



Neutral Citation Number: [2024] EWHC 850 (Ch)

Case No: CR-2021-002450

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 15 April 2024

Before:

Caroline Shea KC, sitting as a Deputy Judge of the Chancery Division

Between:

MR JOHN SIMPSON

Petitioner

- and -

- (1) MR MICHAEL AGAPIOS DIAMANDIS**
- (2) ~~MS LORNA LEONARD~~**
- (3) MR ANDREW CHARLES WOOLLETT**
- (4) ~~MR ROBERT JOHN WHITLOCK~~**
- (5) ~~MR LYNDON WHITLOCK~~**
- (6) ARTEMAS JOSEPH HOLDINGS LIMITED (“AJHL”)**
- (7) TILON CG LIMITED (“TCGL”)**
- (8) TILON (HOLDINGS) LIMITED (“THL”)**

Mr Fraser Campbell (instructed Mishcon de Reya) for the Petitioner

The First Respondent in person

Mr Ben Channer (directly instructed) for the Third Respondent

Hearing dates: 8 November 2023 (reading);

9, 10, 13, 14, 16, 17 November 2023

JUDGMENT

Caroline Shea KC:

Introduction

1. This case concerns the transfer of a company, Tilon CG Limited (TCGL), out of the sole ownership of its holding company, Artemas Joseph Holdings Limited (AJHL), into the sole ownership of a new holding company, Tilon Holdings Limited (THL) (“the Transfer”). The price paid by THL for TCGL was £150,000. The Petitioner, Mr Simpson, says that its true value at the date of the Transfer was £2.9 million. Mr Simpson had (and still has) a 47.5% shareholding in AJHL, but no shares in THL. By contrast the First Respondent, Mr Diamandis, and the Second Respondent, Ms Leonard, who together instigated the transfer of TCGL, who respectively had a 47.5% and a 5% shareholding in AJHL, had 70.3% and 6.5% of the shares in THL, the purchasing company, at the time of the Transfer.
2. Mr Simpson claims that the Transfer was effected at a gross undervalue, with the effect of depriving him of the value of his interest in AJHL (and indirectly in TCGL), and vesting that value in the shareholders of THL. He alleges that Mr Diamandis deliberately kept him out of the loop when devising and implementing the plan to sell TCGL, and in effect ambushed Mr Simpson with a shareholder’s resolution that he and Ms Leonard, with a combined majority shareholding in AJHL of 52.5%, passed in order to effect the Transfer. This course of action unfairly prejudiced Mr Simpson, within the meaning of section 994 of the Companies Act 2006 (“Section 994”). He alleges that the transfer of TCGL at an undervalue was in breach of the duties of Mr Diamandis, as a director of AJHL and in breach of the relationship of quasi-partnership in AJHL between Mr Simpson and Mr Diamandis. Mr Simpson seeks relief pursuant to section 996 of the Companies Act 2006 (“Section 996”) in the form of a retrospective buy out of his shares in AJHL.
3. Mr Simpson further claims that others were sufficiently complicit in the Scheme to fix them with liability. Ms Leonard, who owned 5% of the shares in AJHL and was allocated 8.7% of the shares in THL, worked together with Mr Diamandis to obtain a shareholder’s resolution approving the Transfer. Mr Woollett, the Third Respondent, came on the scene when investment into TCGL was being sought. He provided advice, and agreed to take a place on the board of THL. After the Transfer, he was rewarded with a 15% shareholding in THL. The Fourth and Fifth Respondents invested in THL by means of convertible loans, to a value of £687,500. Their combined shares in THL following conversion of the loan notes would be 25%. All the Respondents were fully aware of the sale price, and of the fact that no shares in AJHL were allocated to Mr Simpson. They all, it is alleged, were complicit in the Scheme, and should be fixed with liability.
4. Of those Respondents, only Mr Diamandis and Mr Woollett were defending the claim at the substantive trial. Messrs Whitlock reached terms with Mr Simpson a few days prior to the trial. Ms Leonard was in court on the first day of the trial, represented (as was Mr Diamandis) by Mr Loxton on an application to adjourn the trial (“the Adjournment Application”) (which was refused for reasons appearing in the related judgment (“the Adjournment Judgment”). The morning after the Adjournment

Application had been refused, on the first effective day of the trial, I was informed that Ms Leonard also had now reached terms with Mr Simpson and would play no further part in the proceedings. The Sixth, Seventh and Eighth Respondents are the companies involved in the dispute, playing no active part in the proceedings. Unless the context requires otherwise, references to the Respondents are references to Mr Diamandis and Mr Woollett together.

Mr Diamandis's position

5. Mr Diamandis, who appeared in the substantive trial in person, defends this claim robustly. He says that the value of TCGL at the date of the transfer was nil (based on the evidence of his expert, Mr Isaacs), and certainly no more than £150,050. The Transfer was therefore for full value, AJHL was fully compensated, and no question of prejudice to Mr Simpson arises. He maintains it was necessary, in order to secure investment, to extract TCGL from the ownership of AJHL which was perceived by potential investors as contaminated by other, poorly performing, assets held by AJHL, and who made their investment conditional upon TCGL being separated from AJHL. Thus, it is alleged, selling TCGL out of AJHL was necessary in order to save the business from collapse. He maintains he would have been in breach of his duty to TCGL and its shareholders had he not taken the steps of selling it out of AJHL and into THL. He further suggests that Mr Simpson refused to participate in the Transfer, in effect turning down shares that were offered to him, shares which continued (and he said at trial continue to this day) to be available for him after the Transfer.

Mr Woollett's position

6. Mr Woollett denies any liability. He too relies on the evidence of Mr Isaacs, that the value of TCGL at the date of the Transfer was nil. He distances himself from the events leading up to the Transfer, saying that he performed the modelling of various ownership structures and allocations of shares that were considered whilst investment was being sought solely on the instruction of Mr Diamandis. He himself was never proactive in designing or advancing those structures, nor was he an architect of the plan to extract TCGL for AJHL and transfer it to THL. Whilst his pleaded case is that Mr Simpson has suffered no prejudice, he gave oral evidence that he regards it as manifestly unfair that Mr Simpson was not allocated any shares in THL. He denies that he was responsible for, or sufficiently implicit in, that outcome, and alleges that he always assumed that Mr Diamandis would distribute shares to Mr Simpson at some stage.

The core elements of the Scheme

7. It is Mr Simpson's case that Mr Diamandis, with Mr Woollett's full knowledge and involvement, hatched a scheme ("the Scheme") to transfer TCGL into a new holding company, whilst compensating AJHL at a fraction of the actual value of TCGL, to Mr Simpson's prejudice. There are three core elements to the Scheme as alleged. The first element concerns the value of TCGL at the date of transfer. Mr Simpson claims that it was in fact worth £2.9 million but only £150,050 was paid. The second element to the scheme was the decision made to extract TCGL from AJHL, in which Mr Simpson and Mr Diamandis were both equal minority shareholders, and into THL, wholly owned by Mr Diamandis. This restructuring would deprive Mr Simpson both of any

influence over TCGL as a shareholder of AJHL, and of the value of his interest in AJHL. The third element of the Scheme was the decision deliberately to keep Mr Simpson out of the loop, with a failure to provide information as the search for new investment proceeded. A request Mr Simpson made for an update on progress remained unanswered, as did more formal requests made in the latter stages by his solicitor. He was in effect frozen out, and denied information, thus denying him the opportunity to contribute to the plans, be properly compensated for his interest in AJHL, and participate in the future operations of TCGL.

Evidence

8. Although there were several witness statements in the bundle, only three witnesses of fact gave oral evidence: Mr Simpson, Mr Diamandis, and Mr Woollett.
9. Mr Simpson was measured when giving evidence, to the point of being laconic. He gave careful thought to the questions he was asked, and gave careful answers. On occasion he gave the impression he was finding it irksome to be answering questions, particularly when being cross examined by Mr Diamandis in person, but that is perhaps unsurprising in view of the rift that has grown between them. Neither at the time he gave his oral evidence, nor when assessing that evidence in the light of contemporaneous documents and submissions that have been made, did I find any cause to doubt the truthfulness of his evidence.
10. Mr Diamandis was a relatively excitable witness, at times appearing fuelled by his own sense of rightness; again, perhaps unsurprising given the nature of the dispute. His memory did not always serve him well. He gave the impression on more than one occasion of someone who had convinced himself of the truth of a memory or position, and became more entrenched with every repetition of it. By way of example, Mr Diamandis averred in his witness statement, and several times under cross examination, that UKSE (an entity which was considering investing in TCGL) had withdrawn from negotiations due to concerns about Mr Diamandis's age, and about his being the sole director of AJHL. He stated this in his witness statement, and repeated it several times when being cross examined, until he was taken to an email addressed to him in which it was spelt out in terms that UKSE withdrew because of Mr Diamandis' history of directors' disqualifications, and current litigation. There were further examples of similar inaccuracies in his evidence, which I refer to later in this judgment, which led me to conclude that Mr Diamandis has a tendency to remember or interpret facts so as to suit the narrative he was promoting. There were sufficient examples of this tendency to lead me to treat his evidence with caution, especially where it could not be supported by contemporaneous documents.
11. Mr Woollett gave evidence in a measured, calm manner. Some key elements of his oral evidence differed from what was pleaded and repeated in his witness statement, in particular those relating to whether he thought it was fair that Mr Simpson has been allocated no shares at trial. His written case was that the Transfer was at full value. His oral evidence was that it was surprising and manifestly unfair that Mr Simpson was allocated no shares in THL. Broadly, he sought to distance himself from the Scheme, and to diminish his role in the plans leading up to the Transfer, saying that

the decision to exclude Mr Simpson from any shareholding in THL was a matter for Mr Diamandis, and not one in which he, Mr Woollett, had any interest or over which he sought to exert any influence.

12. Expert evidence was given by Mr Pearson for Mr Simpson, and by Mr Isaacs for Mr Diamandis and Mr Woollett. Both had relevant expertise, and neither side sought to impugn the experience or credentials of the other's expert. The chief difference between them was the figure for the value of TGCL in November 2021. Mr Pearson puts it at £2.9 million, Mr Isaacs at nil. As I set out more fully below, the rival calculations are based on opposing and mutually inconsistent valuation assumptions: Mr Pearson values on the basis TCGL is a going concern, Mr Isaacs on the basis that it is a sale of a distressed, imminently insolvent, entity. The resolution of that difference lies at the heart of the issues between the parties.
13. Also at issue is the correct valuation date for the purposes of assessing the share price to be paid if a buy out order is made. The Adjournment Application now becomes relevant. The principal reason advanced in support of the Adjournment Application was what was said to be the recent downwards turn in the fortunes of THL. It was said that the financial downturn had commenced as long ago as June 2023 (before the experts had completed their joint statement); and that the matters that had arisen since then were all relevant to the issue of the value of THL, and also to the issue of which valuation date should be adopted for the purposes of valuing the shares for the purposes of any buy out order.
14. I refused to grant an adjournment, for reasons set out in the Adjournment Judgment. The question of the correct valuation date was left as an issue for my determination, on the express basis that if I decided that the correct valuation date was later than June 2023 (for example, the date of the trial or of the determination), directions could be given for further disclosure, witness evidence and expert evidence, as necessary.
15. The factual history of the business and particularly the events that led to the Transfer require to be explored in detail, with specific focus on the three elements of the alleged Scheme I identify above: (1) the diminishing shareholding allocated to Mr Simpson, and how that came about; (2) the transfer of TCLG out of AJHL and into THL; and (3) the provision or otherwise of information to Mr Simpson. Prior to embarking on that exploration, I shall summarise the applicable statutory provisions and legal principles and identify what issues arise for determination in that context.

The law

16. I set out the central tenets of the applicable law, whilst noting that none were contested save as to their application. It is fair to say that it was Mr Campbell who did the lion's share of the work of presenting the relevant law to the Court, and I am grateful to him for setting out his exposition with clarity and economy. In view of that helpful introduction, Mr Channer rightly did not consider it necessary to address me at any length on the law, understandably reserving most of his input both during the evidence and in closing for an analysis of the factual background and the valuation evidence. Mr Diamandis as a lay person, albeit articulate and clearly intelligent, had

the obvious limitations facing any litigant in person without a legal background in terms of addressing me on the law. I do not consider he was prejudiced by this, since the central disputes in this case are ones of valuation and of fact.

Sections 994/996

17. Section 994(1) provides that a member of a company may apply to the court by petition for an order under Part 30 of the 2006 Act, which deals with protection of members against unfair prejudice, on the ground

“(a) that the company’s affairs have been conducted in a manner that is unfairly prejudicial to the interests ... of some part of its members (including at least himself)”, or

(b) that an actual or proposed act or omission of the company ... is or would be so prejudicial”.

18. Under Section 996(1)

“If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.”

19. For the purposes of Section 994(1)(b), an “act” includes the passing of a resolution regardless of the fact that members’ votes for or against a resolution are properly regarded as private acts: *Re Unisoft Group Ltd (No 3)* [1994] 1 BCLC 609, at 611c. Similarly, an action taken by the board is properly regarded as conduct of the company’s affairs: *Re Unisoft* at 623c.

20. To succeed a petitioner must show that the conduct is both prejudicial and unfair. Prejudice will be established where the petitioner can show that the economic value of his shareholding has been seriously diminished by reason of conduct on the part of persons who have *de facto* control of the company: *Re R A Noble & Sons (Clothing) Ltd* [1983] BCLC 273, at 290h. Financial prejudice to the company is tantamount to financial prejudice to the interests of its members as a holder of its shares: *Re Macro (Ipswich) Limited* [1994] 2 BCLC 354, at 404d.

21. The concept of unfairness applies where there are breaches of terms on which the companies’ affairs have been by agreement conducted, which includes the requirement for directors to observe fiduciary duties to the company. It also applies to breaches of equitable considerations (which may be particularly strong where there exists a quasi-partnership) that render it unfair for those who have the conduct of the company’s affairs to use their strict legal powers to justify their conduct: per Lord Hoffmann in *O’Neill v Phillips* [1999] 1 WLR 1092, at 1098-99.

22. In the case of a quasi-partnership, special considerations can arise. A quasi-partnership can arise where a company was either formed or continues on the basis of a personal relationship involving mutual confidence, or where an agreement or understanding exists that the shareholder would participate in the conduct of the

business: *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; *Re Foundry Miniatures Ltd* [2017] 2 BCLC 489 at [59] – [62].

23. The question of fairness must be assessed against the particular legal background of the corporate structure, taking into account all the circumstances of the case: *Grace v Biagioli* [2006] 2 BCLC 70, at [61]. The test for unfairness is objective. The petitioner does not have to establish that the respondents have knowingly acted unfairly to the petitioner, nor to establish bad faith on their part. Rather the test as per Slade LJ in *Re Bovey Hotel Venture Ltd* (3 July 1981, unreported, but oft quoted in subsequent cases) is:
- “whether a reasonable bystander observing the consequences of their conduct would regard it as having unfairly prejudiced the petitioner’s interests”.
24. Under section 239(1) of the Companies Act 2006, it is possible for the members of a company to pass a resolution ratifying a director’s breach of fiduciary duty. By sections 239(3)-(4), the director whose breach is being ratified may not validly vote on the resolution. Moreover, ratification cannot defeat or pre-empt a claim for unfair prejudice: *Re Saul Harrison plc* [1995] 1 BCLC 14, 18c – d.
25. A well-established category of case where the test for unfair prejudice is satisfied is where a company’s property or assets are disposed of, at an undervalue, to another company in which the majority shareholder in the existing company have a proprietary interest: *Re Little Olympian Each-Ways Ltd (No 3)* [1995] 1 BCLC 636; *Parkinson v Eurofinance Group Ltd* [2001] 1 BCLC 720; *Rock Nominees Ltd v RCO (Holdings) plc (in liq)* [2003] 2 BCLC 493; *Re Tobian Properties Ltd* [2013] 2 BCLC 567.
26. Equally unfair prejudice arises where a company’s business is diverted to the majority shareholders of a company owned by them but in which the petitioner has no interest and is granted none; or where a director fails to protect one company against its business being poached by another in which the director has an interest. See for example *Whillock v Henderson* [2009] BCC 314, [15].
27. The last category relevant to this case is where a quasi-partnership exists between the petitioner and the respondent. Unfair prejudice can arise by conduct contrary to the agreed basis of conducting the company’s business, or else by breach of the implied understanding that the shareholders would act in good faith towards each other. This can arise where the minority is excluded from participation in the management of the company contrary to the understanding on which the company was formed: *Re Guidezone Ltd* [2001] BCLC 692 at [175]. It can also arise where there is a failure to consult the petitioner on strategic issues or provide management information where the existing relationship of trust and confidence gave rise to a reasonable expectation of involvement: *Re Regional Airports Ltd* [1999] 2 BCLC 30, at 80. The mere act of stepping back from day to day management will not necessarily result in justifying a failure to include the petitioner from participation in management, much less in important strategic decisions: *re Foundry* at [66].

Valuation Date

28. The correct valuation date is a matter of discretion, taking all relevant circumstances into account. The starting point for the buy out of shares in a business that is a going concern is the date of the order. However, this is far from fixed in stone, and the court will take another date where fairness to one side or the other requires it: *Profinance Trust v Gladstone* [2002] 1 WLR 1024 [60 – 61]. One of the situations which might justify a valuation date earlier than the date of the hearing is where there has been a significant deterioration in the fortunes of the relevant enterprise following the conduct which causes the unfair prejudice.
29. My attention has been drawn to the judgment of Proudman J in *re Pheonix Contract (Leicester) Ltd* [2010] EWHC 2375 (Ch). She held (at [150]) that where there has been a diminution in value of the shares, it may be appropriate to adopt a valuation date earlier than the date of the hearing even in circumstances where there is a lack of clarity as to whether such diminution has been caused by the respondent's conduct subsequent to the conduct which caused the unfair prejudice. This is on the basis it is not fair for the petitioner to bear the burden of that risk. She referred to the judgment of His Honour Judge Cooke (sitting as a deputy Judge of the Chancery Division) in *Croly v Good and Others* [2010] EWHC 1 (Ch), in which he fixed the valuation date at the date of expulsion, notwithstanding that was considerably earlier than the date of the Petition. One relevant factor in his doing so was that the company had been put into administration by the majority shareholder for the purposes of implementing a pre-pack sale of its assets to a new company owned by that shareholder and his wife.
30. The fixing of the valuation date is a matter of principle, and does not depend on having had the benefit of valuation evidence addressing all possible valuation dates. To allow valuations at different times to affect the court's decision as to which date should be selected is "the wrong way round": per Proudman J in *Re Phoenix Contracts* at [152].

Remedies against non-members

31. The test for whether a remedy lies against a third party is highly fact sensitive. It is set out by Sales J in *F&C Alternative Investments Ltd v Barthelmy (No 2)* [2012] Ch 613 at [1096]:
- “[T]he test is whether the defendant in a section 994 claim is so connected to the unfairly prejudicial conduct in question that it would be just, in the context of the statutory regime contained in sections 994 to 996, to grant a remedy against that defendant in relation to that conduct. The standard of justice to be applied reflects the requirements of fair commercial dealing inherent in the statutory regime. This is to state the test at a high level of abstraction. In practice, everything will depend upon the facts of a particular case and the court's assessment whether what was done involved unfairness in which the relevant defendant was sufficiently implicated to warrant relief being granted against him.”

Primary and secondary liability

32. Also at issue is whether Mr Woollett, if found liable, should bear primary liability, concurrently with that of Mr Diamandis (if such is found), or secondary liability: *Re Fi Call* [2013] EWHC 1652 (Ch) at [125]:

“Non-members of a company who are alleged to have been responsible for such conduct can be joined as respondents and in an appropriate case such non-members can be made primarily or secondarily liable to buy the petitioners’ shares.”

That passage was approved by the Court of Appeal in *Taylor Goodchild td v Taylor* [2021] EWCA Civ 1135.

33. A court making an order that multiple respondents are primarily liable does not have to decide relative culpability. If enforcement is achieved against one for the entire amount due, that party can look to the co-respondent(s) for recovery of the appropriate share. Any dispute as the proportion for which each respondent should be liable can be resolved at that stage, between the respondents, and will not involve the petitioner.
34. Alternatively the court may make an order whereby one respondent is held primarily liable, whilst further respondents are fixed with secondary liability. Whilst the petitioner can enforce against any respondent held liable, those with secondary liability can in turn force against the respondent with primary liability. In that way the risk of the impecuniosity of the respondent with primary liability falls on those with secondary liability.

Minority discounts

35. Where a relationship of quasi-partnership exists between parties, buy out orders are not generally subject to minority discounts. Where there is no quasi partnership, then the Court will determine the issue according to fairness in all the circumstances: *Re Edwardian Group Ltd* [2018] EWHC 1714 at [640].

Issues

36. Against that legal background, the issues to be determined are:

- (1) Was the Transfer at an undervalue? This involves comparing the actual value of TCGL at the date of the Transfer with the sum transferred to AJHL in exchange for its shares in TCGL.
- (2) If so, has there been conduct, or an act or omission, which has caused unfair prejudice to Mr Simpson within the meaning of Section 994(1)?
- (3) If so, should a buy-out order be made as against (1) Mr Diamandis and/or (2) Mr Woollett under Section 996?
- (4) If an order is made against Mr Woollett, should he share primary liability with Mr Diamandis, or should he be only secondarily liable?
- (5) If a buy-out order is made, what is the correct valuation date?
- (6) At the valuation date, what was the value of TCGL?

37. As for issue (3), I do not understand Mr Diamandis or Mr Woollett to be contending that, if either is found liable, the appropriate remedy is anything other than a retrospective buy out of the shares at the value they have on the valuation date as determined.

The Tilon business – a short history

38. The Tilon business manufactures environmentally friendly noise barriers, scaffolding, and decking from recycled composite materials such as plastics and fibreglass. Mr Simpson's involvement began in March 2011, when he invested £154,500 in the holding company, Castlegate 535 Ltd ("Castlegate"). He continued to invest in Castlegate, having injected some £700,000 by 2019. Mr Diamandis came on the scene in around 2017, and was introduced to Mr Simpson by Mr Keith, Mr Simpson's then business partner. Castlegate was dissolved in 2018, with Mr Keith exiting the scene soon afterwards.

39. AJHL was incorporated (under its original name of Tilon CG Holdings) on 4 September 2019. Mr Simpson and Mr Diamandis reached an agreement that would give each of them 47.5% of the AJHL shares, the balance of 5% being held by Ms Leonard, the Company Secretary. Mr Diamandis was the sole director of AJHL. In around September 2019, all of the TCGL shares were transferred to AJHL, and TCGL became the operating company of the Tilon business. Mr Diamandis described Mr Simpson as a "shadow director" of AJHL, in the sense that he expected to be informed and have a say in important decisions, and would insist on attending Board meetings even though he was not on the Board (by his choice). Essentially Mr Diamandis was responsible for the day to day running of AJHL, and Mr Simpson was an investor who took an active interest in the performance of the business. Around this time Mr Simpson advanced a further £100,000 by way of loan, taking his total loan balance to around £150,000. That loan was formalised in March 2020.

The position in early 2021

40. Relevant events move forwards to early 2021. At this point, AJHL owned a number of other entities, in addition to TCGL. The other subsidiaries were, to put it broadly, in the doors and windows business. None of them owned any part of TCGL, and none was owned as to any part by TCGL. One of them, Tornick Services, was the sole

owner of a then dormant company known as Hesa Professional Windows Installations Limited (“Hesa”). Hesa was the company which came to be renamed as THL, the holding company into which TCGL was later transferred pursuant to the Transfer.

41. At this time, the doors and windows businesses were not performing well, in contrast to TCGL, which had a full order book but was experiencing cash flow difficulties. It was apprehended that in order to meet demand and expand its operation, TCGL needed to acquire a second production line, which would allow it to double production without any substantial increase in staff. The cost of purchasing a second line was £750,000 to £800,000, and investment would be required. The second production line was seen as the key to unlock the future of the Tilon business.

The search for investment

42. From about March 2021, attempts were made to raise funds for the second production line. First, in March 2021 TCGL applied for a grant of £375,000 from the Waste and Resources Action Programme (WRAP) to fund the second production line. A grant of £300,000 was awarded on 24 June 2021. The grant was conditional on a guarantee being given to match the funding. Originally Mr Simpson had been willing to provide the guarantee. He decided during the events of October 2021 that he was no longer willing to do this. Mr Diamandis’s finances had improved at that stage and he was able to stand as surety and put in a match funding letter. He heavily qualified his obligation in that regard, and accepted in cross examination that the guarantee left him with very little in the way of concrete obligation.
43. In terms of cash investment, initially promising discussions with a Mr Oliver Wesseley did not bear fruit. Mr Wesseley had expressed an interest in obtaining a sizeable stake in TCGL, and being heavily involved in its development over the following 5 – 10 years. Around that time, Mr Diamandis advanced a valuation of TCGL of around £1m, though in his witness statement prepared for these proceedings he says this was optimistic.
44. Similarly, negotiations with UK Steel Enterprise (“UKSE”) failed to secure investment. Initially Mr Diamandis’s evidence, both in his witness statement and when being cross examined, was that the principal reason UKSE declined to invest was Mr Diamandis’ age, together with its concern that the board of AJHL comprised only one person, namely Mr Diamandis, and that Mr Simpson would not take a seat. Mr Diamandis was given several opportunities to clarify his answers in cross examination, but it was only on being taken to an email from Martin Palmer of UKSE, dated 9 July 2021, that Mr Diamandis was prepared to accept that UKSE stated in terms that it was unwilling to invest due to concerns surrounding Mr Diamandis’s history of business failures, director’s disqualifications, and current litigation.
45. Mr Diamandis then turned to Mr Woollett, a family friend of long standing, and an experienced businessman. Mr Woollett agreed to act nominally as TCGL’s non-executive chairman, in return for some sort of equity interest, to be negotiated. Mr Woollett then at an early stage requested a 15% share in the business in return for the

provision of his services. In August 2021, the Fifth Respondent, Mr L Whitlock, entered into discussions with Mr Diamandis and Mr Woollett. He agreed in principle to acquire 20% of the shares in TCGL for £550,000. The scene was now set to obtain the investment necessary to purchase the second production line, and thereby to grow the Tilon business.

The evolution of proposals to restructure TCGL

46. By the end of September 2021, with the commitment in principle from Mr Whitlock, there commenced a series of proposals as to how the existing shareholder's investments, the incoming investment, and Mr Woollett's input, would all be reflected in the allocated equity, and what the structure of the eventual holding of TCGL was to be.

First proposal – 27/29 September 2021

47. The first formulation was originally recorded by Mr Woollett in an email to Mr Diamandis (alone) dated 27 September 2021. In that email Mr Woollett refers to having had a good session with "Mike" that morning. This is a reference to Mr Michael Brooke, Mr Diamandis's accountant. Mr Woollett sets out a table which he describes as "the ownership scheme we discussed". It was proposed that the existing 150,050 £1 shares in TCGL (then wholly owned by AJHL) be increased to a total of 187,560 £1 shares. Mr L Whitlock was to subscribe for 20% of the total new issue shares with one third of that 20% being allocated to Damian Walsh (who had originally introduced Mr Whitlock to Mr Diamandis but who later drops out of the picture). For that allocation Mr L Whitlock envisaged paying a price of £550,000.
48. The following points are of note. First, the structure for receiving the inward investment was the issue of new shares in AJHL. There was no question of TCGL being transferred to a new holding company. Second, Mr Simpson and Mr Diamandis were shown as having 47.5% of the shareholding each at the outset, reducing to 40% each after distribution to Mr Woollett of 15% of the shares. It was envisaged that each would contribute 7.5% of the shareholding to Mr Woollett. They would each be left with 31.5% following dilution occasioned by the Whitlock investment, and Mr Woollett would be left with 11.84%. Thirdly, after setting out the table of shares, Mr Woollett offered some quite detailed advice as to how Mr Diamandis should approach certain meetings he was due to have the following week with those providing the WRAP funding.
49. The proposal set out in the 27 September 2021 email is the same as the proposal then sent by email dated 29 September 2021 from Mr Diamandis to Mr Simpson and Mr Woollett. Mr Diamandis reported advice he was expecting from Mr Brooke as to "the best method of allocating the shares to avoid unnecessary tax liabilities". Mr Brooke made an initial suggestion that the "money should be injected as a loan with an irrevocable option to convert to shares sometime in the future." Mr Diamandis reported that he had been in touch with his lawyer at Carbon Law, Mr William Brewis, who would act for TCGL to produce identical shareholders' agreements for himself, Mr Simpson, Mr Woollett, Ms Leonard, Mr Whitlock's company and Mr Walsh.

The electricity bill issue emerges

50. In the same email of 29 September 2021, Mr Diamandis observed that all three of them – he, Mr Simpson and Mr Woollett – had agreed to pay £50,000 into TCGL as a loan. That such an agreement had been reached is common ground. Mr Diamandis suggested that should happen as soon as possible. He also referred to imminent cash flow difficulties. He was expecting a demand from SSE, which supplied electricity to the premises in which the Tilon business was conducted, in the sum of £39,500. He had hoped to pay this a refund expected from HMRC, but this was now “running late”. Mr Diamandis asked if each of Mr Simpson and Mr Woollett could lend the company £20,000 by the following Monday. This would “act as part of your £50k investment”, or could be refunded when the HMRC refund was received. He envisaged that the deal with Mr L Whitlock would complete on 22 October 2021, and hoped that the loan (from the three of them) would complete on the same day. The request for the £20,000 cash proved to be the trigger for the subsequent rupture in relations between Mr Diamandis and Mr Simpson.

Mr Woollett’s suggestions

51. Before that situation unfolded further, Mr Woollett provided a response (although addressed only to Mr Diamandis) to Mr Diamandis’s suggestions regarding the investment into TCGL contained in the 29 September 2021 email. Mr Woollett proposed that the £150,000 loan should be on terms, namely, a duration of 2 years, attracting interest at 4% over base, with interest rolled up for year 1, then paid quarterly. As to gifting equity to key employees, he agrees with the idea, but suggests that “as I have already taken the dilution hit on “Lindon’s [sic] group participation would it be ok if I was not diluted further?” In other words, if 5% was to be distributed to key staff members, he did not want it to affect his share allocation, previously agreed at 15%, already set to dilute to 11.84% upon conversion of the convertible loan notes. He then supplies a table recording the effect of his counter proposal, resulting in the following proposals for share allocations post investment by Mr Lyndon Whitlock and staff distribution:

<u>Shareholder</u>	<u>Percent allocated</u>
MD:	29.08
JS:	29.08
LL:	5
Woollett:	11.84
Whitlock:	13.33
Walsh:	6.67
Staff:	5 (divided equally between three)

52. So far, so mathematical. He then proceeds to make the following suggestion:

“Are you happy having the same as John? Why not negotiate an option to buy half of John’s shares for £500,000? And perhaps I could have an option to buy from you 1/3 of those you purchased from John. Give me a call when you have considered this situation.”

This is the first reference to the possibility of a post investment outcome in which Mr Diamandis and Mr Simpson might end up having unequal shareholdings. Of further note is the suggestion that half of Mr Simpson's shareholding in TCGL had been valued by Mr Woollett at that stage, albeit informally and only by way of proposal, at £500,000. The email was sent to Mr Diamandis alone.

Transfer of shares out of AJHL – Mr Brooke's letter

53. In an attachment to an email dated 1 October 2021, the first reference is made to the possibility of taking the TCGL shares out of AJHL as an element of the investment strategy. Mr Brooke sent a proposal to Mr Diamandis in which he records that there is an investor who is prepared to provide £550,000 of long-term capital by way of loan, convertible into 20% of the share capital; this would enable the company to purchase plant and equipment and provide working capital to take the business forward. The reference to an investor is a reference to Mr L Whitlock. Mr Brooke then suggests that "the shareholders of [AJHL] want to transfer ownership of [TCGL] to their personal names. The investor [L Whitlock] wants ultimately to own 20 per cent of [TCGL]."
54. He contemplates extracting the value of TCGL from AJHL by one of two methods: a dividend *in specie*, which he says "is the declaration of a dividend, say £10,000, which is satisfied by the transfer of assets. Namely, the shares in [TCGL]. This will create a loss on investment of £140,450". The second potential method is a distribution *in specie* which he defines as "the declaration of a dividend of the shares. Our initial view is that this is the simplest approach of the two." He goes on to consider what the market value of the dividend would be and notes "this may be subject to debate with HMRC after the event If HMRC take the market value at £150,000 then there is potential [sic] higher rate liability of 32.5%."
55. Finally, in envisaging how the shares might be transferred out of AJHL, he considers a proposal that they be paid to Mr Simpson, who would then allocate them to the other investors. He concludes with a table showing the allocation of shares in TCGL as follows (with no mention of Mr Walsh or of any equity being given to staff):

<u>Shareholder</u>	<u>Percent allocated</u>
MD:	29
JS:	29
LL:	3
Woollett:	20
Whitlock:	20

56. Whilst a new approach is being suggested by Mr Brooke, he is not suggesting that the inward investment is made into any vehicle other than TCGL itself. Neither does he suggest that the shares in TCGL be transferred from AJHL into a new holding company. Rather he is proposing transferring the shares out of AJHL and into the names of Mr Diamandis and/or Mr Simpson, and considering a number of ways of achieving this. In doing this he suggests possible values attributable to TCGL of £10,000 and £150,000. The element of his email is important, because it is relied on

by Mr Diamandis and Mr Woollett to justify what they say was their belief that the value of TCGL at the relevant time was somewhere between nil and £150,000. Regardless of the value being placed on TCGL, what is being proposed would leave Mr Simpson and Mr Diamandis with identical shareholdings, namely 29%, in TCGL.

57. It was Mr Diamandis's evidence that Mr Brooke "saw the need to separate the businesses" (paragraph 218 of Mr Diamandis's witness statement). It is not clear whether Mr Diamandis is saying that it was Mr Brooke's idea to separate the business, or that Mr Brooke was presented with that idea and understood and agreed with it. Either way, the email from Mr Brooke goes no further than to contemplate that the shares in TCGL might be transferred to Mr Simpson and thence to the other investors, and, as Mr Diamandis also observes in his witness statement, it is evident that Mr Brooke's principal concern was with the tax implications of any given restructure. Regardless, as Mr Diamandis accepted when giving evidence, Mr Brooke was working on the assumption that the shareholders' interests in TCGL would be the same as the balance of their shareholdings in AJHL.

Mr Simpson declines to provide funds to meet electricity bill

58. Thereafter, relations between Mr Simpson and Mr Diamandis took a downwards turn. This followed Mr Diamandis's request (in the email of 29 September 2021) that Mr Simpson and Mr Diamandis each contribute £20,000 in cash in order to meet the imminent liability to pay the electricity bill. By text dated 2 October 2021, Mr Simpson said that he was "as short of cash flow as" Mr Diamandis, due to the ever rising costs of building a new house, and asked whether Mr Woollett had "put some cash in". By reply, Mr Diamandis said that Mr Woollett would be putting cash in.
59. On 3 October 2021, Mr Simpson informed Mr Diamandis in what he described as a difficult telephone conversation that he would not be providing any cash to contribute to the electricity bill. Whilst Mr Diamandis originally suggested (witness statement at paragraphs 201 – 204) that Mr Simpson had previously agreed to make the contribution, he accepted in cross examination that Mr Simpson had not committed to put in the £20,000. Mr Diamandis was however "disappointed" that he declined. After the first direct debit payment bounced, the payment cleared on a second presentation on 11 October 2021, with no further cash input from Mr Simpson, but with the assistance of a temporary loan from Mr Woollett to Mr Diamandis, and by diverting cash flow within the business. Mr Diamandis also suggested in his witness statement that Mr Simpson had told Mr Diamandis at this point that he, Mr Simpson, would never make any further investment into AJHL/TCGL. In cross examination Mr Diamandis accepted that Mr Simpson would not use a black and white sentence of this type.
60. It is notable that from this point, the plans to obtain investment proceeded between Mr Diamandis, Mr Woollett and various advisors, but without involving Mr Simpson, and with the shareholding to be allocated to Mr Simpson being whittled down, from a starting point of parity with Mr Diamandis to no allocation at all.

12 October 2021 proposal – 12% differential

61. On 12 October 2021 Mr Woollett emailed Mr Diamandis, setting out what he called “the impact on overall ownership by targeting a 12 per cent differential between you and John in ownership following Lyndon’s equity investment. To my thinking this seems very fair. I have also shown the effect of issuing options to management for a further 10% of the company.” Noting that the Whitlock investment of £550,000 “buys 20%”, the table he produced showed what was termed a “Tilon Ownership Structure”, with Mr Diamandis commencing with an allocation of 54.15%, Mr Simpson 40.85%, and Ms Leanord 5%. The table goes on to show the anticipated dilution of those interests: following Mr Woollett being granted his 15%, the inward Whitlock/Walsh investment at a combined 20%, and donation of 5% to three members of staff, Mr Diamandis would end up with 34.98% and Mr Simpson with 23.02%, a differential of 11.96%.
62. Mr Diamandis appeared to run this scenario, or at least the differential being proposed, past Mr Simpson by text dated 12 October 2021, asking “does acceptable mean a 12% different?”. Mr Simpson concluded the exchange that followed by texting (he says on 13 October 2021) “to be very clear, I have not agreed to anything. I don’t understand what you are talking about in regards to any changes in shares being agreed, all I said clearly was let’s have a meeting which includes everything.” Mr Diamandis responded “Let’s leave it”, to which Mr Simpson simply replies “Fine”.
63. The following day there were further text exchanges, with Mr Diamandis saying that he believed he had earned the difference in shares and “was hoping this was a given”, and that he had unfortunately believed there was an agreement and had texted both Mr Woollett and Mr Brooke “which I will undo today”. Mr Simpson replied “Ok I’m now wanting to discuss with Andrew and yourself a way forward, because at the moment, I’m very very unhappy and I guess you are too. We can only go forward by open discussion I would think. Texting and phone calls are not working, and are resulting in just more confusion.”
64. Mr Simpson did not agree at that stage to a differential in shareholdings as between himself and Mr Diamandis, nor did he subsequently agree to any such differential. From then on, discussions and proposals about the post investment structure of the business and shareholdings did not involve Mr Simpson at all.

Mr Brewis’ meeting 20 October 2021 and email 21 October 2021

65. The next event of any significance was a meeting on 20 October 2021 between Mr Woollett, Mr Diamandis and Mr Brewis, Mr Diamandis’s solicitor at Carbon Law. Mr Brewis provided a witness statement on behalf of the Respondents the contents of which were agreed by Mr Simpson. Three important points emerge from his witness statement. First, Mr Brewis is clear that the separation of TCGL from AJHL was presented to him by Mr Woollett and Mr Diamandis “as a critical requirement”. The idea emanated from them, not from him. This is contrary to the evidence of Mr Diamandis in his witness statement at paragraph 237, where he says that it was Mr Brewis who advised that TCGL would have to be separated out of AJHL into a new

holding company. Second, Mr Brewis advised that a sale of the TCGL shares could be approved by a board resolution. The AJHL board comprised a sole director, Mr Diamandis, who could therefore make this resolution alone. Since it was a substantial property transaction it would also require approval by shareholders by ordinary resolution, requiring a bare majority. He contrasted this with a dividend in specie, the mechanism proposed by Mr Brooke, which would require the unanimous agreement of all current shareholders. Third he was emphatic that the shares must be sold at a fair value.

66. By email dated 21 October 2021 to Mr Diamandis and Mr Woollett, Mr Brewis set out his record of the “agreed steps we discussed”. He referred to AJHL and its “two wholly owned subsidiaries (one of which is [TCGL]). There is a commercial driver to separate the two subsidiaries as they are very different businesses. Tax is not a driver.”. He went on to record the next steps which include setting up a new company, with shares issued on incorporation at a nominal value in desired proportions to the new owners of TCGL allowing for dilution when the convertible loans notes to be issued to Mr Whitlock were converted. Importantly the next steps were that the AJHL board (identified as Mr Diamandis) would obtain advice on a fair value for TCGL. It was noted that “this may be low given that it needs a cash injection to survive and that is not available from the existing shareholders.” It was then contemplated that the AJHL board (again identified as Mr Diamandis) would resolve to sell TCGL for “not less than its “fair value” – however that is comprised.” Next, there would be an AJHL shareholder resolution to approve the sale notwithstanding any conflict of interest; and it was recorded that a simple majority was required. It was noted that after completion “AJHL would be as it now is but with the benefit of whatever consideration it received for Tilon”; and that the new company and TCGL, its wholly owned subsidiary, would be “an entirely separate group”. Lastly, it was recorded that “Time is short and you wish to complete swiftly”.
67. The following points emerge. First, this is the first record of any suggestion that TCGL would be sold out of AJHL into a new company. Secondly, it was contemplated that the sale would take place pursuant to an AJHL shareholder resolution for which a bare majority would be sufficient. This route was chosen because, on Mr Brewis’ advice, it was apprehended that the steps required for a dividend in specie, as originally proposed by Mr Brooke, would require the unanimous agreement of all AJHL shareholders, each of whom would therefore have the power to block the sale. Thirdly, Mr Simpson had neither attended the meeting with Mr Brewis on 20 October 2021, nor was he the recipient of the follow up email. Mr Simpson was unaware of these plans at this time. Fourthly, one of the steps recorded as agreed was that Mr Diamandis would obtain “advice on a fair value for Tilon”. Mr Diamandis did not obtain any such advice. Rather, he relied on the references to potential value of Mr Brooke as recorded in the email dated 1 October 2021.

24 October proposal – 20.75% differential

68. The next relevant document is an email of 24 October 2021 from Mr Woollett to Mr Brewis and Mr Diamandis. A further investor had been sourced, a Mr Wynter-Bee, a friend and colleague of Mr Woollett who wished to invest £137,000 in return for 5%

of the shares in the new company. That brought the total external investment to 25 per cent of the new company, assuming conversion of the convertible loan notes. The impact on the shareholdings in the new company (referred to as “new Tilon”) were spelled out in is as follows:

<u>Shareholder</u>	<u>Percentage</u>
<u>Allocated</u>	
Mr Diamandis:	36.75
Mr Woollett:	11.25
Ms Leonard:	6.5
Staff:	5
<u>Unallocated</u>	
Mr L Whitlock:	13.33
Mr Walsh:	6.67
Mr Wynter-Bee:	5
Mr Simpson:	16

69. This proposal distinguished Mr Simpson from Mr Diamandis in two ways. First, Mr Diamandis is described as having allocated shares, whilst Mr Simpson is in the “Unallocated” group. Second, the differential between the shareholdings of Mr Diamandis and Mr Simpson has grown to just over 20%. Mr Simpson was wholly unaware this proposal.
70. In the draft documentation provided by Mr Brewis with this email, he had inserted a provisional value of £10,000 payable by THL for TCGL, on a “to be confirmed basis”. The next day it was suggested by Ms Leonard that the value should be raised to £150,050, which was the nominal share value of TCGL, in order to settle an inter-company debt owed by TCGL to AJHL. Mr Brooke accepted this by reply of the same date, observing “... the value of the Tilon shares is not of huge importance to the transaction, just a bit more stamp duty.” This demonstrates that he at least was not focussing on the fair or market value of TCGL.

25 October proposal

71. By email dated 25 October 2021, Mr Woollett sent to Mr Diamandis and Mr Brewis a table showing a further scheme of shareholdings in THL, to assist Mr Brewis in filling out the Schedule to the shareholder agreement he was drafting. He proposed the following allocation:

<u>Shareholder</u>	<u>Percentage</u> <u>on formation</u>	<u>Percentage</u> <u>after conversion/dilution</u>
Mr Diamandis	49.0	36.75
Mr Woollett	15.0	11.25
Ms Leonard	8.7	6.5
Staff (combined)	6.0	4.5

General	21.3	16
Mr Whitelock		13.33
Mr Walsh		6.67
Mr Wynter-Bee		5.00

72. In his response of the same date, Mr Brewis indicated that he understood that the general shareholding would be available for Mr Simpson “if he comes with the project”, and if he did not then they would be allocated amongst the original shareholders with a view to preserving the existing distribution. Mr Woollett replied: “Glad it helps, but if JS doesn’t want to come to the party the distribution of general will be up to Mike.” Mr Simpson was unaware of this proposal.

Mr Simpson’s requests for information

73. On 26 October 2021, Mr Simpson texted Mr Diamandis asking for a progress report and requesting a meeting to discuss the shareholder agreement. Mr Diamandis did not reply. On 29 October 2021 a letter was sent by Ms Laura Chandler, a partner in Mishcon de Reya (MDR), on behalf of Mr Simpson to Mr Diamandis and Ms Leonard. She set out her understanding that TCGL would be undertaking a restructuring “such that it will cease to be a subsidiary of [AJHL] and will then be receiving direct investment (from a third party) with some additional proposed changes to its shareholding.” This relates back to Mr Brooke’s proposals contained in the email of 1 October 2021, and reflects the latest information that Mr Simpson had been given as to the proposals. A request was made for documentation in respect of the proposals, together with any tax advice, so that Mr Simpson had the time he needed to review the documentation and take advice before any implementation, and also to do his own planning. This letter received no response.

Effecting the Transfer

74. In the following period documentation was prepared by Mr Brewis and sent for review to Mr Woollett, Mr Diamandis, and Ms Leonard, and to the external investors and their lawyers, but not to Mr Simpson or Ms Chandler. A draft shareholder agreement was updated to provide for Mr Whitlock and Mr Wynter-Bee to invest through their companies, Plaspac UK Ltd (“Plaspac”) and Wynter Bee Resources Ltd (“WRBL”) respectively. It was also agreed that Mr R Whitlock (Mr L Whitlock’s brother, and business partner in Plaspac) be appointed as a director of THL, and the documentation was updated accordingly. The documents relating to the shareholding and investment in THL, and those effecting the Transfer, were finalised on 5 November 2021. They made no reference to Mr Simpson. There were no unallocated or general shares. Mr Diamandis’s allocation was set at 70.3%, reducing to 52.75% upon dilution after conversion of the convertible loan notes. Mr Simpson had simply been written out of the picture in terms of any shareholding in THL.

75. On 8 November 2021, Mr Diamandis sent Mr Simpson a draft AJHL shareholder written resolution, seeking approval for the transfer of TCGL to THL for a

consideration of £150,050, and ratification of any conflict of interest by Mr Diamandis.

76. By letter to Mr Diamandis dated 10 November 2021, Mr Simpson through MDR objected to the resolution on three grounds: (1) it was wrongly predicated on Mr Simpson being a minority shareholder in AJHL (this was a misstatement on the part of Mr Simpson, a mistaken understanding which endured through to the late stages of this litigation, and abandoned shortly before the trial); (2) the disposition was to a related party at a gross undervalue; and (3) the Transfer was a breach of Mr Diamandis's duties as a director of AJHL.
77. The resolution became effective upon the approval of Mr Diamandis and Ms Leonard on 12 November 2021. Mr Woollett and Mr R Whitlock were registered as directors of THL on the same day. On 24 November 2021 the THL shareholder agreement between Mr Diamandis, Mr Woollett, Ms Leonard, Plaspac, WBRL, and the three staff members to whom 5% of shares were allocated became effective. Mr Simpson was allocated no shares in THL. Loan notes were prepared to accompany the Transfer, at 20 percent in return for £550,000 in respect of Mr Whitlock's Lyndon company investment, and 5% in return for £137,000 in respect of Mr Wynter-Bee's company investment. These were issued in stages between 8 November 2008 and 19 April 2022.

Post Transfer meeting

78. On 13 December 2021, Mr Diamandis and Mr Simpson met at Burford Garden Centre. Their accounts of the meeting differ sharply. Mr Simpson says Mr Diamandis refused his offer of a coffee, stated that it would not be possible to reverse the situation following the Transfer since he had now sold Tilon for between £1m and £1.2m to "lots of people", and confirmed that Mr Woollett had been involved in the sale. Mr Diamandis became increasingly agitated and raised his voice. Mr Simpson asked him to calm down, at which point Mr Diamandis stood up and left.
79. Mr Diamandis's evidence was that he thought the meeting was to discuss the shares that Mr Simpson was to have in THL. He says he was still willing to offer him a significant holding in the business, either by writing off some or all of Mr Simpson's loan (presumably the loan to TCGL) or failing that as an act of goodwill. He went to the meeting with the intent to tell Mr Simpson that he was holding 15% of the shares in reserve for Mr Simpson, to be sourced entirely from his own shareholding. He says Mr Simpson raised his voice and was aggressive in his approach. The meeting was heated and he did not get a chance to discuss any of what he had intended to discuss. He walked away after telling Mr Simpson that they could talk again after Mr Simpson had calmed down. He wishes now he had made it clear that Mr Simpson still had a place in the business if he wanted it. Mr Diamandis stated when giving oral evidence that that is still his position. He confirmed that no offer to that effect had ever been made to Mr Simpson.
80. I find it most unlikely that Mr Diamandis attended this meeting with the intention of offering shares in THL to Mr Simpson. The final proposal for share allocation prior to

the Transfer did not include Mr Simpson. Although he says in his witness statement, and he said when he was giving evidence, that it was still his intention that Mr Simpson have shares in THL, no such offer has ever been made, not even after Mr Diamandis confirmed in court that he still intended Mr Simpson to be offered a share in THL. I find that Mr Diamandis did not attend with the intention of offering shares in THL to Mr Simpson, nor did he retain any intention to do so after the Transfer. His suggestion that he still has any such intention is frankly incredible in the light of the events I have described, and in the context of this petition.

Post Transfer investments

81. To complete the story of investment, funds were initially provided under the loan notes in early November, with Plaspac paying the outstanding amount due in February or March 2022. THL required further cash injections, and Plaspac subscribed for further loan notes in the sum of £315,897. WBRL paid a further £15,795 in order to preserve its shareholding at 5%. In the result, the shareholdings in THL were as follows (assuming conversion of the loan notes):

<u>Shareholder</u>	<u>Percentage</u>
Mr Diamandis	45.71
Mr Woollett	9.75
Ms Leonard	5.63
Staff (combined)	4.9
Plaspac	30
WBRL	5.

82. That is a factual background against which I will now turn to determine the Issues in the light of the statutory framework and the authorities.

Issue (1) – was the Transfer made at an undervalue?

83. If the Transfer was not at an undervalue, and AJHL was fully compensated for the transfer of its shares in TCGL, no question of prejudice to Mr Simpson arises. So the first thing that must be established is the value of TCGL at the date of the Transfer. This question depends principally on the evidence of the experts.

84. I heard from Mr Gavin Pearson of Quantuma Advisory Limited on behalf of Mr Simpson and Mr Isaacs of Milsted Landon LLP on behalf of Mr Diamandis and Mr Woollett. Each had prepared a report, and each had been instructed to address the question set out in the order of Deputy Judge Frith dated 24 June 2022: to produce an expert report on company valuation, specifically (1) the value of TCGL when transferred in November 2021, and (2) its current value.

85. The rival valuations are as follows

	<u>November 2021</u>	<u>June 2023</u>
Mr Pearson	£2.9m	£3.2m
Mr Isaacs	£0	£2.34m - £2.43m

86. The experts' joint statement dated 26 June 2023 sets out the agreed background facts relevant to the financial condition of TGCL. Management accounts from May 2021 to November 2021 showed TGCL to be loss making, with net liabilities. It was insolvent on a balance sheet basis at the beginning of November 2021. Revenue significantly improved from £1.3m to £2.4m in the year ending April 2022. However, an increase in expenses during that period (in particular in energy costs and management fees) resulted in increased losses. In the year ending April 2023, profitability had improved such that it was close to break-even point at an EBITDA level.
87. In the period leading up to November 2021, a number of detailed projections were prepared for TCGL by its management, varied to reflect the effect of operating the business on one, two and three production lines. Those projections forecast a significant improvement in financial performance. It is common ground that the funding received by issuing convertible loan notes in 2021 and 2022, and the WRAP government funding, allowed TCGL to stabilise its financial position and to expand its operations. There was nothing in the management accounts for the year ending April 2023 that caused either expert to make any material changes to their valuations. At 26 June 2023 (the date of the joint statement,) it was forecast by the management of TCGL that there would be a significant improvement in financial performance in the year ended 30 April 2024, and beyond. The experts agree that their respective current valuations – that is to say, as at 26 June 2023 – are within a range of reasonable valuation outcomes at that date.
88. They both accept that the loan notes issued by THL (and used to fund TCGL), and the rate at which they can be converted into shares, whilst not exactly analogous with the equity value, are of assistance in valuing TCGL as at June 2023, albeit they do not agree as to the conclusions on value that can be derived from them. Equally, it is common ground that in practice an earnings/multiple approach, a discounted cashflow (“DCF”), and a balance sheet approach are all standard valuation methodologies widely used when valuing companies and shareholdings. They agree that actual transactions involving the same company or business can be of assistance in deriving value, and that in principle loss making companies can have value.
89. The chief, and stark, difference between the experts on the issue of the value of TCGL at the date of the Transfer lies in the valuation approach each has adopted. Mr Pearson has performed the exercise on the basis that TCGL was a going concern at the date of valuation, and he has adopted a DCF as the basis of valuation, based on the projections made by TCGL shortly before the Transfer. That methodology provides an indication of value by converting anticipated cash flow to a single current value, using a discount rate which reflects the risk of the anticipated cash flows not being achieved. Mr Pearson has applied what he described as a fairly high discount rates of 20 and 25% in his calculations to reflect the risks.
90. By contrast Mr Isaacs has performed the valuation on the basis that as at November 2021 TCGL was not a going concern. His opinion was that if the Transfer had not

taken place, TCGL would have been forced to cease trading within a very short timeframe either because the electricity might have been cut off or by virtue of recovery action that he considers would have been likely to have been taken by creditors (Joint Statement section 4.1). He regarded TCGL as cash flow insolvent, on the basis it would be unable to pay its debts if they fell due. He accepted that everyone involved at that stage intended that TCGL would be able to pay its debts as they fell due because it anticipated receiving the cash pursuant to the loan notes that were to be issued. He said:

“It is all a question of timing. So the company was cash flow insolvent until such time as it had the benefit of the loan note investments. Once it had the benefit of those loan note investments it ceased to be cash flow insolvent because it had an injection of cash”.

91. Under cross examination, Mr Isaacs accepted the proposition that his approach, which was essentially to value TCGL on the basis of a distressed sale, was counterfactual. He confirmed that he had not been instructed to perform the valuation on the basis of a distressed sale, but it was his opinion that in November 2021 the seller was distressed. His evidence was that this was the case prior to TCGL issuing the loan notes and receiving the cash, on the basis that the seller would not prior to that point have been able to achieve market value.
92. By the same token, Mr Isaacs accepted that after the loan notes had been issued, and TCGL had received the first tranche of cash, any sale would then become a market value sale, because TCGL would be able to meet its debts and would therefore no longer be distressed. He accepted that on 8 November 2021 loan notes in TCGL were issued in the total sum of £687,500, albeit the cash came in in tranches, with £237,000 arriving in November 2021 and the remainder being paid in March 2022.
93. Importantly, when asked what date he had taken on which to perform the valuation on the counterfactual basis, he was unable to provide an answer, beyond stating that the outcome would be different depending on which date in November one were to choose to perform the valuation. At one point he suggested that if the Court were to conclude that following the receipt of the £237,000 TCGL was no longer cash flow insolvent and so not a distressed seller, then the sale would be a market based sale. This evidence was somewhat confusing, given that Mr Isaacs had himself stated that it was his own opinion that after receipt of the loan note cash the sale would proceed on a market value basis. I accept his evidence on that, and insofar as necessary find that following the issue of the loan notes on 8 November 2021 TCGL was not cash flow insolvent, and that any transfer thereafter was on a market basis, between a willing seller and a willing buyer.
94. I reject Mr Isaac’s evidence that the valuation should be performed on a distressed sale basis, for the following reasons. First, his characterisation of the sale as a distressed sale is flawed. He accepts that his approach is counterfactual. He confirmed that he was not instructed to value on that basis. The order of Deputy Judge Frith dated 24 June 2022 gave permission for each party to rely on a written expert

report on inter alia “the value of [TCGL] when transferred” (emphasis added). I was not addressed on the meaning of that Order, but in my view there is no room for doubt: it means a valuation of TCGL as at the date of the Transfer. That can only mean a valuation in the factual circumstances which obtained at the time of the Transfer. There is a good reason for this, and so obvious it went without saying in the Order: if Mr Simpson’s case is made out, then the moment at which he suffered the prejudice was the moment at which TCGL was transferred out of AJHL. Moreover, that this was Mr Isaac’s own understanding appears from his expert report (at paragraph 1.3.1) where he states in terms: “I have been instructed to provide my opinion as to the value of [TCGL] when its shares were transferred in November 2021 and its current value” (emphasis added). Its shares were transferred on 12 November 2021. In the light of the Order, and of his own understanding, for him then to proceed on a counterfactual basis, choosing a valuation date prior to the date of the Transfer, on which date the factual matrix was materially different from that obtaining on the date of the Transfer, is an oddity he failed to address and failed to explain.

95. Relatedly, Mr Isaac’s inability to identify the date on which he was performing the valuation was telling. He chose an unspecified date in early November, prior to the issue of the loan notes on 8 November 2021. His evidence was that the basis of the sale would change from a distressed sale to market value after they had been issued. He gave no account of why he chose the earlier date. It remains a mystery why he chose the earlier date. The failure to provide a reason lends some force to the submission that the date was chosen in order to justify a basis of valuation which would lead to the result that TCGL had no value. I do not however need to decide that in order to reject the basis of valuation as unjustified, and plainly wrong, for the reasons given.
96. I further hold that even if it had been correct to value TCGL on an earlier date, the circumstances that Mr Isaacs relied to value TCGL on a distressed sale basis were exaggerated. He referred to the threat that the electricity might be cut off, and also to the possibility of creditors taking recovery action. It is true that TCGL had experienced cash flow difficulties in meeting the electricity bill in October 2021, but there was no evidence that the provider, SSE, had commenced any process of enforcement, much less reached the stage where a threat to cut off supply had been made. Whilst that would be the feared eventual outcome should the bill remain unpaid, such outcome had neither eventuated nor been threatened in October; and there is no evidence of live problems in paying the electricity bill in the early days of November, the period in which Mr Isaacs says he is valuing. Secondly, no creditors had threatened action for recovery, and Mr Isaacs was only able to name the electricity company as one creditor who might do so. In suggesting that those are two separate reasons, he is double counting.
97. So the circumstances Mr Isaacs claimed justified his valuing on the basis of a distressed sale simply did not exist. His evidence amounted to no more than that, if the investment promised by Messrs Whitlock and Wynter-Bee did not come good, then TCGL would have been in challenging circumstances, and would have probably

ended up being sold in a pre-pack administration at a very low value. Given my conclusion as to his basis of valuation, I do not need to address his evidence on that, save to observe that whilst that could possibly be argued prior to 8 November 2021, it simply had no application on 12 November 2021, when the shares were transferred.

98. Accordingly I reject the basis for valuation which led to Mr Isaac's evidence that the value of TCGL in November 2021 was zero. I also reject the evidence that in the events leading to the Transfer the value of TCGL had at any point been zero.
99. Mr Isaacs agreed that following the loan notes being issued, the Transfer was able to command market value, which means, in the absence of any special instructions, the price that would be paid by a willing buyer to a willing seller as opposed to a forced or anxious seller. He did not however accept Mr Pearson's valuation basis of constructing a series of DCFs based on TCGL director/management forecasts in the period leading up to the Transfer.
100. Mr Pearson relied on the detailed forecasts prepared by the directors and management of TCGL in the period leading up to November 2021, as providing a firm basis for a DCF model to be applied. Those forecasts were prepared on the basis of TCGL operating one, two or three production lines, representing the different options facing TCGL at that time. Mr Pearson then provided a weighting to the three valuations; giving 50% to the lowest valuation, on the basis that it was predicated on the business continuing with the sole production line it was then operating; with lower 25% weightings applied to each of the less certain scenarios of two and three productions lines respectively. Those calculations produced a valuation of TCGL at the date of the Transfer of £2.9m.
101. Mr Isaacs did not accept that a valuation based on a DCF methodology was reliable, on the basis that the forecasts produced values that differed dramatically: £1.68 million if TCGL was operating one production line, £6.41 million if it were operating two production lines, and £2.84 million if it were operating three. I do not accept the logic of that criticism; the forecasts varied so widely because the key variable – the number of production lines – had a dramatic effect on forecast income and costs. Mr Pearson's evidence was that, beyond the variation in production lines, there was not a large number of other variables and it was not a difficult DCF valuation to perform.
102. Mr Pearson was cross examined on his deployment of the DCF methodology on the basis that current expectations as to future performance may prove inaccurate. It was put to him that this undermined the accuracy of the valuation obtained using DCFs, the implication being that it undermines the reliability of the methodology in terms of deriving a present value. Mr Pearson explained, cogently and persuasively in my judgment, that when calculating a DCF one applies a discount rate which reflects the risks of each of those cash flows not being achieved. For this reason he had applied what he described as fairly high discount rates of 20 and 25% in his DCF calculations. His use of these rates as adequate to reflect the risks involved was not

challenged. Further, I accept the submission that for the purposes of the valuation exercise, matters arising after the valuation date are irrelevant.

103. The calculations in the projections themselves were not the subject of challenge as to their particulars either in the experts' Joint Statement or at trial, nor were submissions made that the predictions were faulty in their input or calculations. The disparity between valuations based on variation in the number of production lines is not therefore indicative of faulty projections; it merely demonstrates the profound effect that the TCGL management calculated different levels of production would have on the finances of TCGL. Mr Pearson was content to rely on the forecasts as having been produced by TCGL management, who were in the best position to make the forecasts. The forecasts had also been produced to banks and potential investors, and Mr Pearson regarded himself as entitled to rely on them as reasonable estimates of the future potential of TCGL, assuming appropriate investment could be sourced. He pointed out that was a normal basis on which DCFs were undertaken. Neither Mr Simpson nor Mr Woollett contended that those forecasts were in any way flawed at the time they were made, and so should not be used as the basis of DCF approach to valuation.

104. I accept that in the light of the three possible levels of production, the value produced by the DCF methodology as a basis of calculation is principled, well reasoned, and rooted in appropriate and relevant evidence and data. I accordingly accept the value that Mr Pearson calculated using the DCF method of valuation as at November 2021, namely, £2.9 million.

Loan notes as a guide to value

105. Mr Pearson and Mr Isaacs had diverging opinions as to the extent if any to which the issue of the loan notes support any conclusion on value. Neither relied on this approach for the purposes of reaching their valuation as at November 2021. When Mr Pearson performed the loan note based valuation as at the date of the Transfer, he arrived at a similar valuation (at £2.75 million) to the DCF based valuation. Mr Pearson reasonably acknowledged that that could have been coincidence. Mr Pearson was asked about his views on the utility of the loan notes to deriving a valuation at a given time, and he gave detailed answers. Whilst maintaining (when pressed) his opinion that a value could be derived from the conversion rate of the loan notes issued in November 2021, he was not relying on that approach to calculate a November 2021 value.

106. Indeed Mr Isaacs had been instructed that the November loan note investments should not be considered as an asset of TCGL for the purposes of his valuation. He does not say whether he agrees with that approach, but gave evidence that that the receipt of the November 2021 loan note cash by THL had no effect on the value of TCGL because it had no effect on its net assets, simply replacing liabilities due to suppliers with a corresponding liability to THL to the extent that THL had settled those liabilities on TCGL's behalf. His view (paragraph 3.9.9 of his report) is that the income produced would only have alleviated TCGL's cash flow insolvency once the Transfer had completed and the debt to THL became what he termed a "soft" liability.

Mr Isaacs was specific (at paragraph 4.3 of the Joint Statement) in his view that “the value implied by the loan note conversion rate is not indicative of the value of the company at the date of investment because the investment was made by way of a loan rather than by way of an allotment of shares.” He accordingly disavowed the relevance of any valuation based on the loan notes for the purposes of the valuation at 12 November 2021.

107. Whilst the loan notes are relied on as being relevant for the assessment of value as at June 2023 (if that issue becomes relevant) neither expert advocates using them for the purposes of the November 2021 valuation. Accordingly I do not need to decide between the rival opinions on the extent if any to which they speak to value on that date.

108. To conclude on the expert evidence: I reject the basis of valuation adopted by Mr Isaacs. He was valuing on the wrong date, and the chosen valuation basis – that of a distressed sale – did not apply on the correct valuation date. I further consider he was wrong to adopt that approach at the earlier date (pre loan note issue) in any event, since the facts underpinning that approach were exaggerated and did not justify a conclusion that the sale would have taken place on a distressed sale basis. I accept Mr Pearson’s methodology based on DCFs, the particulars (as opposed to the outcomes) of which were not seriously challenged. In any event the forecasts on which the DCFs were calculated were supplied by the management of TCGL in its quest to secure investment, and neither Mr Diamandis nor Mr Woollett has suggested that the forecasts were inaccurate or flawed. I reject the contention that the method is undermined if subsequent events show the forecasts to have been misplaced. The risk of that is catered for by the discount rate applied, and Mr Pearson adopted a reasonably high rate for that reason. Neither expert invites me to determine the value of TCGL on the date of the Transfer by reference to the conversion rate of the loan notes. Accordingly, I find that the value of TCGL as at 12 November 2021, the date of the Transfer, was £2.9m. It follows that the sale of TCGL for £150,000 was at a substantial undervalue.

Issue (2): Was the Transfer at the price of £150,000 unfairly prejudicial to the interests of Mr Simpson?

Prejudice

109. At the time of the Transfer, Mr Simpson owned (and continues to own) 47.5% of the shares in AJHL. Prior to the Transfer, TCGL, which was worth £2.9 million, was AJHL’s principal asset. Following the Transfer to THL at a price of £150,050, the value of AJHL was reduced by just short of £2.75 million. Mr Simpson’s share of the value of TCGL was diminished by 47.5% of £2.75m. It is hard to see any basis on which it could possibly be argued that the Transfer at an undervalue was not prejudicial to Mr Simpson. It is hard to conceive of a clearer example of the economic value of the petitioner’s shareholding being seriously diminished by reason of the conduct on the part of a person with *de facto* control of the company, namely, Mr Diamandis. Mr Diamandis’s actions and omissions as sole director are properly regarded as the conduct of the affairs of AJHL. The financial prejudice caused to

AJHL by the Transfer at an undervalue is tantamount to financial prejudice to the interests of its member as holder of its shares: see *Re Macro (Ipswich) Limited* [1995] 2 BDLC 354, at 404d.

110. The prejudice was caused by the conduct of AJHL's affairs within the meaning of Section 994(1)(a), and/or by an act or omissions of AJHL within the meaning of Section 994(1)(b) of AJHL, through the actions of its director Mr Diamandis, in selling TCGI at a significant undervalue; and organising the sale to THL such that Mr Simpson as a minority shareholder was unable to participate in or influence the resolution taken by the Board of AJHL. Mr Simpson's protests against the Transfer at what he reasonably (and correctly) believed to be a significant undervalue ignored. Similarly, the failure to keep Mr Simpson apprised of the developing proposals, and the form and structure of the ultimate sale, in effect not merely keeping him out of the loop but wholly excluding him from any involvement in the affairs of AJHL, were omissions of AJHL, or the conduct of its affairs, which caused the prejudice to Mr Simpson.

Unfairness

111. Given my findings on Issue (1), it is hard to see that the prejudice to Mr Simpson can be anything other than unfair. The unfairness must be assessed against the particular factual background, which in this case includes the close working relationship between Mr Simpson and Mr Diamandis for a number of years, and their parity of shareholdings. Whilst Mr Simpson was not involved in the day to day management, he had always been involved with Mr Diamandis in the strategic decision making, and as Mr Diamandis acknowledges in his witness statement, Mr Simpson operated as a shadow director. It is evident that at the beginning of the process of seeking investment the two were working closely together, as they always had. It is equally evident that whatever structure was being contemplated to receive the inwards investment, the planning process originally involved them taking joint decisions, and proceeded on the presumption of perpetuating the parity of shareholding as between the two of them.
112. The two had worked together very closely over a number of years. I find that they reposed such trust and confidence in each other, and had such mutuality of interest, that their business relationship was that of a quasi-partnership. It was a clear breach of that trust and confidence for Mr Diamandis to create a scheme whereby he deprived Mr Simpson of the value of his shareholding in AJHL, whilst preserving the value of his own.
113. The immediate source of the breakdown of relations between the two men appears to have been twofold. First, Mr Diamandis' belief, albeit misguided, that since Mr Simpson had converted his previous loans to the AJHL into a contractual loan, with clear repayment terms, he had in some way forfeited his status as a shareholder/investor, and "ceased to be a fellow investor and became another creditor" (Mr Diamandis's witness statement paragraph 117), and again "[John] wasn't paying anything and had become an effective creditor" (Mr Diamandis's

witness statement paragraph 230) . It is correct that Mr Diamandis agreed under cross examination that this was not true, because Mr Simpson retained his shareholding notwithstanding the loan agreement. Mr Diamandis could hardly do otherwise. But he gave the clear impression that he regarded Mr Simpson as somehow renegeing on an understanding that shareholders should not require the repayment of loans, and that to do so was contrary to their role in the company as shareholders. Equally they should be prepared to lend sums from time to time when the company was in difficulty. Mr Simpson was in Mr Diamandis' eyes no longer playing the game, as Mr Diamandis saw it.

114. Secondly, it appears that Mr Simpson's refusal to fund the electricity bill at the beginning of October led to or hastened a change of behaviour and attitude in Mr Diamandis. He seems to have been fortified in breaking away from Mr Simpson by having Mr Woollett at his side, as partner and confidant, and providing him with the credentials and the confidence to complete the investment of Messrs Whitlocks and Mr Wynter-Bee. (I shall consider the precise role played by Mr Woollett in more detail when I come to consider whether he is liable to Mr Simpson.)

115. There were three elements to the plan as it evolved over time. First, there was the extraction of AJHL into a new holding company. There is no evidence that Messrs Whitlock, Mr Wynter-Bee, or Mr Woollett gave Mr Diamandis any cause to believe, as he says he did (witness statement paragraph 239), that they would not invest whilst AJHL was saddled with the windows business. Neither did Mr Wesseley, when he was involved, make any of this offers conditional on separating AJHL and TCGL. Mr Whitlock, who was a respondent and originally gave a witness statement in support of his defence of the claim, states in terms that he never stated it to be a condition of his investing that those companies be separated, but that Mr Diamandis and Mr Woollett did convince him of its necessity. Under cross examination on this point Mr Diamandis was evasive, saying he could not remember whether Mr Brewis initially advised that TCGL has to be separated from AJHL, despite his witness statement expressly stating so. Finally, after the line of questioning was sustained, he confirmed that the commercial impetus to separate the two subsidiaries was something that he and Mr Woollett agreed then told to Mr Brewis, not the other way round.

116. Accordingly I reject Mr Diamandis's contention that any investor ever required such a separation. Nor is it the case that it was Mr Brewis who advised at the meeting on 20 October 2021 that the separation of TCGL from the windows and doors enterprises was necessary, and best achieved by transferring TCGL shares out of AJHL and into a new holding company, as Mr Diamandis asserts (witness statement paragraph 237). It is clear, both from Mr Brewis' unchallenged witness statement and from the email he had sent the day following their meeting, that that corporate uncoupling was an idea presented to Mr Brewis by Mr Diamandis and Mr Woollett when they met with him on 20 October 2021.

117. It does not appear that, at that stage, the decision had yet been reached to cut Mr Simpson out completely. His allocation following this new structural change was

by now subject to a large differential, as compared to Mr Diamandis's shareholding, of some 20%. So whilst his interest was being whittled down, he was not yet out of the picture. But the process of hiving off TCGL out of AJHL and into THL was crucial: it permitted the transaction to take place by bare majority, allowing Mr Diamandis, with the support of Mr Leanord's 5% share, to control the entire process, and to make the transfer into a company wholly owned and controlled by him, the allocation of shares in which would be in his exclusive gift. By the meeting with Mr Brewis, this idea had clearly been conceived, and formed an integral part of the Scheme.

118. Secondly there was the gradual erosion of Mr Simpson's interest from 47.5%, on a par with Mr Diamandis's, to zero. The concept of a differential was first introduced by telephone and text messages on around 12 October 2021 between Mr Diamandis and Mr Simpson, where they found no favour with Mr Simpson, who made it clear to Mr Diamandis by text that he had agreed to nothing, regardless of what Mr Diamandis may have thought had been agreed following an earlier telephone call between the two. I accept Mr Simpson's evidence that he had not agreed to any differential and to the extent that Mr Diamandis genuinely thought agreement had been reached he was mistaken. In any event he could have been in no doubt that Mr Simpson's last word on the subject was that he emphatically did not agree to any differential. As the proposals continued to evolve, Mr Simpson's allocation was continually reduced until finally, just prior to the Transfer, it was set at zero. Thereafter Mr Diamandis was in a position to exploit the opportunities presented to him by the transfer of TCGL into a new holding company of which he was the sole owner.
119. Thirdly, there was the exclusion of Mr Simpson from the planning and decision making process. Mr Diamandis is wrong to say he kept in touch with Mr Simpson throughout this period. He did not communicate with Mr Simpson at all after the cantankerous text exchange ended abruptly on 13 October. To suggest otherwise, as Mr Diamandis does, is misleading. Mr Simpson was not involved in whatever planning sessions Mr Woollett and Mr Diamandis had between 12 October 2021, nor in the meeting with Mr Brewis on 20 October 2021. He was completely unaware of the plan to transfer TCGL into a new holding company, and unaware of his share allocation dwindling through each iteration of the proposal.
120. Accordingly, I find that Mr Diamandis, together with Mr Woollett, came up with the idea first of hiving TCGL off into AHL, and of doing so in a way that did not depend on Mr Simpson's agreement or even prior knowledge (save for being notified at the last minute of the vote on the resolution); and secondly, of allocating Mr Simpson no shares in THL, which was to be under the sole control of Mr Diamandis. Moreover I note Mr Diamandis's evidence that the 12% differential, the first move in the series, was his idea, and that he told Mr Woollett that is what he wanted to try and achieve with Mr Simpson. That was his evidence under cross examination and he was not challenged on it. I have already stated that I do not accept Mr Diamandis's evidence that he intended to offer a shareholding in THL to Mr Simpson at the

meeting on 13 December 2021. Mr Simpon denies that any such offer was made at that meeting, and it is common ground that no such offer has been made since that final meeting. Mr Diamandis's evidence on this borders on the fanciful.

121. The final important element of the Scheme was the price. I have already determined that the value of TCGL at the date of the transfer was £2.9m. I do not accept that Mr Diamandis believed it to be worth only £150,050. He says that he relied on the advice of Mr Brooke. However, Mr Brooke was an accountant, not a property valuer, and Mr Diamandis was aware that, when Mr Brooke expressed an opinion on the value of TCGL, his interest was to minimise tax liabilities arising on any transfer. Mr Brewis made it abundantly clear that a professional opinion as to fair value must be sought. No such valuation was sought, in spite of the advice. It is clear that the decision to transfer TCGL for £150,050 was a key element of the Scheme, and that it had the result of depriving Mr Simpson of almost the entirety of the value of his shareholding in AJHL.

122. To my mind it is also clear that Mr Diamandis knew that the value was nowhere near as low as the price at which TCGL was transferred. Mr Diamandis has shown himself to be a shrewd businessman. He could well understand that if Messrs Whitlock were prepared to invest £550,000 by way of unsecured loans, convertible into a total of 20% of the equity in THL, and Mr Wynter-Bee to pay £137,500 to obtain loan notes convertible to a 5% share, then their views of the value of TCGL were radically in excess of £150,050. Mr Diamandis may suggest that it was only by extracting TGCL from AJHL that such additional value could be realised. I do not believe that Mr Diamandis was so naïve as to believe that. This does not appear to have been a belief he held whilst negotiating with UKSE for example, at a time when he was looking for UKSE to invest £1 million, with Mr Diamandis retaining a 52% stake in TCGL. It is also to be contrasted with his offer to Mr Wessley for 50% of TCGL for the sum of £500,000; and indeed Mr Wessley's counteroffer to pay £300,000 for 50% of the shares in TCGL. I find that Mr Diamandis did not believe that TCGL was worth only £150,050, but rather knew that its value was far in excess of this.

123. Whilst the test is objective, and does not depend on *mala fides* or subjective intention, in my judgment Mr Diamandis was at the very least wholly reckless as to the true market value of TCGL, and did not and could not reasonably have a belief that it was worth as little as £150,000. He failed to follow his own lawyer's advice to obtain a proper market valuation. He had a very good idea of just how valuable TCGL was by the levels of investment he and Mr Woollett had been able to attract. He acted unfairly, to Mr Simpson's substantial prejudice, and in breach of the relationship of trust and confidence that the two had previously enjoyed.

124. Whilst that relationship may have been beginning to pall in the months prior to the events in question, nonetheless Mr Simpson was accustomed to being involved in the decisions affecting TGCL, and used to acting in effect as a shadow director. He was entitled as an equal shareholder with Mr Diamandis to continue to be involved in

important decisions concerning TCGL, *a fortiori* where those involved dealings with his own shareholding. Against that background, it would be unfair for Mr Diamandis to rely on his strict legal right to use the majority he formed with Ms Leonard's assistance to pass a resolution approving the transfer of TCGL at such a substantial undervalue that severe prejudice was caused to its only other shareholder. I do not need to decide whether the ratification of his self-dealing was lawful. The circumstances of the Transfer are replete with unfairness. I find that Mr Diamandis was fully aware of this, and indeed (leaving aside for present purposes Mr Woollett's involvement) was the deliberate author of the unfairness. If he were not aware, then I find that a reasonable person in his position would have been aware that the Transfer was unfairly prejudicial to Mr Simpson.

125. Moreover, though it adds little, I accept that Mr Diamandis' actions involved the breach of fiduciary duties he owed as director of AJHL, in stripping out its most valuable asset, and failing to secure more than nominal compensation for the value of TCGL.

126. Similarly, Mr Diamandis breached his statutory director's duties in that he

- (1) failed to exercise his powers as a director for a proper purpose: s 171 Companies Act 2006. Securing the sale of AJHL's principal asset at an undervalue in order to acquire personal benefit was not a proper purpose;
- (2) failed to promote the success of AJHL for the benefit of its members: Companies Act 2006 s. 172. The success of AJHL would have subsisted in either retaining ownership of TCGL with the additional investment that was on offer; or selling at a market value. Mr Diamandis could have achieved either of those outcomes, but chose not to;
- (3) failed to exercise reasonable care, skill and diligence: s. 174 Companies Act 2006. Mr Diamandis was advised to obtain, and ought to have obtained, a market valuation of TCGL, and should have transferred it to THL for consideration reflecting that value;
- (4) placed himself in a position of conflicting personal interests: s. 175 Companies Act 2006. In selling at such a low value, Mr Diamandis preferred his own interests to those of AJHL.

Issue (3): Should a buy-out order be made as against (1) Mr Diamandis and (2) Mr Woollett under Section 996?

Order against Mr Diamandis

127. I have no hesitation in deciding that an order should be made requiring Mr Diamandis to buy out Mr Simpson's shares in TCGL. Before considering the parameters of that order, including the appropriate valuation date, I first consider the questions whether a similar order should be made against Mr Woollett, and if so whether his liability should be primary or secondary.

Order against Mr Woollett

128. The test for third party liability is as set out by Sales J in *F&C Alternative Investments Ltd v Barthelmy (No 2)* [2012] Ch 613 at [1096]: whether the defendant is so connected to the unfairly prejudicial conduct in question that it would be just, in the context of the statutory regime contained in Sections 994 to 996, to grant a remedy against that defendant in relation to that conduct. This requires an enquiry into whether the alleged wrongdoer was sufficiently implicated in the unfair conduct to be held liable for it.
129. I will accordingly examine the extent and quality of Mr Woollett's involvement in the Scheme in order to consider the question whether he is sufficiently implicated, or so connected, to the unfair prejudice, that it is just to grant a remedy against him.
130. On the issue of the stepped erosion of Mr Simpson's allocation of shares, Mr Woollett was aware of the increasing differentials between Mr Diamandis's proposed share allocation, and that of Mr Simpson. Mr Woollett states that all he was doing in drafting the share allocation tables was implementing instructions from Mr Diamandis, who was unfamiliar with Excel spreadsheets. It was Mr Diamandis who felt that "he was due a greater number of shares than John", and who "felt that this extra contribution should be reflected in their relative shareholdings in the new structure. This seemed quite fair to me".
131. So Mr Woollett distances himself from the process of eroding Mr Simpson's shareholding and says that Mr Diamandis was using the sequence of proposals "as a negotiating discussion point but at the end of the day it was up to John". This evidence in my judgment is at best post hoc rationalisation. Mr Woollett could not possibly have believed at the relevant time that the series of decreasing share allocations to Mr Simpson were being suggested as points for negotiation between Mr Diamandis and Mr Simpson when he was also aware that from 13 October 2021 Mr Simpson was kept out of the loop, entirely unaware of the steps being taken by Mr Diamandis and Mr Woollett in terms of the structure being developed and the proposed share allocations. Mr Woollett said he always believed that Mr Simpson would get a share. It is true that he referred in his email to Mr Brewis dated 25 October 2021 to the possibility that Mr Simpson might still be awarded some shares if he should choose to come to the party. But he also knew that TCGL was to be transferred into THL, wholly owned by Mr Diamandis, and that the power to allocate shares would lie with Mr Diamandis alone.
132. As for hiving off TCLG, like Mr Diamandis, he suggests that it was at the meeting of 20 October 2021 that Mr Brewis "thought we should consider selling the shares in [TCGL] to a new holding company". I have already found that it was in fact Mr Woollett and Mr Diamandis who made it clear to Mr Brewis, as a critical requirement, that they wished TCGL to be extracted out of AJHL. Mr Woollett said he attended the meeting as an observer, in order to satisfy himself that what was proposed as a structure was fair and reasonable, a good structure, and could be

achieved quickly. This was necessary in order for Mr Woollett to feel secure to encourage investors to come into the business. But he did not attend in any instrumental role.

133. I find that this account considerably underplays Mr Woollett's role in the process of securing investment. He was giving detailed advice, for example, on how to approach negotiations with the administrators of the WRAP funding, from as early as end September 2021. In an email of 9 October 2021 he referred in terms to "these sessions" being "fun". The reference to "sessions" is to discussions he had been having with Mr Diamandis, and is suggestive of an active collaboration with Mr Diamandis in the process of planning the route to obtaining the investment. He was brought in as a respectable, experienced front man, to persuade other investors to invest, and to overcome the problems caused by Mr Diamandis's history of director's disqualifications and litigation, as well as to give business advice to Mr Diamandis along the way. From the outset, he was focussed on being awarded 15% of the shares in TCGL, subject to dilution as and when the loan notes were converted: a prize of considerable value, considering that Mr Wynter-Bees' investment of £137,000 secured him a mere 5% of THL, one third of the stake granted to Mr Woollett.

134. As to the question of value, Mr Woollett accepted in cross examination that Mr Brewis was not giving independent advice on any particular valuation being appropriate, and that nobody was instructed to provide an independent value. Mr Woollett's take on this is that he was being advised or reassured by both Mr Brooke and Mr Brewis, and Ms Leonard who had detailed intimate knowledge of the financial health of TCGL, that the valuation would be "low". In my judgment Mr Woollett was at the very least careless regarding the need to obtain formal valuation as to the fair value of TCGL, and was in reality more focussed on Mr Brooke's advice that the value needed to be low to avoid tax liabilities arising on the transfer of TCGL. He could not but be aware from the investments being contemplated by Mr Whitlock and Mr Wynter-Bee that the market value of TCGL was much higher, of a wholly a different order, than the low valuation suggested by Mr Brooke. His own suggestion on 1 October 2021 that Mr Diamandis consider taking an option to acquire half of Mr Simpson's shares, for £500,000, and that Mr Woollett would himself have an option to buy one third of those, makes it clear he valued TCGL much higher than £150,050.

135. Mr Woollett's evidence was that he feels that the way Mr Simpson was kept out of the loop "quite extraordinary". The explanation he received at the time from Mr Diamandis was that he, Mr Diamandis, was worried that if Mr Simpson were to learn of the plans he might seek an injunction or something of the sort. That of course would have been highly problematic for Mr Woollett; if Mr Simpson were to challenge the deal prior to its being executed, Mr Woollett would risk losing the opportunity to acquire a 15% stake in a valuable business with no financial input. He said he expressed his surprise that Mr Simpson was kept out of the loop at the time. There is no reference to that in any of the contemporaneous documentation, and whatever surprise he may have expressed at the time he did nothing either directly or through Mr Diamandis to bring Mr Simpson back into the loop. His stance was: it was

up to Mr Diamandis to negotiate with Mr Simpson; Mr Diamandis wanted the deal structured so as to deprive Mr Simpson of much and then all of the value of his shareholding in AJHL; and it was up to Mr Diamandis together with Ms Leonard to do as they saw fit. Mr Woollett had no power to stop what was happening.

136. In my judgment, it is clear that Mr Woollett was a *de facto* business partner of Mr Diamandis from September 2021 at the latest. Mr Woollett knew about the Scheme, and was alive to the prejudice that would be caused to Mr Simpson thereby. He was aware that Mr Simpson was being kept out of the loop. This was to Mr Woollett's benefit: the risk of alerting Mr Simpson was that he might start injunctive proceedings to block the deal, a deal that would bring Mr Woollett a 15% stake in a highly valuable business into which he himself was required to provide no financial investment by way of share purchase, loans, or otherwise. That was a very good deal indeed. He was indifferent to the question of whether Mr Simpson received any shares in THL at all, since any such allocation would not affect Mr Woollett's shareholding, but he is unlikely to have been indifferent to the prospect of the derailing of a deal that would provide very attractive remuneration for the advice and input he had provided. To my mind, further than merely knowing of the Scheme, his conduct is properly characterised as collusion; he was fully aware that if successful the Scheme would prejudice Mr Simpson's interests, and that such prejudice was unfair to Mr Simpson.
137. The question I must determine is whether such collusion means that Mr Woollett was sufficiently implicit in the unfair conduct to warrant relief being granted against him. I am mindful of the fact that Mr Woollett owed no duty, contractual or tortious, to Mr Simpson, and that the discretion to impose liability on a non-member of a company in respect of unfair acts leading to prejudice against another member must be exercised in a principled way. In particular, in deciding whether a respondent is so connected that it is just to make an order, I bear in mind that the standard of justice to be applied is such as reflects the requirements of fair commercial dealing inherent in the statutory regime.
138. It was submitted on behalf of Mr Woollett that the discretion does not extend to non-member third parties in the position of Mr Woollett. I reject that submission. It was further submitted that mere knowledge is not sufficient to fix Mr Woollett with liability. My findings are that Mr Woollett did more than merely acquiesce in the plan of Mr Diamandis. He was his *de facto* partner in bringing that plan to Mr Brewis on 20 October 2021 and presenting to Mr Brewis the extraction of TCGL from AJHL as a critical requirement. He was aware of the prejudice that would be caused to Mr Simpson, and by his own admission at trial was aware of the unfairness of it. He allowed any concern to be allayed because of the huge financial benefit to him, a benefit that would be jeopardised if Mr Simpson were alerted in time to take steps to prevent the Transfer at that price. In those circumstances Mr Woollett's role goes further than that of merely acquiescing in conduct he knew to be unfairly prejudicial to Mr Simpson.

139. The facts as I have found them above lead me to conclude that Mr Woollett was so connected to the creation and implementation of the Scheme that it would be just to grant a remedy against him. If I am wrong in characterising Mr Woollett's involvement as collusion, and Mr Woollett's involvement was no more than acquiescence, I would hold that mere acquiescence would be sufficient to establish liability on the facts of this case. In view of his intimate knowledge of what was being planned, and his collusion or acquiescence in it for his own self-interest, he was sufficiently implicated in conduct causing the unfair prejudice to be fixed with liability.

Issue (4): Primary or Secondary Liability?

140. Mr Woollett can be made either primarily liable jointly and severally with Mr Diamandis, or secondarily liable. I have described Mr Woollett as colluding in the Scheme. I have not found that he was the driving force behind it, as I was asked to find. The extraction of TCGL from AJHL was not necessary, at least at the outset of his involvement, in order for Mr Woollett to achieve his primary objective of a 15% share in a holding company. That element was necessary in order for Mr Diamandis to gain control of TCGL and control any allocation of shares to Mr Simpson. In that sense Mr Diamandis is primarily liable.

141. Whilst a joint and several primary liability does not necessarily reflect equality of culpability, in my judgment it fits the justice of the case to order that Mr Woollett is secondarily liable in respect of the acts causing Mr Simpson to suffer unfair prejudice.

Minority discount

142. Mr Simpson argues that no minority discount should be applied when calculating the value of his shares for the purposes of the buy out order. Mr Isaacs was taken in cross examination to a pamphlet containing the text of a webinar which he co-delivered in 2021. Mr Isaacs then expressed the view that a fair valuation (as opposed to a market valuation) takes into account the special position of a respondent purchaser as an existing shareholder, where there may be value in obtaining a petitioner's shares in order to gain overall control. In such cases there can be a case for applying a control premium rather than a minority discount. Mr Isaacs confirmed that that remains his view.

143. Mr Simpson also relies on the fact that the relationship was a quasi-partnership (which I find it was) and that is inimical to the idea of a minority discount being applied. Mr Diamandis made no specific submissions on this issue. Whilst Mr Channer made it clear on behalf of Mr Woollett that the point was not conceded, no contrary submissions were made.

144. In the light of Mr Isaac's evidence, and in the circumstances of this case, I decline to order that a minority discount be applied to the value of Mr Simpson's shares in AJHL on the valuation date.

Issue (5): Valuation date

145. The correct valuation date for the purposes of a buy out order is a matter of discretion, the court aiming to do what is fair and just in all the circumstances. Where there is doubt about the valuation at the date of the hearing, in particular where there is a suggestion or a risk that the fortunes of the company whose shares will be bought have suffered a downturn, an earlier date may be justified.
146. During the making of the Adjournment Application, I was told that the financial fortunes of THL had taken a significant downturn, a change which had commenced in May 2023. It was said that documents exist from that point up to the date of the trial, which were relevant to the valuation of THL, and this could affect the issue of the correct valuation date. It was submitted that if liability were established, the issue of the valuation date should be adjourned, allowing the disclosure of further documents, witness statement of fact, and expert evidence, to take into account the changing fortunes of THL since June 2023 when the experts last valued THL.
147. The delay which is sought is undesirable. It will prolong Mr Simpson's quest for relief. I note that the application to adjourn determination of this issue is made in the context of a frank acceptance that the Respondents had since May 2023 and up to the date of the trial been in breach of their duty to disclose relevant documents. Had those documents been disclosed, it may have been the case that the experts could have been instructed to provide updated evidence in time for hearing at the trial. Failing to make such disclosure ensured that it was not possible for the experts to do so. So it is an inherently unattractive position for the Respondents to seek to adjourn the court's determination of the substantive remedy, with a view to yet more delay, more expense, and further uncertainty for Mr Simpson, who has had his claim vindicated. Again I bear in mind that no reasons have been given for breach of the duty to give disclosure, nor for bringing this application so late.
148. Nor in my judgment is an adjournment necessary. Where there is alleged to have been a diminution in the value of the shares, even where it is unclear whether that has been caused by the respondent's conduct subsequent to the conduct which caused the unfair prejudice, it may be appropriate to adopt an earlier valuation date: see *re Phoenix Contract (Leicester) Ltd* [2010] EWHC 2375 (Ch). This applies with greater force where the reason for the lack of information is the Respondent's own breach of their duty to disclose relevant documents, and their own failure to seek relief in a timely manner. The Respondents have raised the spectre that the experts' valuations as at June 2023 may be unsound, since relevant documentation in the Respondents' possession had not been provided to them. To permit an adjournment of the questions of value and valuation date in those circumstances would be to reward the admitted wrongdoing of the Respondents, who have already been found liable for causing Mr Simpson unfair prejudice. This would be manifestly unfair to Mr Simpson, and also contrary to the overriding objective, in particular to ensure the fair allocation of the court's resources to all parties, not merely those in this case.

149. Accordingly, I have reached the conclusion that the valuation date for the purposes of the buy out order should be the date of the Transfer. It was on that date that Mr Simpson was deprived of the value of his shareholding. It seems just and appropriate in all the circumstances to order that he be paid now at the price he would have been able to achieve as at that date, subject to dilution following the inward investment achieved by the loan notes. Accordingly I will make an order that Mr Diamandis pays to Mr Simpson a sum equivalent to his shareholding in AJHL, at its value on 12 November 2021, namely £2.9m.

Issue 6: value on valuation date

150. As I have found, the value of TCGL on the valuation date was £2.9 million.

Repayment of loan

151. Mr Simpson sought an order for the repayment of the outstanding value of his loan to TCGL which was subsequently taken over by AJHL. The balance stands at £169,649.33 (including interest), which pursuant to the loan agreement dated 6 March 2020 was due to be repaid by 20 January 2023. It is common ground that the debt under this loan was subsequently taken over by AJHL. Of this debt, AJHL has paid £52,000, with £117,649.33 remaining outstanding. Whilst this appears in the Petitioner’s closing note, I do not believe it was addressed in oral submissions. If such repayment is not agreed, I will make provision for submissions to be made.

Relief sought

152. Mr Simpson seeks relief in the form of a buy-out order in respect of his shares in AJHL, by the persons responsible for the unfair prejudice.

153. If the Court is satisfied that a petition in respect of unfair prejudice is well founded, the Court has a broad discretion to “make such order as it thinks fit for giving relief”: Section 996(1). In particular, by Section 996(2)(e), the Court may “provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company’s capital accordingly”.

154. Accordingly, I will make an order that Mr Diamandis and Mr Woollett pay to Mr Simpson the value of his shareholding, based on a value of TCGL of £2.9 million as at 12 November 2021, and subject to allowance for the dilution following the inward investment, with such other consequential orders, including concerning the repayment of Mr Simpson’s outstanding loan to AJHL, and directions as may be required.

155. I invite the parties to agree an order, failing which to apply for a consequentials hearing to be listed. I thank Mr Campbell, Mr Channer and Mr Diamandis for their helpful and clear assistance during the course of the hearing.

