved is and I will ask the experts to calculate the fuel use for one Partnership tractor five days a week from February 2016. I accept that this is a largely arbitrary (although I hope reasonable) means of estimating such use, but given the state of the evidence it is, I think, the best I can do.

Planting cultivating and harvesting potatoes

657. I am not satisfied that ABF has made any loss as a result of the arrangements for the Partnership to plant, cultivate and harvest its potatoes from the 2016 growing season

(compared to what ABF would have paid to a third party contractor to carry out this work) because: (a) it is common ground that NAAC rates are the average rates charged by contractors to farmers, they are the best evidence I have about what a third party contractor would have charged ABF for husbandry work that the Partnership carried out; and (b) whilst the Partnership has used PLC's fuel for its vehicles, machinery and equipment used to plant, cultivate and harvest potatoes for ABF (at no costs to ABF) it has purported to compensate PLC for this use by adjusting its charges to ABF downwards (Mr Lewis has calculated that the Partnership has undercharged against NAAC rates by £85,211, RSM calculated, in the RSM Report that the Partnership undercharged ABF by £170,000 against NAAC rates). ABF appears therefore to have gained from these adjustments.

658. I am not satisfied that the arrangements for ABF to rent the land from the Partnership at Home Farm have resulted in any loss to ABF nor are such losses pleaded in the ABF Petition.

659. So far as PLC is concerned, the PLC Petition pleads that the arrangements between PLC/ABF/the Partnership are a breach of the no conflict rule and that Paul should be required to account for the profits that the Partnership has made as a result, it is not pleaded that PLC suffered any loss as a result of those arrangements. Further I am not satisfied that PLC did suffer any loss as a result of those arrangements. Mr Bell accepts that PLC has paid substantially less to ABF to purchase ABF's potatoes, than it on average paid to third party suppliers. Whilst Mr Bell complains that PLC is funding the losses of ABF, by advancing money to ABF to enable it to cover those losses, I am not satisfied the PLC has suffered any loss as a result of advancing those monies to ABF, the advances are treated as money owing by ABF to PLC. To the extent that PLC's fuel has been used for Partnership vehicles, machinery and equipment used in carrying out husbandry work for ABF, a claim is made separately for the use of PLC's fuel by the Partnership and cannot be claimed twice.

WPS

660. I am not satisfied that PLC has suffered any loss as a result of the Respondents failing to comply with Section 175 CA 2006 by not disclosing to a board meeting of PLC, their interest, as shareholders in WPS, in the loan of £623,500 by PLC to WPS, because the £623,500 was repaid to PLC, together with interest earned upon that sum by WPS. In any event, as I have already noted, a breach of duty under Section 175 does not form part of the pleaded case

against the Respondents in the PLC Petition (Andrew's case is that the transfer of £623,500 to WPS was an attempted fraud on him which I have rejected).

DO THE COMPANIES HAVE A RIGHT TO AN ACCOUNT OF PROFITS IN RESPECT OF THE ARRANGEMENTS WITH PAUL (WHICH CAN BE QUANTIFIED NOW OR AT A REMEDIES HEARING)

661. In his skeleton argument, Mr Zaman asserts that the remedy for failure to comply with Sections 177 and 182 CA 2006 is that the director who breaches their duty under either of those sections must account to the relevant company for the profit that they have made out of the arrangements which they have failed to disclose the nature and extent of, to the directors of that company. In support of that proposition, Mr Zaman refers to *Stafford and Ritchie Fiduciary Duties 2nd Edition* paragraph 9.44 which says "*the account of profits has been described as the primary remedy for the breach of fiduciary duty. In one sense, however an account is not simply a remedy it is a primary obligation of the fiduciary to account for the profits made...*". However that paragraph is concerned generally with the obligation of a fiduciary to account for profits, at paragraph 2.113 and 2.114 *Stafford and Ritchie* refer to their being doubt about whether a civil remedy is available for a breach of Sections 177 or 182.

662. In his comments upon this specific issue, Mr Zaman says that "The losses arising to the Companies by way of loss, or account of profits are matters that can be addressed at a remedies hearing".

663. Mr Auld in his skeleton argument and closing argument does not, so far as I can see, address the question of whether the companies have a right to an account of profits made by the Partnership, as a matter of principle, if there has been a breach of Section 177/182 CA 2006.

664. The issue of whether the relevant company has a right to seek an account of profits from the Partnership does not appear to bear directly on the question of whether the affairs of that company have been conducted in a manner that is unfair or prejudicial to Andrew in his capacity as a shareholder of that company (or in the case of PLC, ABPT) and Mr Zaman does not submit that it does. I will leave to the remedies hearing therefore, this issue, and its relevance to any remedy.

UNFAIR PREJUDICE

Issue 54 - In relation to Section 994 of the Companies Act, on the basis of the findings of fact made by the Court at the trial of liability:

- (1) Have the affairs of (a) ABPT and/or (b) BIL and/or (c) ABF been conducted in a manner which is unfairly prejudicial to the interests of members including Andrew?**
- (2) If so, what directions are required to be made for a remedies hearing?**

THE LAW ON UNFAIR PREJUDICE

665. Section 994 of the CA 2006 provides:

- (1) A member of a company may apply to the court by petition for an order under this Part on the ground—
 - (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
 - (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

666. It is common ground that “the company’s affairs” includes the affairs of a subsidiary and so, if the affairs of PLC have been conducted in a manner that is unfairly prejudicial to Andrew’s interests as a member of PLC’s holding company, ABPT, then this will be covered by Section 994.

Mr Zaman’s case

667. Mr Zaman’s case may be summarised as follows:

- (a) It is accepted that Andrew must demonstrate that the Respondents’ conduct of the affairs of the relevant Group company is both unfair and prejudicial;
- (b) the test for unfairness is objective, but considered by reference to factors and standards that the courts expect directors to adhere to such as keeping promises, honouring agreements and exercising their fiduciary powers properly. In support of those propositions, Mr Zaman relies upon the judgment of Hoffman LJ (as he then was) in *Re Saul D Harrison & Sons plc [1994] BCC 475, p.488*: “The answer to this question often turns on the fact that the powers which the shareholders have entrusted to the board are fiduciary powers, which must be exercised for the benefit of the company as a whole. If the board act for some ulterior purpose, they step outside the terms of the bargain between the shareholders and the company. As a matter of ordinary company law, this may or may not entitle the individual shareholder to a remedy. It depends upon whether he can bring himself within one of the exceptions to

the rule in *Foss v Harbottle (1843) 2 Hare 461*. But the fact that the board are protected by the principle of majority rule does not necessarily prevent their conduct from being unfair within the meaning of Section 459 [the predecessor to section 994] enabling the court in an appropriate case to outflank the rule in *Foss v Harbottle* was one of the purposes of the section.”

- (c) breach by the Respondents of their fiduciary duties and/or the duties that they owe to the Group companies under CA 2006 is at least prima facie conduct which is unfair to Andrew. Mr Zaman refers to *Charman and Du Toit Shareholder Actions 2nd edn. para 9.73* where it is said that: “Members’ interests are informed by the nature of the rights that is sought to be protected: broadly speaking strict legal rights and equitable rights. The strictly legal rights involve an expectation that the de facto controllers of a company will conduct the affairs of the company in accordance with its constitution and where required the applicable Companies Act, in compliance with their fiduciary duties towards the company. They are the so-called ‘strict legal rules’. Breach of the conduct expected of them as prescribed by the law governing their position, is prima facie detrimental to members’ interests.; and
- (d) whilst prejudice often is financial and measured in terms of diminution in the value of the shareholder’s shareholding, in the relevant company, prejudice can be sustained by the shareholder in other ways, Mr Zaman refers to the judgment of HHJ Purle QC in *Re Sunrise Radio Limited [2009] EWHC 2893 (Ch)* at paragraph 4: “There must be both prejudice and unfairness. Prejudice will most often be established by reference to conduct having a depressive effect (actual or threatened) on the value of the petitioner’s shareholding, which will in most cases be a minority holding, typically in a private company with restrictions on transfer. Unfairness, in turn, most often connotes some breach of the articles, statute, or general principles of company law. However, the operation of the section is not necessarily limited to such cases. The test is an objective one. There may be mutual understandings between shareholders giving rise to special rights of a quasi-partnership kind. Even without that, the conduct of the company’s directors may, whether by reason of malevolence, crass stupidity, or something in between, fall so far short of the standards to be expected of them as to lead to the conclusion that the petitioning shareholder cannot reasonably be expected to have the minimum of trust and confidence in the integrity or basic competence of the board that any shareholder is entitled ordinarily to expect. This is so irrespective of any impact on the value of his or her shares, and irrespective of whether any specific breach of the articles, statute, or the general principles of company law is involved.”

Mr Auld’s case

668. Mr Auld’s case may be summarised as follows:

- (a) Andrew must show that his interests as a member of the relevant Group company have been prejudiced unfairly by the conduct of one or more of the Respondents;
- (b) Andrew cannot complain of unfairness unless there is some breach of the terms on which he agreed with the other members of the relevant Group company, that the affairs of that company should be conducted. Unfairness

may be a breach of those rules or using the rules in a manner that is contrary to good faith (*O'Neill v Phillips [1999] 1 WLR 1092* per Lord Hoffman at paragraphs 1098-1099);

- (c) the terms on which the members agree that the affairs of the relevant Group company are conducted will, by implication, include an agreement that members who are directors will comply with the duties that that member/director owes to the company (*Joffe, Minority Shareholders, paragraph 6.86*) and that is the basis upon which a breach of fiduciary duty owed by a member/director to the company (as director) may be relevant to an unfair prejudice petition. It remains however for Andrew to show that any such breach of fiduciary duty by one or more of the Respondents has caused him prejudice, in his capacity as a member of the relevant company (*Gore-Brown on Companies-paragraph 19.10; Joffe, Minority Shareholders-paragraph 6.229; Re Blackwood Hodge Plc [1997] B.C.C 434 (Ch); and Re Coroin at 642*);
- (d) the more trivial the breach of fiduciary duty, the less likely it is to amount to unfair prejudice (*Re Saul D Harrison and Sons Plc [1994] BCC 475 per Hoffman LJ (as he then was) at 489*);
- (e) if the breach of fiduciary duty makes no practical difference, then it will not be unfairly prejudicial (*Birdi v Specsavers Optical Group Limited and others Ltd [2015] EWHC 2343 (Ch)* at para 184 per Nugee J (as he then was)); and
- (f) the prejudice to Andrew does not have to be financial, but it invariably is (*Gore Browne on Companies paragraph 19.11*) and it is difficult to establish unfair prejudice if there is no financial loss (*Re Coroin*).

My Conclusions on the Legal Principles

669. Mr Zaman and Mr Auld agree and I accept that:

- (a) Andrew must show that the conduct of one or more of the Respondents has resulted in his interests as member of the relevant Group company being unfairly prejudiced;
- (b) breaches of fiduciary or statutory duties by one or more of the Respondents as directors of the relevant group company can be unfair (Mr Zaman says *prima facie* are unfair); and
- (c) prejudice to Andrew does not have to be financial (Mr Auld says it invariably is financial and it is difficult to establish prejudice if there is no financial loss to Andrew). I will consider the relevant authorities in more detail, on this point, when considering the particular breaches of fiduciary duty/CA 2006 duties which I have found Andrew has proved.

670. I accept Mr Auld's submissions that:

- (a) the more trivial the breach of fiduciary duty, the less likely it is to be regarded as unfair; and
- (b) if a breach of fiduciary duty makes no difference to what would have been done in any event then such a breach of fiduciary duty is not likely to be unfair or prejudicial (in *Sunrise Radio* paragraph 7 of HHJ Purle QC's judgment, acknowledged that point).

671. Paragraph 4 of the judgment of HHJ Purle QC in *Sunrise Radio* (relied on by Mr Zaman) appears to go beyond the points agreed between Mr Zaman and Mr Auld, in suggesting that, if the conduct of the directors (who are also shareholders) falls so far below the minimum standard of integrity and basic competence that any shareholder is entitled to expect, then, irrespective of whether there has been a breach of the Articles, statute or general principles of company law, and irrespective of whether the value of the Petitioning shareholder's shares have been impacted, the conduct will be unfairly prejudicial. HHJ Purle QC also said that this applied irrespective of whether the relationship between shareholders was in the nature of a Quasi Partnership.
672. I approach what HHJ Purle QC says in paragraph 4 of his judgment in *Sunrise Radio* with some caution, because the judge was summarising in very short and broad terms what a Petitioning creditor would need to prove, in order to establish unfair prejudice. Paragraph 4 was not meant to be a precise or exhaustive definition of what a Petitioning creditor must prove in order to demonstrate unfair prejudice, which is in any event not capable of precise or exhaustive definition. Mr Zaman relies in particular upon HHJ Purle QC saying that, if the conduct of a company's directors falls so far short of what shareholders are entitled to expect of them, such that the petitioning creditor cannot be expected to have the minimum trust in their basic integrity and competence, that any shareholder is entitled to expect, the conduct will be unfair and prejudicial..."*irrespective of any impact on the value of his or her shares*". This still leaves the question of whether the relevant conduct has fallen sufficiently short of what the Petitioner as shareholder is entitled to expect to mean that the conduct is unfair and prejudicial, irrespective of any impact on the value of the petitioner's shares.
673. I accept Mr Auld's point that breach of the agreement or understanding between shareholders is the basis of the Section 994 jurisdiction and that, by implication, this agreement will include a term that directors who are shareholders will comply with their fiduciary duties as directors. That agreement, or understanding would also, in my judgment, by implication include an agreement or understanding that the directors would not act in bad faith (malevolently) in relation to the interests of shareholders or in a seriously incompetent manner. The implication that directors who are shareholders will not act in bad faith viz shareholders appears to me to be an obvious term to be implied in the agreement between shareholders. HHJ Purle QC's reference to crass stupidity is, consistent with the guidance given by Arden J in *Re Macro* (see paragraph 578 (h)) above that serious mismanagement may justify the court intervening to grant a remedy under section 459 of the Companies Act 1985 (the predecessor to Section 997 CA 2006) provided it is serious enough to justify such a remedy.

Summary of Allegations proved by Andrew

674. I have found that the Respondents have breached their fiduciary/statutory duties to ABPT/ABF in the following respects:

- (a) in connection with the loan by PLC to ABF of £1,006,000 to purchase Barn Farm:

- (i) each of the Respondents breached their duties under Section 175 CA 2006, by not disclosing to the board of PLC, their interests as shareholders in ABF, in the loan of £1,006,000 advanced by PLC to ABF (this breach is not pleaded in the PLC Petition);
 - (ii) a failure by the Respondents to act with reasonable skill and care in failing to agree or document the terms upon which the loan of £1,006,000 was advanced by PLC to ABF (this is not pleaded in the PLC Petition); and
 - (iii) a breach by Paul (and Mr Sharratt) of their duties to PLC and ABF by backdating a written agreement purporting to record the terms upon which PLC advanced the £1,006,000 to ABF (this is not pleaded in the PLC Petition);
- (b) for the sub contract arrangements between PLC and the Partnership, in relation to the Cemex and Biffa sites and the use of PLC's resources by the Partnership in connection with the Partnership's performance of the Cemex and Biffa sub-contracts:
- (i) Paul breached his duty under section 177 CA 2006 to disclose to the directors of PLC, the nature and extent of the Partnership's interest in the Cemex and Biffa sub-contracts and he breached the fiduciary duty he owed to PLC, by deciding, both on behalf of the Partnership and PLC, what the Partnership would charge PLC for the work it carried out under those sub-contracts;
 - (ii) Paul breached his duties under Sections 172 and 175 CA 2006 in causing or allowing PLC's resources to be used by the Partnership in connection with its performance of the Cemex and Biffa sub-contracts and PLC to pay the road tax and insurance on Partnership vehicles engaged in performing the Cemex sub-contract ,whilst those vehicles were included on PLC's Operator's Licence;
- (c) using PLC's employees, to carry out work for the Partnership, repairing and maintaining Partnership vehicles, machinery and equipment at the expense of PLC, and using PLC's fuel for the Partnership's vehicles, plant and machinery was:
- (i) a breach by Paul of the fiduciary duties that he owed to PLC under Section 172 CA 2006 (duty to act in good faith in the way that he considered would be most likely to promote the success of PLC) because those resources were used without the informed agreement of the directors of PLC, without keeping proper records of the resources of PLC which were being used for the benefit of the Partnership and without PLC receiving proper compensation

for the use of those resources and a breach of Paul's duty under Section 175 CA 2006 to avoid conflicts of interest; and

(ii) a breach by Mr Ellis of his duty under Section 173 CA 2006 to act independently in relation to the use of employees and the fuel of PLC, which Mr Ellis knew or ought to have known were being used for the purposes of the Partnership;

(d) the arrangements for the Partnership to:- provide husbandry services to ABF and rent fields at Home Farm from the Partnership, for ABF to plant potatoes in was:

- (i) a breach by Paul of his duty under section 182 CA 2006 to inform the directors of ABF, on his appointment as a director of ABF, on 13 July 2016, of the nature and extent of the Partnership's interest in those arrangements;
- (ii) a breach of Paul's duty under section 177 CA 2006 to inform the directors of PLC of the nature and extent of the Partnership's interest in those arrangements;
- (iii) a breach by Paul of his fiduciary duty owed to ABF, by deciding, both on behalf of the Partnership and ABF, what the Partnership would charge ABF; and
- (iv) a breach by Mr Tomkinson of the duty that he owed under Section 173 CA 2006 to act independently in the interests of PLC/ABF, by allowing Paul to agree those arrangements between the Partnership and ABF and between ABF and PLC; and

(e) each of the Respondents breached their duties under Section 175 CA 2006, by not disclosing to the board of PLC, their interests as the beneficial holders of the shares in WPS in the loan of £623,500 advanced by PLC to WPS.

675. I will now consider separately, whether each of the respects (673 (a)-(e)) in which I have found that Andrew has proved that one or more of the Respondents have breached their fiduciary or statutory duties to either PLC or ABF mean that the affairs of ABPT or ABF have been conducted in a manner that is unfairly prejudicial to Andrew's interests as a member of those companies.

Andrew's Knowledge and conduct

676. Whilst issue 55 directly asks the question of whether any knowledge or conduct of Andrew is relevant to the question of whether the affairs of ABPT/BIL/ABF have been conducted in a manner that is unfairly prejudicial to Andrew, as their member, I consider it both logical and convenient to consider as part of issue 54, whether Andrew's knowledge of the conduct of the Respondents (which I have found to breach their statutory/fiduciary duties as directors) and what Andrew did or did not do,

having acquired that knowledge, is relevant to the question of whether the affairs of ABPT/ABF have been conducted in a manner that is unfair and prejudicial to Andrew as a shareholder of those companies. It seems to me to be entirely artificial to purport to decide whether the affairs of ABPT/ABF have been conducted in a manner which is unfairly prejudicial to Andrew as a member of those companies, whilst disregarding Andrew's knowledge and conduct and then to ask (if I find that it is unfair and prejudicial) whether Andrew's knowledge and conduct changes that answer. It seems to me that the conduct of the affairs of ABPT/ABF either is or is not unfairly prejudicial to Andrew in all the relevant circumstances and if those relevant circumstances include Andrew's knowledge and conduct, then this should be taken into account in deciding whether the affairs of ABPT/ABF have been conducted in a manner that is both unfair and prejudicial to Andrew.

677. I will consider first therefore to what extent Andrew's knowledge of the Respondents' various breaches of their statutory/common law duties as directors, or of the matters giving rise to those breaches and Andrew's own conduct can and should be taken into account in deciding whether the affairs of ABPT/ABF have been conducted in a manner that is both unfair and prejudicial to Andrew as their member. As part of that process I will consider Mr Zaman's objection to my dealing with issue 55, which is that the question of Andrew's knowledge and conduct is not raised in the Respondents' statements of case.
678. It is common ground that 'clean hands' does not apply to a claim under Section 994 CA 2006, because Section 994 CA 2006 is a statutory regime and not an equitable principle. So Andrew's general conduct as a shareholder of the Group companies is not relevant to the question of whether the conduct by the Respondents means that the affairs of ABPT or ABF have been conducted in a manner which is unfair and prejudicial to Andrew.
679. Mr Auld says that:
- (a) the wrongdoing of Andrew may: (i) mean that the conduct that Andrew complains of is not unfair and/or not prejudicial; or (ii) justify the court in refusing to grant relief to Andrew or may influence the choice of any relief that it does grant. At this stage I am concerned with (i) but not (ii). I will need to consider (ii) at any remedies hearing;
 - (b) there must be a connection or nexus between Andrew's conduct and the alleged unfair prejudice by the Respondents (*VT Football Assets v Blackpool Football Club (Properties) Ltd* [2017] EWHC 2767 (Ch) at 419 per Marcus Smith J); and
 - (c) delay by Andrew in issuing his petition after knowledge of the breach may mean that Andrew should be taken to have agreed to or acquiesced in the breach (*Joffe, Minority Shareholders* paragraph 6.286 and *Fisher v Cadman* [2005] EWHC 377 (Ch) Philip Sales sitting as a Deputy Judge of the High Court (as he then was). Mr Auld points out that much of the conduct complained of by Andrew took place many years ago (Cemex 10 years, Biffa 7 years and starting husbandry work for ABF, 5 years)
680. I broadly accept Mr Auld's submissions as to the relevance of Andrew's knowledge and conduct, but will consider and analyse his submissions in more detail when considering the particular knowledge or conduct of Andrew which is said to be relevant to the specific breaches of fiduciary/statutory duty by the Respondents.

The Loan of £1,006,000 PLC to ABF

681. None of the three breaches of duty by the Respondents that I have identified, in answering issue 14 (breaches of duty in connection with the advance of £1,006,000 by PLC to ABF and acquisition of Barn Farm by ABF) are pleaded by Andrew in his ABPT petition as breaches of duty by the Respondents. I have identified the three unpleaded breaches of duty only because issue 14 asks whether there has been a breach of fiduciary or statutory duty in connection with the loan of £1,006,000 by PLC and purchase of Barn Farm by ABF and I have therefore identified three breaches of duty, in connection with the loan notwithstanding that they are not pleaded. As Andrew has not pleaded any of the three breaches that I have identified, he cannot rely on any of them to make out his case that the affairs of ABPT have been conducted in a manner which is unfairly prejudicial to him as one of its shareholders. I will nonetheless say briefly why I do not consider that any of those three breaches of duty amount to carrying on the affairs of ABPT in a manner that is either unfair or prejudicial to Andrew, in any event.
682. I would describe the breach of Section 175 CA 2006, by the Respondents, in failing to disclose at a board meeting of the directors of PLC that each of the Respondents had (on my findings) a beneficial interest in the shares of ABF, as a technical and trivial breach. The directors of PLC, in September 2014 were the Respondents and Mr Sharratt and they all knew (again, on my findings) about the beneficial interests that each of the Respondents (and Andrew) had in the issued shares of ABF. If the Respondents had formally disclosed at a board meeting of PLC, their interest in the shares of ABF, which all of the directors already knew about, there is no reason to suppose that the result would have been any different (that is the directors of PLC would have approved the loan of £1,006,000 by PLC to ABF, in any event).
683. The failure of the Respondents (and Mr Sharratt) as directors of PLC to ensure that the terms upon which PLC would advance £1,006,000 to ABF and to document those terms, left PLC vulnerable to not recovering the principal and a commercial rate of interest, There is no evidence that that vulnerability either has or is likely to result in any loss to PLC and therefore any diminution in the value of Andrew's shares in ABPT. I take the view that these breaches of duties by the Respondents have not resulted in any unfairness or prejudice to Andrew. No unfairness, because the terms of the loan are now documented and no prejudice because Andrew has not proved that PLC has suffered any financial loss and therefore that he has suffered a diminution in the value of his shareholding in ABPT. There is nothing exceptional about these breaches of duty that lead me to conclude that the Respondents conduct fell so far below what Andrew was entitled to expect of them as directors that Andrew should be regarded as having been prejudiced regardless of PLC having suffered no financial loss (and Andrew not having suffered any diminution in the value of his shares in ABPT).
684. Finally as regards the loan of £1,006,000 from PLC to ABF, there is the backdating of the loan agreement from 22/23 November 2016 to 14 September 2015 which I have found to involve breaches of duty by Mr Sharratt and Paul. I have already found that Mr Sharratt decided that it was appropriate to backdate the loan agreement and the director's resolution of ABF approving it, and Mr Sharratt who presented the backdated loan agreement to Paul to sign on behalf of PLC (Mr Sharratt signing on behalf of ABF). As the backdated loan agreement mirrors the terms on which PLC

loaned money to BIL in 2010 (when Andrew was both the sole director of BIL and a director of PLC) and the terms of the loan appear to be objectively commercially fair to PLC, I am not satisfied that the backdating of the loan agreement, whilst being inappropriate, was unfair to Andrew and I am not satisfied that it has resulted in any financial loss to PLC (and therefore diminution in the value of Andrew's shares in ABPT). Whilst the conduct of deliberately backdating documents might be described as undermining Andrew's confidence in the integrity of the directors involved and therefore as conduct falling well below what Andrew was entitled to expect of them, it is only the conduct of Paul that Andrew can complain of in his ABPT Petition and I have already found that it was Mr Sharratt who took the lead role in deciding to backdate the loan agreement and that I am not satisfied that Paul acted dishonestly in signing the backdated loan Agreement that Mr Sharratt put in front of him to sign. For those reasons I am not satisfied, absent Andrew proving that he has suffered a financial loss as a result of the backdating of the loan agreement (and I have found that he has not proved that he has suffered such a loss) that Andrew can say that he has been prejudiced in his capacity as a shareholder of ABPT, because his confidence in the integrity of Paul has been undermined to the extent to which he has legitimately lost all trust and confidence in Paul.

The Cemex Sub-contract

685. I am not satisfied that the breaches of duty by Mr Tomkinson and Mr Ellis owed by them to PLC under Section 173 CA 2006, in connection with the Cemex sub-contract amount to the conducting of ABPT affairs (through its wholly owned subsidiary, PLC) in a manner that is unfair to Andrew as a member of ABPT. My reasons are as follows:
- (a) I have found that all the directors of PLC (including Andrew but excluding Mr McQuaide) were aware, at or around the time that PLC entered into a contract with Bi-Products to remove waste from the Cemex site, that the Partnership had entered into a sub-contract with PLC to transport some of the waste away from the Cemex Site. Paul however breached his duty under section 177 CA 2006 by failing to declare the nature and extent of the Partnership's interests in that sub-contract;
 - (b) I have also found that both Mr Tomkinson and Mr Ellis breached their duty under section 173 CA 2006 to act independently, because they knew that the Partnership had entered into a sub-contract with PLC to transport waste from the Cemex site but they did nothing to find out about what the terms of that sub-contract were or to ensure that the terms of that sub-contract were agreed on an arm's length and commercial basis from PLC's perspective.
 - (c) Andrew was also a director of PLC in 2010 and in my judgment he breached his duty to PLC under Section 173 CA 2006, because he also knew that the Partnership had entered into a sub-contract with PLC and he did nothing to find out about what its terms were or to ensure that the terms were agreed on arm's length and commercial basis for PLC. In fact, if anything Andrew's breach of Section 173 is more serious and less excusable than those of Mr Ellis and Mr Tomkinson, because I have found that Mr McQuaide specifically asked Andrew about the Partnership's involvement in the Cemex contract and Andrew did nothing about it (and on the evidence no one raised any concerns either with Mr Tomkinson or Mr Ellis about it). Andrew's own breaches of duty are, in my

- judgment conduct on his part which is directly connected to the unfair conduct of Mr Tomkinson and Mr Ellis of which he complains (it was open to Andrew to take the steps that he complains Mr Ellis and Mr Tomkinson failed to take in breach of their duties and he breached his own duty to PLC in failing to take those same steps, and thereby failing to protect PLC and himself as a shareholder of ABPT). This militates against Mr Tomkinson and Mr Ellis's breaches of duty being unfair to Andrew, in his capacity as a member of ABPT;
- (d) on 1 September 2017 Andrew wrote to Paul setting out (in paragraphs 28 – 34 of that letter) the matters that he then said amounted to unfair prejudice and he threatened to issue a Section 994 petition. In the letter he complained about; (i) his removal as a director of PLC without his consent (which I have found was not true) and his exclusion from management of the Group companies; (ii) the failure to convene meetings of members; (iii) a failure to consider declaring dividends and that he had received no salary since 29 August 2014; and (iv) that there were conflicts of interest between the Partnership and Group companies, and PLC was employing Sam and William, but they were working for the Partnership. Whilst there was therefore a reference to conflicts of interest, the complaint was in the present tense in September 2017 and not, in my judgment, conceivably about the Cemex contract which had ended in mid-2013;
- (e) the fact that Andrew included allegations in the ABPT Petition 8 years after the Cemex sub-contract started and 5 years after it finished, but Andrew made no complaint about it being unfair to him, even in his letter of 1 September 2017, in which he set out what he then asserted to be the conduct which was unfair to him, leads me to conclude that Andrew went along with that arrangement, raising no objection to it, until he was looking to include in his ABPT petition as many allegations of unfairly prejudicial conduct as he could. I do not consider that Andrew genuinely considered at the time that the Partnership was performing its Cemex sub-contract that those arrangements were either unfair or prejudicial to his interests as a shareholder of ABPT (with the exception of Paul's actions in putting Partnership vehicles on PLCs Operator's Licence, of which conduct, neither Mr Tomkinson, nor Mr Ellis were aware);
- (f) I will deal now with Mr Zaman's point that I should not take into account Andrew's conduct in deciding whether the conduct of the Respondents is unfair or prejudicial to Andrew, because, he says, this is not a point raised in the Respondents' statements of case. If the point were, that Andrew's delay in issuing the ABPT Petition and complaining about the Cemex sub-contract amounted to acquiescence, then I consider that there would be some force in Mr Zaman's point, however, in my judgment I am entitled to take into account: (i) what Andrew did or did not do when he became aware of the Partnership's involvement in the Cemex arrangements at the time, as an indication of whether he acquiesced in them (which in my judgment he did); (ii) Andrew's own breach as a director of PLC of the same duties that he complains Mr Tomkinson and Mr Ellis breached; and (iii) the fact that Andrew did not complain about the Partnership Cemex sub-contract with PLC, even in his letter of 1 September 2017, all of which lead me to conclude that Andrew went along with the Partnership having a sub-contract with PLC, the terms of which

were determined only by Paul and he has chosen now to assert that this was unfair to him, even though at the time (and until he was looking for allegations to plead in his petitions) he did not regard it as unfair to him (the length of time between the Cemex contract starting and finishing and the issue of the ABPT Petition is simply a further indicator of this);

- (g) Mr Auld relies on the decision of Newey J (as he then was) in *Birdi v Specsavers Optical Group Limited* in support of his submission that, if there would be no difference to the outcome, if the relevant directors had not breached their duty, then that breach of duty will not be unfair for the purposes of Section 994. The background to *Birdi* was that Specsavers Optical Group Ltd (“SOG”) ran opticians shops as joint ventures with the managers of those shops. The managers and SOG each appointed directors to the board of the joint venture company (“JV Company”). The opticians shop at Dartford was run by a JV Company of which Ms Birdi and directors nominated by SOG were directors. Ms Birdi was suspended and SOG provided and charged for management services to keep the Dartford shop running during Ms Birdi’s suspension. Ms Birdi brought a petition under Section 994 against SOG claiming that the affairs of the JV Company had been conducted in a manner which was unfairly prejudicial to her as a member, for the purposes of Section 994. Two of the allegations were that her suspension was not authorised by the board of the JV Company, in accordance with the shareholder’s agreement and that, in agreeing that SOG would provide management services to the JV Company and the terms on which it would do so, there had been no proper disclosure, to the board of the JV Company of the nature and extent of that agreement, for the purposes of Section 177. Newey J found that the suspension of Ms Birdi was not properly authorised by the board of the JV Company and there had not been proper disclosure, for the purposes of Section 177, of the agreement for SOG to supply management services to the JV Company. However Newey J found that neither failure was unfair to Ms Birdi because the outcome would have been the same if the question of her suspension had been put to the board of the JV Company and the board of the JV Company would have approved the agreement for SOG to provide management services to the JV Company, if there had been full disclosure of the nature and extent of that agreement. As to the later issue, at paragraph 184 Newey J said “But as with the breach of the shareholder's agreement, this would no doubt not constitute unfairly prejudicial conduct if the failure to comply the Section 177 duty made no practical difference, that is, if the same decisions would have been made had matters been properly disclosed. I find that had matters been put before the board, they would indeed have been approved.”; and

- (h) I am satisfied that, if Mr Tomkinson and Mr Ellis had enquired into the terms of the Partnership’s Cemex sub-contract with PLC and had they insisted that those terms were considered and approved by the board of PLC (or someone acting independently on behalf of PLC) rather than by Paul, then the terms that Paul says (and I have accepted) applied to that sub-contract would have been agreed on behalf of PLC by its board (namely that the Partnership would charge the same as the independent contractor, Gilbert). The board of PLC, when the Cemex sub-contract was entered into, in the summer of 2010 consisted of

Andrew, Mr Large, Mr McQuaide, Mr Sharratt, Mr Ellis, Mr Tomkinson and Paul. Mr McQuaide raised questions with Andrew about the Partnership's involvement in the Cemex contract. Mr McQuaide might nonetheless have voted against PLC entering into the Cemex sub-contract with PLC, because he gave evidence that he was generally unhappy about corporate governance and management control within the Group and specifically unhappy about the Partnership's use of PLC's resources and the confusion of businesses between Group companies and the Partnership, but I am satisfied that the other directors would have voted in favour because the terms as to what PLC would pay, looked at in isolation (that is isolated from the use by the Partnership of PLC's resources which I will consider separately) were objectively fair (that the Partnership would charge the same as the independent contractor (Gilbert)) and: (i) Andrew having listened to Mr McQuaide's concerns about the Partnership's use of PLC resources did nothing about it. At that time it is common ground that Paul and Andrew had a close and cordial relationship and in June 2009 Paul had supported BIL purchasing the Willows from Andrew for £630,000 which enabled Andrew to purchase the Old Vicarage, it is unlikely, in my judgment, in those circumstances that Andrew would have voted against PLC entering into the Cemex sub-contract with the Partnership on the basis that the Partnership would charge PLC the same as the independent contractor, Gilbert; (ii) Mr Large was the newly appointed MD and he was unlikely to want to have a disagreement with Paul (and possibly Andrew) about what on its face was a fair arrangement; and (iii) Mr Sharratt, Mr Ellis and Mr Tomkinson all gave evidence that they trusted Paul to act fairly between PLC and the Partnership and on its face the price Paul says was charged was fair, linked as it was, to what an independent contractor was charging.

686. Paul's position is different in that he breached his duty under Section 177 CA 2006 to disclose the nature and extent of the Partnership's interest in the Cemex arrangements and he breached his fiduciary duties, by agreeing the terms of the Partnership's sub-contract with PLC on behalf of both PLC the Partnership. These breaches of duty are more serious than those of Mr Tomkinson and Mr Ellis and there are further serious breaches of duty by Paul in causing the Partnership's vehicles to be placed on PLC's Operator's Licence, knowing that he should not have done so and in order to enable the Partnership to earn revenue that it could not otherwise have earned and in causing or allowing the Partnership to use PLC's resources. Whilst I take the view that Paul's failure to disclose the nature and extent of the Partnership's interest in the Cemex sub-contract and his agreeing of its terms on behalf of the Partnership and PLC were not unfair to Andrew, I do take the view that: (i) putting the Partnership's vehicles on PLC Operator's Licence and thereby causing or allowing PLC to incur the cost of taxing and insuring those vehicles; (ii) causing the Partnership to use Mr Whetton and Mr Elliott-Dickens as drivers for the Partnership on its Cemex sub-contract; (iii) causing the Partnership's trailers used on its Cemex sub-contract to be repaired and maintained at PLC's expense; and (iv) causing or allowing Partnership vehicles used on its Cemex sub-contract to fill up on PLC fuel on 72 occasions is unfair to Andrew and if the Partnership received more money for transporting similar loads away from the Cemex site than Gilbert did (about which I have asked for further evidence from the experts) that will also amount to the affairs of ABPT being

conducted in a manner that is unfair to Andrew (I have accepted Paul's evidence that the terms of the Cemex sub-contract were that the Partnership would charge the same as Gilbert so the charges should have been the same). I make all these findings for the following reasons:

- (a) whilst Paul's breaches of duty in not disclosing the nature and extent of the Partnership's interest in the Cemex sub-contract and agreeing its terms on behalf of the Partnership and PLC are more serious breaches than Mr Ellis and Mr Tomkinson's breaches under Section 173, the points summarised by me in paragraph 682 (c) - (f) above apply with equal force to show Andrew's acquiescence in those arrangements and Andrew's own breach of his duty to PLC under Section 173, such that I am not satisfied that those breaches of duty make the sub-contract arrangements between the Partnership and PLC unfair to Andrew as a shareholder of ABPT;
- (b) I have already referred to the decision of Newey J in *Birdi v Specsavers Optical Group Limited* in which Newey J said that a failure to comply with Section 177 would not be unfairly prejudicial, if the board would have approved the relevant transaction in any event, if there had been full disclosure of the nature and extent of the transaction for the purposes of Section 177. I am satisfied that the terms that the Partnership would be paid the same rate as the independent contractor, Gilbert would have been approved by the board of PLC had Paul provided full disclosure of the nature and extent of that sub-contract (including the Partnership's expected profit) for the same reasons as I found that the board of PLC would have approved the sub-contract, had Mr Ellis and Mr Tomkinson complied with their duties to act independently under Section 173 (see paragraph 683 (h) above), the additional details that Paul should have provided of what profit the Partnership was expecting to make from the Cemex sub-contract would be unlikely, in my judgment to cause the directors to vote differently;
- (c) causing Partnership vehicles to be placed on PLC's Operator's Licence, in order to enable Partnership vehicles to participate in the Cemex sub-contract (by giving the impression that they were covered by PLC's Operator's Licence). was dishonest and had the directors of PLC known about it, then I do not consider that they would have agreed to it happening (certainly I do not consider that Mr McQuaide, Mr Tomkinson and Mr Ellis would have agreed to it, because, having heard from them I am satisfied that they would not have agreed to anything dishonest). I am satisfied that that conduct was unfair to Andrew because it may have had repercussions for PLC with the licencing authorities, had the misuse of PLC's Operator's Licence been discovered. It was also unfair because it led to those vehicles being taxed and insured at PLC's expense;
- (d) causing or allowing the Partnership to use PLC's employees, maintenance and repair services and to use PLC's fuel is unfair, in circumstances (as I have found) where PLC was not recompensed for that use and no attempt was made by Paul to record the extent of that use, thereby making accurate proper recompense of PLC for that use impossible; and
- (e) I have found that the terms of the Partnership's Cemex sub-contract included a term that the Partnership would charge the same rates as Gilbert for the same work. It is unclear to me whether this was in fact what happened (Mr

Bell suggests that PLC made a greater margin on Gilbert's invoices than it did on Partnership invoices, but I accept Mr Lewis's criticisms of the methodology used by Mr Bell to arrive at this conclusion and even if Mr Bell is correct, this does not mean that the Partnership charged PLC more for transporting similar loads. If, having considered further expert evidence upon this point, I come to the conclusion that the Partnership charged more than Gilbert for the same loads, then that may (depending on whether it is materially more) be unfair to Andrew, given my conclusion that it was agreed (by Paul) that the Partnership would charge the same as Gilbert.

687. As I have found that Andrew has not proved that the entry by PLC into the Cemex sub-contract with the Partnership was unfair to Andrew, in his capacity as a member of ABPT strictly speaking it is not necessary for me to consider whether the entry into that sub-contract was prejudicial to Andrew's interests as a shareholder of ABPT. Andrew has not however, in any event, satisfied me that it was prejudicial because
- (a) In *Re Coroin*, David Richards J (as he then was) said as follows "Where the act complained of has no adverse financial consequence, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omissions are breaches of duty owed to the company rather than to shareholders individually, if it is said that the directors or some of them have been in breach of duty to the company but no loss to the company has resulted, the company would not have a claim against those directors. It may therefore be difficult for a shareholder to show that nonetheless as a member he has suffered prejudice ... "
 - (b) In *Sunrise Radio*, HHJ Purle QC said that if the conduct of directors fell so far below the minimum that shareholders are entitled to expect, such conduct of itself can amount to unfair prejudice if it leads "*..... to the conclusion that the petitioning shareholder cannot reasonably be expected to have the minimum of trust and confidence in the integrity or basic competence of the board that any shareholder is entitled ordinarily to expect..... even if there is no diminution in the value of the petitioning creditor's shareholding*". I approach, as I have already said, that formulation with some caution, because it was part of a very general statement of what a petitioning creditor must prove to show unfair prejudice. Nonetheless, I will proceed on the basis that HHJ Purle QC was recognising that finding prejudice where there is no diminution in the value of the petitioning creditor's shareholding is possible, if the misconduct of the directors, deliberate or negligent, is serious enough to be regarded as well below the minimum that the petitioning creditor is entitled to expect of them, in all the circumstances; and
 - (c) it appears to be common ground that PLC made some profit out of the Cemex contract (including a profit on the work carried out by the Partnership pursuant to the sub-contract). I am not satisfied that the value of Andrew's shares in ABPT have been diminished as a result of PLC entering into the sub-contract with the Partnership (subject to further expert evidence on the question of whether the Partnership in fact charged more than Gilbert for the same loads) nor that, looking at the Cemex sub-contract in isolation, Andrew's interests as a shareholder of ABPT has been otherwise prejudiced in such a way as to make the entry into the sub-contract prejudicial to Andrew's interests as a

shareholder of ABPT. Any breach of duty by a director can be said to reflect badly on their competence or integrity or both, but in my judgment, in order to meet the test promulgated by HHJ Purle in *Sunrise radio* of conduct falling so far below the conduct that Andrew was entitled to expect of the Respondents as directors of PLC, to mean that Andrew was justified in losing all trust and confidence in their competence or integrity, something more than a breach of duty is required, I am not satisfied that the conduct of Mr Tomkinson, Mr Ellis or Paul can be said to have fallen so far below the minimum standard of conduct that Andrew was entitled to expect of them that this conduct was prejudicial to Andrew, even if Andrew suffered no loss as a consequence, particularly when Andrew himself was a member of the board and, with knowledge of the existence of the sub-contract chose not to enquire into it. Put simply Andrew was himself part of the failure by PLC's board to ensure that PLC's sub-contract, with the Partnership, was entered into on a proper arms-length commercial basis and in those circumstances I do not consider he is entitled to say that the conduct of the other directors falls so far below what Andrew is entitled to expect of them, that their conduct is prejudicial to him, because he has lost and is entitled to lose all confidence in them, as a result.

688. I am not satisfied that Paul's breaches of duty in causing Partnership vehicles to be put on PLC's Operator's Licence has resulted in a financial loss to PLC beyond PLC paying the insurance and road tax on those Partnership vehicles which appeared on PLC's Operator's Licence, for the period the Partnership's vehicles appeared on PLC's Operator's Licence) there is no evidence that it has. There was a risk that PLC may have suffered some regulatory consequences in having Partnership vehicles, which were not being used for the purposes of PLC's business, included on PLC's Operator's Licence, but there is no evidence before me as to how serious that risk was. I accept that it is at least in principle possible for Andrew to establish prejudice to his interests as member of ABPT, absent financial consequences flowing to PLC (and through PLC to the value of Andrew's shares in ABPT). However there is no evidence of PLC suffering any intangible prejudice either, such as a loss of reputation from Paul's actions. As I have already said, in *Sunrise Radio* HHJ Purle QC suggested that if the conduct of directors falls so far below the minimum standards that the shareholders can expect of them, then that conduct may be found to be prejudicial even if there is no financial loss. Here I have no doubt that Paul's actions in causing Partnership vehicles to be placed on PLC's Operator's Licence, so that those vehicles could participate in removing waste from the Cemex Site (whilst appearing to do so legally in compliance with the relevant regulations) was conduct which fell well below the minimum standard that the other shareholders of ABPT (including Andrew) were entitled to expect of him. However, I have not found that any of the other breaches of duty by Paul are founded on his acting dishonestly and I am not satisfied that this single incident of dishonesty by Paul, should mean that Andrew is entitled to say that that conduct is prejudicial to him (because he has legitimately lost all trust and confidence in Paul) even though he has suffered no loss, when the conduct occurred, over 10 years ago and 8 years before the ABPT Petition was issued.
689. Causing or allowing: (a) Mr Whetton and Mr Elliott-Dickens to drive for the Partnership on the Cemex sub-contract (for 20 days and 9 months respectively); (b) Partnership

trailers used on the Cemex sub-contract to be repaired and maintained by PLC; (c) Partnership lorries used on the Cemex sub-contract to fill up with PLC fuel on 72 occasions; and (d) causing road tax and insurance on at least 2 Partnership vehicles to be paid by PLC, whilst they appeared on PLC's Operator's Licence, does represent a material loss to PLC and therefore prejudice to Andrew, in the form of a material diminution in the value of Andrew's shares in ABPT

690. If I find, having considered further expert evidence on the question of whether there was a material difference between the price charged by the Partnership to PLC and the price charged by Gilbert to PLC, for the same work on Cemex, that there was a material difference, which makes it unfair to Andrew that the Partnership charged more than Gilbert, then I will also need to decide whether that conduct caused prejudice to Andrew, in his capacity as a shareholder of ABPT (causing a loss to PLC and prejudice to Andrew, in the form of a consequential diminution in the value of Andrew's shares in ABPT).

The Biffa Sub-Contract

691. There are two separate sub-contracts between PLC and the Partnership relating to arrangements for the removal of waste from the Biffa Site: (a) a sub-contract for the removal of solid waste; and (b) a sub-contract for the spreading of liquid waste.
692. I have found that similar breaches of duty were committed by Paul, Mr Ellis and Mr Tomkinson for the Biffa solid waste and liquid waste sub-contracts and I will deal with each in turn.
693. The sub-contract for the removal of solid waste appears to have started in late 2012 and only lasted a few months until early/mid 2013. I have accepted Paul's evidence that the terms of that sub-contract were that PLC sub-contracted the removal of solid waste to the Partnership and the Partnership in turn used a third party to remove that solid waste from the Biffa Site. Whilst it is unclear to me why PLC did not contract direct with the third party, rather than with the Partnership, on the basis that the Partnership was simply passing on what the third party charged the Partnership, I am not satisfied that the breaches of duty by the Respondents in connection with the entry by the Partnership into the sub-contract with PLC, to dispose of solid waste was unfair or prejudicial to Andrew because:
- (a) the breaches of fiduciary duty can, I consider, in relation to the Biffa solid waste sub-contract be fairly described as technical breaches, in the sense that the involvement of the Partnership in the arrangement simply seems to have facilitated the removal of solid waste by a third party from the Biffa Site, at no additional cost to PLC and with no profit being made by the Partnership. It is difficult to see therefore how the terms of that sub-contract could be regarded as unfair or uncommercial from PLC's point of view, (even though, as I have found: Paul failed to disclose the nature and extent of the Partnership's interest in that sub-contract to the other directors of PLC and agreed its terms on behalf of PLC and the Partnership; and Mr Ellis and Mr Tomkinson breached their own duties, as directors of PLC, to act independently by allowing Paul to do that);
 - (b) Paul said in his witness statement that after he returned full time as managing director of PLC (from around July 2012) he was no longer looking to expand the Partnership's business (as he had been in 2010 when the Partnership

entered into the sub-contract on Cemex) because he did not have time to manage any such expansion of its business. I accept that evidence, which is consistent with the Partnership entering into a sub-contract with PLC to remove solid waste from the Biffa contract, not with the aim of making a profit itself but to facilitate PLC's entry into its contract with 4R);

(c) the breaches of duty by the Respondents should be seen in the context of what happened between Andrew and the Group companies in the period prior to the end of 2012 when the Biffa solid waste sub-contract was entered into. In 2011 Andrew received significant financial assistance from BIL (a £30,000 loan in June 2011, a £110,000 loan in October 2011 and in December 2011 BIL purchased the Old Vicarage from Andrew (which avoided Andrew breaching his contract for the purchase of the old Rectory). In addition, Andrew persuaded Paul to return as full-time managing director of PLC, following the dismissal of Mr Large, whilst Andrew pursued his political career. Further and more importantly, Andrew was contemplating divorcing his wife at the end of 2012 (he presented a petition in January 2013) and in my judgment he knew, at the end of 2012 that he would want further financial support from the Group, for which he would need Paul's support. If, as I find, Andrew would not have complained at the end of 2012 about the Partnership entering into a relatively small sub-contract with PLC to dispose of solid waste from the Biffa Site, because he had received substantial financial support from the Group and as I find he knew that he would want to continue to receive substantial financial support, for which he needed Paul's support, then it seems to me that these are matters of material weight to my finding that the PLC sub-contract with the Partnership to remove solid waste from the Biffa site, did not amount to the conducting of the affairs of PLC in a manner which was unfair to Andrew, as a shareholder of ABPT. For the avoidance of doubt, I do not consider that these findings relate to Andrew's conduct, but rather that if, as I have found, Andrew would not have complained about the sub-contract at the end of 2012, when it was entered into, because the Partnership was receiving little or nothing out of that sub-contract, and because Andrew had received and wanted to continue to receive substantial financial assistance from the Group (for which he needed Paul's support) and he wanted Paul to take responsibility for managing the Group companies, so that he could continue to pursue his political career, I do not consider that Andrew, having received all that benefit, can say, in 2018, that the entry by PLC/the Partnership into that sub-contract, in 2012, is unfair to Andrew, as a member of ABPT;

(d) I am satisfied that, had Paul disclosed the nature and extent of the Partnership's interest in the sub-contract for the removal of solid waste from the Biffa Site and had the terms of that arrangement been properly considered by the Board of PLC, in light of that full disclosure the board of PLC would have approved that agreement, by which the Partnership employed an independent contractor to carry out the work and passed on that charge to PLC with no margin for the Partnership. The members of PLC's board at that time were Andrew, Mr Tomkinson, Mr Ellis, Mr Sharratt and Paul. It was the evidence of Mr Tomkinson, Mr Ellis and Mr Sharratt that they trusted Paul to ensure that the terms of the arrangements between the Partnership and PLC were fair to

PLC and I consider that they would have regarded the terms of the sub-contract between the Partnership and PLC for the removal of solid waste from the Biffa Site to be fair. As for Andrew, I am satisfied that he equally would have considered the terms fair and the substantial support which Andrew had received from the Group companies and which I am satisfied he wished to continue receiving would have meant that Andrew would also have approved those “fair” arrangements;

- (e) if the Partnership simply passed on to PLC, at no margin, what it was charged by the third party for removing solid waste from the Biffa Site, then PLC suffered no loss and consequently Andrew has suffered no diminution in the value of his shares in ABPT, as a result of the breaches of duty by the Respondents. Further, I am not satisfied that those breaches of duty could be said to mean that any of the Respondents’ conduct fell so far below the conduct that Andrew was entitled to expect of the Respondents as directors of PLC, to mean that Andrew was justified in losing all trust and confidence in the competence or integrity, of any of them, such that I could conclude that Andrew has been prejudiced by their breaches of duty, even though PLC has suffered no loss (and therefore Andrew has suffered no diminution in the value of his ABPT shares); and
- (f) if in fact the Partnership charged PLC materially more than it was charged by the third party contractor that actually removed the solid waste from the Biffa Site then that may be unfair and/or prejudicial to Andrew depending upon whether there was a material difference.

694. The sub-contract between PLC and the Partnership to spread liquid waste from the Biffa Site appears to have been entered into from late 2014 and have continued (albeit at a reducing rate) until 2018. Paul says, and I have accepted his evidence, that the Partnership entered into the sub-contract with PLC to dispose of liquid waste from late 2014, because PLC, which had, up to that point been disposing of liquid waste from the Biffa Site alongside another contractor, took over sole responsibility for disposing of that liquid waste and from that point it was necessary for the Partnership to work alongside the existing sub-contractor to PLC (Prestons) in order to spread the additional liquid waste that PLC had to dispose of, from the Biffa Site.

695. I am not satisfied that the breaches of duty by any of the Respondents in connection with the entry by the Partnership into the sub-contract with PLC for spreading liquid waste from the Biffa site was unfair or prejudicial to Andrew (save for the use of PLC’s fuel by the Partnership tractors engaged in spreading the liquid waste from the Biffa Site):

- (a) I am not satisfied that the terms of the sub-contract were uncommercial or unfair to PLC in spite of those terms having been agreed by Paul on behalf of both PLC and the Partnership: (i) Paul asserts that PLC made a clear profit of £2.30 – £3.30 per tonne on liquid waste spread by the Partnership; and (ii) Mr Bell deals with the Cemex and Biffa sub-contracts together and suggests that PLC made a greater margin on work sub-contracted to Gilbert on the Cemex contract. He does not suggest that PLC made no profit on work it sub-contracted to the Partnership to spread liquid waste from the Biffa Site, nor does he provide a comparison of what Prestons were charging for spreading liquid waste, compared to what the Partnership was charging PLC. There is no

evidence, at present, therefore to set against Paul's assertion that PLC was making a profit from the sub-contract that it entered into with the Partnership to spread liquid waste, nor do I have any evidence that PLC would have made more profit had it entered into that sub-contract with an independent third party;

- (b) as I have already mentioned, in his witness statement, Paul says that, after he returned full-time as managing director of PLC (in around July 2012) he was no longer seeking to expand the Partnership's business. I have accepted that evidence which is supported by the fact that the need to spread additional liquid waste from the Biffa site (which up until the end of 2014 had been spread by Prestons on behalf of PLC) arose from PLC obtaining, at the end of 2014 the whole of the contract from 4R to remove liquid waste from the Biffa Site giving rise to a need for PLC to arrange for additional liquid waste to be spread, rather than the work arising because Paul was actively seeking additional work for the Partnership. In that context the agreement between PLC and the Partnership to spread liquid waste, facilitated PLC taking over the balance of the 4R contract and can be seen as the Partnership assisting PLC to obtain additional work/revenue rather than (in contrast to Cemex) Paul seeking to obtain additional work/revenue for the Partnership;
- (c) as with the Biffa sub-contract for the removal of solid waste, the Biffa sub-contract for the removal of liquid waste should also be seen in the context of the support which was provided by Group companies to Andrew both before and after that sub-contract was entered into. In addition to the financial support that Andrew received from BIL in 2011 (see paragraph 686 (c) above) Andrew, on my findings, instigated the process which led to his being removed as a director and shareholder PLC, in August 2014 and thereafter he was pressing for the maximum possible tax free settlement for the loss of his employment and for the payment of dividends. For those reasons I do not consider that Andrew would have complained, in 2014, about the Partnership entering into a sub-contract with PLC to spread liquid waste from the Biffa Site, when he had received and was seeking further substantial financial assistance from the Group for which purpose he needed the support of Paul. If, as I find, Andrew would not have objected to PLC's entry into the sub-contract to spread liquid waste at the time it was entered into or shortly thereafter, because of the financial support that he had received and wanted to receive from the Group, again I do not consider that Andrew, having received all that benefit, can say, in 2018, that the entry by PLC/the Partnership into the sub-contract to spread liquid waste, in late 2014, is unfair to Andrew, as a member of ABPT;
- (d) as I am not satisfied that the terms of the sub-contract to spread liquid waste were uncommercial or unfair to PLC, and I am satisfied that, had Paul disclosed the nature and extent of the Partnership's interest in the sub-contract for spreading liquid waste from the Biffa Site, and had the terms of that arrangement been properly considered by the Board of PLC, in light of that full disclosure, the board of PLC would have approved that agreement. My reasons for coming to this conclusion are the same as for concluding that the board of PLC would have approved the sub-contract for the removal of solid waste from the Biffa Site (save that Andrew resigned as a director of PLC in August 2014

and so the only directors of PLC in late 2014 were Mr Ellis, Mr Tomkinson, Mr Sharratt and Paul);

- (e) Andrew has not proved that PLC suffered any financial loss as a result of it entering into the sub-contract with the Partnership for the spreading of liquid waste from the Biffa site and has not therefore proved that he suffered a diminution in the value of his shareholding in ABPT. Considered in context I am not satisfied that the breaches of duty by any of the Respondents are sufficiently serious to mean that their conduct fell so far below the conduct that Andrew was entitled to expect of them, as directors of PLC, that Andrew was entitled to lose all confidence in their competence or integrity, such that I could conclude that Andrew suffered prejudice, even though he is unable to show that PLC or he suffered a financial loss; and
 - (f) if in fact the Partnership charged PLC more than Prestons to spread liquid waste (making some allowance for the Partnership using PLC's tankers and boom) then this may be unfair and/or prejudicial to Andrew, depending on the materiality of that difference.
696. I am satisfied that Paul's breaches of duty, in causing or allowing Partnership tractors engaged in spreading liquid waste from the Biffa site to use PLC fuel was both unfair to Andrew and prejudicial to him in his capacity as a shareholder of ABPT: (a) it was unfair because the failure to maintain any record of what fuel was being used by the Partnership tractors which were spreading liquid waste from the Biffa Site for what appears to be a little over a year meant that proper and accurate recompense could not be given to PLC by the Partnership for the use of that fuel and I am satisfied on the balance of probability that PLC in fact received no recompense for the use of that fuel; and (b) I am satisfied, on the balance of probabilities, that the loss caused to PLC by the Partnership using PLC's fuel for over a year for the Partnership tractors used to spread liquid waste from the Biffa Site will have resulted in a material loss to PLC and prejudice to Andrew in the form of a material diminution in the value of his shares in ABPT, caused by PLC suffering such a loss.

The Partnership's use of PLC Resources

697. I have found that: (a) the Partnership has used PLC employees and fuel; (b) PLC paid the road tax and insurance on Partnership vehicles that were added to PLC's Operator's Licence for one year; and (c) PLC has maintained and repaired Partnership vehicles, equipment and machinery, in each case without a proper record being kept of the use of those resources and without PLC being properly recompensed for their use. I have concluded that Paul breached his duties under Section 172 (failing to act in what he considered, acting in good faith, to be in the best interests of PLC) and 175 (avoiding conflicts of interest) CA 2006 in relation to the use of all those resources of PLC by the Partnership and that Mr Ellis breached his duties under Sections 173 (failing to act independently) CA 2006 in relation to the Partnership's use of PLC's employees and fuel, but not otherwise.
698. I am satisfied that Andrew has proved that the use by the Partnership of PLC's fuel, employees causing PLC to pay the road tax and insurance on Partnership vehicles, whilst they were included on PLC's Operator's Licence and maintenance and repair services which was procured by Paul, in breach of Paul's duties under Sections 172

and 175 is unfair to Andrew in his capacity as a member of ABPT, for the following reasons:

- (a) Paul's breaches of duty in causing PLC to allow the Partnership to use its resources without any, or any proper record being kept of that use, made it impossible for any director of PLC to understand what the cost to PLC was of the Partnership using its assets and whether PLC was being properly recompensed by the Partnership for the use of those assets;
- (b) whilst Mr McQuaide (a director of PLC) did alert Andrew, in 2010, to the Partnership's use of PLC's resources and Andrew did nothing about it, I am not satisfied that Andrew knew of the scale and extent over the years since 2010 of the use of PLC's assets, by the Partnership or that such use was not being recorded and no credit was being given or payment made by the Partnership to PLC for such use;
- (c) as for the other directors of PLC, from time to time, over the course of the Partnership's use of PLC's resources (from January 2009 onwards) in so far as they were aware of that use (Mr Tomkinson was not aware of it at all) I am not satisfied that they were aware of the scale of that use;
- (d) Paul says he charged ABF less than NAAC rates for husbandry work that the Partnership carried out for ABF, in order to compensate for the use, by the Partnership of PLC's fuel to carry out that husbandry work. For the reasons that I have already explained however, if Paul did do this, then it did not compensate PLC for the use of its fuel;
- (e) whatever the precise amount of the resources of PLC (employees, fuel and maintenance and repair services road tax and insurance) which were used by the Partnership, it was on any view substantial (whilst I have been unable to precisely calculate that use, I have summarised in paragraph 700 below what I have been able to conclude);
- (f) I do not consider that the directors of PLC, with full knowledge of the scale of the use of PLC's assets by the Partnership and knowledge of the failure to record that use or compensate PLC for it would (or could properly) have approved such use. To do so would, in my judgment, amount to a breach of the duty of those directors to act independently (section 173) and in the manner that they considered, acting in good faith, to be in the best interests of PLC (section 172) ; and
- (g) the use of PLC's assets by the Partnership is not something that ceased several years before Andrew issued his ABP petition, rather such use has been ongoing since January 2009 and has continued after Andrew issued his ABP petition (Paul accepted that the Partnership has continued to use PLC's fuel when carrying out husbandry work for ABF).

699. In so far as Mr Ellis's breaches of duty (sections 173) enabled PLC's fuel and employees to be used by the Partnership, without proper records being kept and without PLC being properly recompensed for such use, I do not consider that those breaches of duty by Mr Ellis can properly be regarded as substantial causes of the unfairness which Andrew is entitled to complain about, as a member of ABPT. Andrew was alerted by Mr McQuaide to the Partnership's use of PLC's resources in 2010 and Mr McQuaide expressed concerns to Andrew that this should not be happening, but Andrew chose to do nothing about it. Andrew therefore, as a director of PLC up to August 2014,

breached his duties to PLC under Sections 173 in the same ways that he complains that Mr Ellis breached his duties to PLC, but, as Mr McQuaide specifically brought the issue to Andrew's attention, in the expectation that Andrew might do something about it, I regard Andrew's breaches of duty as more serious than those of Mr Ellis. In contrast Mr Ellis was only aware in general terms about the Partnership making use of PLC's employees and fuel (but not I find, its scale) and no one mentioned it to him in the expectation that he might do something about it.

700. I am satisfied that Andrew has suffered prejudice, in his capacity as a shareholder of ABPT, as a result of the Partnership using PLC's resources (disregarding for present purposes the resources of PLC used by the Partnership in connection with the Partnership's Cemex and Biffa sub-contracts (dealt with separately)), without that use being properly recorded and without PLC being compensated for that use because:
- (a) it is clear that the Partnership's use of those resources has been substantial:
 - (i) I have found that the Partnership made the following use of PLC's employees: Mr Whetton-2 days working at Home Farm; Mr Elliott-Dickens- 15 days working at Home Farm; Mr Miller 6 weeks for 91 hours a week for each of the 6 years 2016 – 2021 inclusive harvesting potatoes (ongoing) and in 2017 for 6 weeks, 91 hours a week planting potatoes; Mr Ward 4 weeks; Sam 50% of his time 15 March 2013-28 February 2016 and 75% of his time from 1 March 2016=23 March 2019; and William 80% of his time 1 September 2016-29 March 2019;
 - (ii) as for maintenance and repair work carried out to Partnership vehicles, machinery and equipment at the expense of PLC, I have found that from January 2009 PLC has incurred the cost of maintaining and repairing some, but not all of the Partnership vehicles, machinery and equipment not used on the Cemex sub-contract; and
 - (iii) the Partnership has made the following use of PLC's fuel: Partnership tractors spreading liquid waste produced at Enterprise House used PLC fuel (although in this case PLC may have had the benefit of the Partnership charging less for removing and spreading the liquid waste, so this fuel should not be taken into account); Partnership vehicles engaged in carrying out husbandry services for ABF used PLC fuel; and from early 2016 Partnership vehicles engaged in agricultural operations relating to the Partnership's own crops used PLC fuel on occasions;
 - (b) I have found that PLC has not been compensated for the use of its employees, fuel and maintenance and repair services by the Partnership and that the allowance that Paul says he gave for the use of PLC fuel on Partnership vehicles, machinery and equipment used for providing husbandry services for ABF, by charging ABF less than NAAC rates for that husbandry did not compensate PLC for that use, for reasons I have already explained; and
 - (c) whilst I cannot say at this stage what loss has been suffered by PLC as a result of the Partnership using its employees, fuel and maintenance and repair services, I am able to say that the amount involved is substantial enough to amount to a material loss to PLC and therefore a material diminution in the value of Andrew's shares in ABPT, such that Andrew has suffered prejudice as a result.

Husbandry Services provided by the Partnership to ABF

701. I have found that Paul breached his duties as a director of: (a) ABF; (i) under Section 182 CA 2006 (failing to disclose, when appointed a director of ABF, on 13 July 2015, the nature and extent of the Partnership's interest in providing husbandry services to ABF); and (ii) his fiduciary duty owed to ABF, by agreeing on behalf of the Partnership and ABF, what the Partnership would charge ABF for those husbandry services; and (b) PLC under section 177 CA 2006 (because PLC was invoiced by the Partnership for husbandry services that the Partnership carried out for ABF and paid those invoices, deducting the costs from what it paid ABF for its potatoes and PLC was therefore a party to the arrangements by which the Partnership carried out husbandry services for ABF) by failing to disclose the nature and extent of the Partnership's interest in providing husbandry services to ABF, when they were agreed at the beginning of 2016.
702. I have found that Mr Tomkinson breached his duties under Section 173 CA 2006 (duty to act independently) owed to both PLC and ABF by allowing Paul to agree what the arrangements would be, as between ABF and the Partnership for the provision of husbandry services and as between ABF, PLC and the Partnership, for the supply of potatoes/payment for the Partnership's husbandry services.
703. I am not satisfied that the arrangements for the Partnership to provide husbandry services to ABF were unfair to Andrew in his capacity as a shareholder of ABF:
- (a) Andrew accepts that over Christmas 2015, Paul told him ABF would rent land on which to grow potatoes and that the Partnership would be providing husbandry services to ABF to grow those potatoes at UK market rates for contractors (paragraph 172 of Andrew's witness statement). Andrew does not suggest that he objected to those arrangements. What Andrew was told by Paul over Christmas 2015 is, in substance, the arrangements which were entered into between ABF and Partnership, for the Partnership to provide husbandry services to ABF in early 2016 (save that the Partnership charged ABF less than NAAC rates (Paul claiming that this was done deliberately in order to compensate PLC for the use of its fuel by the Partnership));
 - (b) I am satisfied that Andrew, by his conduct in not objecting to the Partnership carrying out husbandry services for ABF acquiesced in that arrangement happening and that he has only raised objection to it, after his attempts to be reappointed as a director to Group companies from 2017 onwards were unsuccessful. This militates against those arrangements being unfair to Andrew;
 - (c) at the beginning of 2016, when the decision was taken that ABF would grow potatoes and that the Partnership would carry out the necessary husbandry services, Paul was not a director of ABF (Mr Sharratt and Mr Tomkinson were ABF's only directors). Mr Tomkinson and Mr Sharratt breached their duties under Section 173 CA 2006 by allowing Paul to agree, on behalf of the Partnership and ABF, the terms on which the Partnership would carry out husbandry services for ABF. I am satisfied however that, if Mr Tomkinson (and Mr Sharratt) had insisted that those terms were negotiated independently on behalf of ABF, ABF would still have agreed that the work should be done by the Partnership at NAAC rates and so the failure of Mr Tomkinson to act independently by ensuring that those arrangements were negotiated

independently on behalf of ABF would not, in my judgment have led to a different result. I find this because, in my judgment, Mr Tomkinson and Mr Sharratt would have turned to Mr Ellis (as the potato expert in the Group) to negotiate on behalf of ABF (or advise upon) the appropriate rate to be paid to the Partnership and it is Mr Ellis's evidence (which I accept) that NAAC rates are standard in the industry and in his view reasonable. Even if Mr Tomkinson and Mr Sharratt would have turned to someone other than Mr Ellis to negotiate on behalf of ABF, I am still satisfied that NAAC rates, as the average rates charged for husbandry services by contractors, are objectively reasonable and that anyone acting independently on behalf of ABF in negotiating the terms on which the Partnership provide husbandry services to ABF would likely have agreed to the husbandry services being carried out at NAAC rates; and

(d) the next breach of duty in time is the breach of duty by Paul under section 182 CA 2006, in failing, when he became a director of ABF, on 13 July 2016 to inform the other director of ABF (Mr Sharratt) of the nature and extent of the Partnership's interest in the agreement between the Partnership and ABF for the Partnership to provide husbandry services to ABF. This breach is not pleaded in the ABF Petition. In any event, I am satisfied that if Paul had disclosed the nature and extent of the Partnership's interest in the husbandry agreement with ABF (including the profit that the Partnership had made up to that point and was likely to make in the future out of that agreement) it would have made no difference. Mr Sharratt would, in my judgment, have viewed the Partnership charging NAAC rates for its husbandry services to ABF as fair, even if Paul had disclosed the profit that the Partnership had made and was likely to make from those arrangements.

704. I am not satisfied that the arrangements for the Partnership to provide husbandry services to ABF and for PLC to buy the grown potatoes from ABF and fund the payment of the Partnership for those husbandry services were unfair to Andrew in his capacity as a shareholder of ABPT:

(a) As I have already said, Andrew accepts, at paragraph 172 of his witness statement that Paul told him over Christmas 2015 that ABF would be growing and supplying potatoes to PLC (with the Partnership undertaking the husbandry work). Andrew does not say that he indicated to Paul in any way that he objected to those arrangements, or that he wanted Paul to supply him with more detail of them. In my judgment it is reasonable therefore to consider that Andrew acquiesced in PLC purchasing potatoes from ABF in principle and cannot therefore complain that it is unfair to him, as a shareholder of ABPT that this happened. It might be unfair to Andrew if the terms on which PLC purchased potatoes from ABF were unfair to PLC, however I have already found that those terms were not disadvantageous to PLC (see paragraph 653 above) and therefore I do not consider it unfair to Andrew, as a shareholder of ABPT, that PLC agreed to purchase potatoes from ABF on the basis that Mr Ellis, as purchasing director of PLC, would determine what PLC would pay;

(b) Paul breached his duty as a director of PLC, in early 2016, in failing to disclose to the directors of PLC, the nature and extent of the Partnership's interest in carrying out husbandry work for ABF which formed part of the overall

arrangements between the Partnership, ABF and PLC. Mr Tomkinson breached his duty owed to PLC under Section 173 CA 2006, by not ensuring that the price paid by PLC to ABF was independently negotiated on behalf of PLC;

- (c) I am satisfied that, if Paul had made full disclosure of the nature and extent of the Partnership's interest in its arrangements with ABF, then the board of PLC would still have approved the arrangements by which PLC participated in purchasing potatoes from ABF and funding the payment of the Partnership's invoices for the husbandry work carried out by it for ABF, such disclosure would therefore have made no difference to PLC entering into those arrangements. I make these findings because: (i) the NAAC rates charged by the Partnership to ABF were acceptable to Mr Ellis and objectively fair; (ii) the boards of PLC and ABF agreed in principle, in early 2016 that ABF would grow potatoes and PLC would purchase them and PLC funding payment for the husbandry services carried out by the Partnership was a necessary part of those approved arrangements, given that ABF had no cash resources available to it, further there is no evidence that PLC had any difficulty in bearing the cash flow burden of those arrangements; and
- (d) I am satisfied that even though Mr Tomkinson failed to ensure that the price to be paid by PLC for ABF's potatoes was independently determined on behalf of PLC, those prices were in fact independently determined on behalf of PLC, by Mr Ellis. Mr Ellis says, and I have accepted his evidence, that he caused PLC to pay the same market rate for those potatoes as PLC paid to other growers of potatoes (Mr Bell suggests that PLC in fact paid less than the average market price that it paid to other growers, but this might be explained by the quality or grade of potatoes supplied by ABF compared to the average for other growers, in any event, Mr Bell supports the conclusion that PLC did not pay more than market rates). Mr Tomkinson's breach of duty therefore made no difference.

705. I am not satisfied that Andrew has been prejudiced by any breach of duty by the Respondents, in his capacity as shareholder of ABF or ABPT: (a) for the reasons set out in paragraphs 657-659 above I have not found that ABF and PLC (and in the latter case therefore ABPT) have suffered financial loss as a result of the Respondents' breaches of duty; and (b) absent there being any financial loss to ABF/PLC and consequent diminution in the value of Andrew's shares in ABF/ABPT, it is for Andrew to establish prejudice in some other way. I am not satisfied that the breaches of duty of the Respondents are serious enough to amount to conduct which fell so far below the minimum standard of integrity and competence that Andrew was entitled to expect as a shareholder of ABF/ABPT, that Andrew could not reasonably be expected to have the minimum trust and confidence in the integrity and competence of Paul and Mr Tomkinson.

ABF renting land from the Partnership

706. The Respondents breached their duties to ABF in relation to the arrangements for the Partnership to rent land to ABF, in the following respects:
- (a) Paul failed to inform the other director of ABF (Mr Sharratt) when he was appointed as a director of ABF on 13 July 2016, about the nature and extent of

- the Partnership's interest in the arrangements to rent land at Home Farm to ABF, a breach of section 182 CA 2006 (not pleaded);
- (b) Paul breached his duty to PLC, under Section 177 CA 2006 by failing to disclose the nature and extent of the Partnership's interest in renting land to ABF, to the board of PLC;
 - (c) a breach by Paul of his fiduciary duties to ABF, by deciding for the Partnership and ABF what rent the ABF would pay to the Partnership; and
 - (d) Mr Tomkinson breached his duty under Section 173 CA 2006, by allowing Paul to agree the terms upon which the land would be rented at Home Farm, for both the Partnership and ABF.
707. I am not satisfied that the arrangements by which the Partnership rented land at Home Farm to ABF for it to grow potatoes on were unfair to Andrew:
- (a) Andrew may not have been aware that ABF was renting land at Home Farm from the Partnership to grow potatoes on, but he was made aware, by Paul, at Christmas 2015, that ABF intended to rent substantial parcels of land) and he raised no objection to that. It does not form part of Andrew's case that the terms on which the Partnership rented land to ABF were uncommercial or unfair and there is no evidence that they were. I am not satisfied that Andrew would have objected to the Partnership renting land to ABF, when this was agreed at the beginning of 2016, there is no reason, in my judgment why he would do so, on the premise that the terms were fair, Andrew having raised no objection to ABF renting substantial amounts of land on which to grow potatoes and taking into account the substantial support that Andrew had received and wanted to receive from the Group; and
 - (b) if Paul disclosed the nature and extent of the Partnership's interest in the arrangements to rent land to ABF and if ABF had been independently represented, so that that independent representative negotiated the terms with Paul, rather than Paul deciding the terms on behalf of the Partnership and ABF, I am not satisfied that the terms would have been any different.
708. I am not satisfied that ABF has suffered any loss as a result of renting land from the Partnership (and therefore I am not satisfied that there has been any diminution in the value of Andrew's shares in ABF as a result) or that Andrew's interests as a shareholder of ABF can otherwise be regarded as having been prejudiced, again there is nothing exceptional about these breaches of duty that leads me to conclude that Paul and/or Mr Tomkinson's conduct fell so far below what Andrew was entitled to expect of them as directors that Andrew should be regarded as having been prejudiced regardless of ABF having suffered no financial loss (and Andrew not having suffered any diminution in the value of his shares in ABF).

Transfer of £623,500 to WPS

709. A breach of Section 175 CA 2006 by the Respondents is not pleaded in Andrew's ABPT Petition in connection with the transfer by PLC of £623,500 to WPS. In any event, I have already described the failure of the Respondents to disclose, at a board meeting of PLC, their interests as shareholders of WPS in the transfer by PLC of £623,500 to WPS as a technical breach of Section 175 CA 2006. I would also describe it as a trivial breach because the directors of PLC at the time of the transfer, on 29 May 2014 were Paul, Andrew, Mr Tomkinson, Mr Ellis and Mr Sharratt, the same people, who owed a

duty under Section 175 to disclose their shareholdings in WPS (Andrew had, as I have already found agreed to Mr Sharratt having a small shareholding in WPS). No purpose would be served by disclosing to the directors of PLC, at a board meeting, what they already knew, namely that they were all beneficial shareholders in WPS. The failure to make the relevant disclosure at a board meeting of PLC was not therefore unfair to Andrew as a shareholder of ABPT (in any event I have found that the transfer was made to WPS when it was, in order to help Andrew in the financial relief proceedings in his divorce and Andrew wanted it to be done for that reason).

710. PLC suffered no loss as a result of the transfer of £623,500 to WPS, because it was transferred back with accrued interest to PLC some 4 months later. The breaches by the Respondents are trivial and therefore come nowhere near amounting to conduct that fell so far below the minimum standards of competence and integrity that Andrew was entitled to expect of the Respondents, so that Andrew might be able to show that he has suffered prejudice, even though he has suffered no financial loss.

PETITIONER'S KNOWLEDGE AND CONDUCT

Issue 55 - Was any knowledge or conduct of Andrew including in relation to the matters referred to in paragraphs 1 to 52 above relevant to the issues in paragraph 54 above.

711. I have dealt with all relevant aspects of Andrew's conduct in dealing with issue 54.

AMPLIFICATION REQUESTED BY THE PETITIONER

712. Following the circulation of my draft judgement, Andrew's solicitors requested that I provide amplification/clarification of certain points made in my draft judgment. I have agreed to do so by way of an addition to my judgment and do so below.

713. In the request for amplification/clarification Andrew's solicitors point to:

- (a) Paragraph 657 of my judgment in which I confirm that I am not satisfied that ABF has made a loss as a result of the arrangements it entered into with the Partnership for the Partnership to carry out husbandry services to ABF's potato crops from 2016 because: (i) NAAC rates are the best evidence I have of what an independent 3rd party contractor would have charged ABF to carry out those same services; and (ii) ABF appear to have benefitted by the Partnership charging it less than NAAC rates (Paul claiming this was compensation for the

Partnership using PLC's fuel for its vehicles which were involved in providing husbandry services to ABF) with the RSM Report suggesting the Partnership undercharged ABF against NAAC Rates by £170,000 and Mr Lewis that the Partnership undercharged against NAAC Rates by £85,211;

- (b) Paragraph 277 (a)-(d) of my judgment sets out my finding that Paul caused the Partnership to use a substantial amount of PLC's resources for the benefit of the Partnership without keeping a proper record of the resources being used and Paul decided what the Partnership would charge PLC/ABF for services the Partnership provided to them: and
- (c) at paragraph 656 I say that PLC incurred a loss as a result of the Partnership using its fuel, but there is no assistance in the evidence as to what quantity of fuel the Partnership used and I ask the experts to calculate the value of one Partnership tractor using PLC's fuel 5 days a week.

714. Andrew's solicitors ask that in light of those findings and given that there is such a significant difference between the amount that the RSM Report suggests the Partnership undercharged ABF against NAAC rates (£170,000) compared to the amount by which Mr Lewis considers that the Partnership undercharged ABF against NAAC Rates (£85,000):

- (a) can I confirm whether I consider it is possible that ABF has not been fully compensated by the Partnership;
- (b) if it is possible that ABF has not been fully compensated and if at the remedies hearing it subsequently transpires that ABF has in fact not been fully compensated, whether that would amount to unfair prejudice in respect of ABF (whilst acknowledging there should be no double recovery); and
- (c) if not, the basis of that finding.

715. The request for amplification/clarification assumes that ABF is entitled to compensation for the use of fuel (or other resources) by the Partnership. It is not ABF which is entitled to compensation because it is not ABF's resources that the Partnership has used, but rather the resources of PLC and therefore it is PLC that is entitled to compensation from the Partnership. Paul has purported to provide compensation for the use of PLC's fuel by charging ABF less than NAAC Rates for the husbandry work it carried out for ABF, but, as I believe my judgment makes clear

charging ABF less money does not compensate PLC for the Partnership using PLC's fuel. I believe that this answers the request for amplification/clarification but I have set out below an explanation of why I have not allowed the experts an opportunity, in advance of the remedies hearing to express a further opinion upon the question of whether the Partnership charged ABF more than an independent 3rd party contractor would have charged for the same husbandry work, but I have allowed the experts to express further opinions on whether independent 3rd party contractors would have charged PLC less than the Partnership charged PLC for work it carried out under the Cemex and Biffa sub-contracts.

716. There is a difference between the opportunity that the experts have already had to calculate any loss suffered by PLC as a result of entering into the Cemex and Biffa sub-contracts with the Partnership and the opportunity they have already had to calculate any loss ABF has suffered as a result of it entering into an agreement with the Partnership, that the Partnership would carry out husbandry services to its potato crops:
- (a) Mr Bell does not suggest that if ABF had used an independent 3rd party contractor to carry out husbandry services in relation to ABF's potato crops that ABF would have paid less to that 3rd party for those husbandry services;
 - (b) not only does Mr Bell not suggest that ABF would have paid less to a 3rd party contractor than it paid to the Partnership to carry out the same husbandry services, but I have found, on the evidence, that NAAC rates are the best evidence of what an independent 3rd party would have charged ABF to carry out the same husbandry services as the Partnership. Therefore, on my findings, only if Andrew could show that the Partnership charged more than NAAC rates would Andrew be able to establish that ABF had suffered loss, as a result of ABF using the Partnership rather than a 3rd party contractor to carry out those husbandry services. Both experts knew that Paul asserted that the Partnership charged ABF less than NAAC rates for husbandry services, when they prepared their reports and they both had the opportunity therefore to: (i) challenge the factual correctness of Paul's assertion and that NAAC rates represented a reasonable basis for determining what an independent 3rd party contractor might have charged ABF; and (ii) to calculate whether the Partnership in fact charged more or less than NAAC Rates. Mr Bell did not suggest that NAAC rates did not represent a reasonable basis for determining what a 3rd party contractor

would have charged ABF, nor did he suggest that a 3rd party contractor would have charged ABF less than the Partnership did (contrast with Cemex/Biffa noted below). There was no evidence before me that the Partnership charged ABF more than NAAC rates and the Respondent's expert Mr Lewis suggests that the Partnership charged less than NAAC rates for reasons I have explained in this judgment;

- (c) given (a) and (b) I do not consider it appropriate to allow the experts a further opportunity to express opinions on whether and if so to what extent a 3rd party contractor would have charged ABF less than the Partnership for husbandry services, given that Mr Bell for the Petitioner has not even suggested that a 3rd party contractor would have done, in the full knowledge that Paul was asserting that the Partnership had charged less than NAAC rates; and
- (d) in contrast, Mr Bell does suggest, in relation to the Cemex and Biffa sub-contracts that a 3rd party contractor would have charged PLC less than the Partnership did for carrying out those sub-contracts. I have not however accepted Mr Bell's methodology for calculating what he suggests is the difference between what the Partnership charged and what a 3rd party contractor would have charged. Having found that the use of PLC's resources to assist the Partnership in performing the Cemex and Biffa sub-contracts meant that the arrangements for those sub-contracts were unfair and prejudicial to Andrew, as ABPT's shareholder, I have allowed both experts a further opportunity to calculate, if they can (in accordance with the formula set out by me) any difference between what the Partnership charged PLC on the Cemex and Biffa sub-contracts and what they say that an independent 3rd party contractor would have charged. Neither expert was aware when they prepared their reports of the basis upon which I have said in this judgment that any difference between the amount charged by the Partnership on the Cemex/ Biffa sub-contracts and what a 3rd party would have charged should be calculated and they have not therefore had an opportunity to calculate that difference, on that basis (contrast with the ABF husbandry services provided by the Partnership where they have had the opportunity to express such opinions against NAAC rates (which they knew Paul asserted were the standard rates charged by agricultural contractors to farmers for husbandry services) which I have found represent the best evidence of what an independent 3rd party contractor would have charged.

