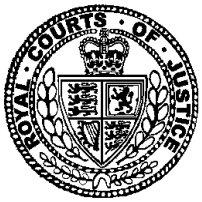

Neutral Citation Number [2021] EWHC 787 (Ch)

Case No: CR-2018-005055

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY AND COMPANIES LIST
COMPANIES COURT

IN THE MATTER OF COMPOUND PHOTONICS GROUP LIMITED
AND IN THE MATTER OF COMPOUND PHOTONICS UK LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

7 Rolls Buildings
Fetter lane, London
EC 4A 1NL

Date: 31/03/2021

Before:

MR JUSTICE ADAM JOHNSON

- -

Between:

(1) MARK FAULKNER
(2) JONATHAN SACHS
(3)-(70) THE MINORITIES
(As listed in Schedule 1 to the Petition) **Petitioners**

- and –

(1) VOLLIN HOLDINGS LIMITED
(2) MINDEN WORLDWIDE LIMITED
(3) COMPOUND PHOTONICS GROUP LIMITED
(4) COMPOUND PHOTONICS UK LIMITED
(5) ALDON INVESTMENTS LIMITED **Respondents**

- -
- -

MR ROBIN HOLLINGTON QC and MR ADRIAN PAY (instructed by **Mishcon de Reya LLP**) for the **Petitioners**
MR ANDREAS GLEDHILL QC, MR DONALD LILLY, MR TIMOTHY LAU and ZARA McGLONE (instructed by **Allen & Overy LLP**) for the **First, Second and Fifth Respondents**
The Third and Fourth Respondents did not appear and were not represented

Hearing dates: 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30 November 2020, 1, 2, 3 and 4 December 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

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MR JUSTICE ADAM JOHNSON

Mr Justice Adam Johnson

CONTENTS

I Introduction

1. This is the hearing of an unfair prejudice petition brought under section 994 of the Companies Act 2006.

2. The Petitioners are minority shareholders in Compound Photonics Group Limited ("*CPGL*"). The First Petitioner, Mr Faulkner, is a former director and chairman of CPGL, and the Second Petitioner, Dr Sachs, is also a former director and CEO of CPGL. The remaining Petitioners are individual investors who were introduced to CPGL, and to Dr Sachs, by Mr Faulkner, in his former role as an independent financial adviser. These Petitioners have been referred to as "*the Minorities*" although in point of fact Dr Sachs and Mr Faulkner are also minority shareholders in CPGL.

3. The business of CPGL, and of the Compound Photonics Group, grew out of Dr Sachs' academic research into gallium arsenide and liquid crystal technology. The business vision was to use this technology to revolutionise the market in projectors. The dispute between the parties arises largely out of Dr Sachs' efforts to realise that vision, through the medium of CPGL and its associated companies, in the period between 2010 and early 2016.

4. The Second and Fifth Respondents, Minden Worldwide Limited ("*Minden*") and Aldon Investments Ltd ("*Aldon*") are the present majority shareholders in CPGL. Aldon is the successor to another company, Vollin Holdings Limited ("*Vollin*"). Vollin and Minden were the majority shareholders at the times relevant to these proceedings. During the trial, they came to be referred to as "*the Investors*", and I will adopt that description in this Judgment.

5. Vollin and Aldon are part of an investment structure of which the beneficial owners are Dr Alexander Abramov and Dr Alexander Frolov, two Russian businessmen who made substantial sums on the public listing of EVRAZ plc, a mining and metals business with interests in Russia, North America and elsewhere. Together Dr Abramov and Dr Frolov hold approximately 29% of the issued shares in EVRAZ plc.

6. Minden is part of an investment structure of which the Israeli-Russian businessman Mr Roman Abramovich is the beneficial object. He too is the owner of a 29% stake in EVRAZ plc.

7. The Petitioners make many detailed complaints, but in outline their case is a simple one. They say that they have been unfairly prejudiced because it was agreed that Dr Sachs and Mr Faulkner would remain involved in the management of CPGL, but in

fact have been excluded – in the case of Dr Sachs in March 2016 and in the case of Mr Faulkner in October 2016. Moreover, say the Petitioners, in all periods after Dr Sachs' exclusion, the agreed-upon constitution of CPGL, as set out in its articles and a corresponding shareholders agreement, has effectively been ignored by the Investors and those associated with them, including in particular their nominated directors. This has resulted in further instances of unfair prejudice, arising both from breaches of the shareholders' agreement and the articles, and also from breaches by the Vollin and Minden nominee directors of the duties owed by them under the Companies Act 2006. Among the allegations made, a particularly important one concerns the alleged sale at an undervalue of a property known as Newton Aycliffe, which was owned by a subsidiary of CPGL, Compound Photonics UK Limited ("*CPUK*"), the Fourth Respondent in these proceedings.

8. The Investors – who have also been referred to from time-to-time as the Active Respondents – deny all these allegations of unfair prejudice. Their basic point is that they invested huge sums in the business over many years in order to support Dr Sachs in realising his vision, but after long delays and a series of failures, they lost faith in Dr Sachs and entirely reasonably asked him to resign, which he agreed to do. They removed Mr Faulkner from the business by exercise of their majority vote after it became clear that his role as director and Chairman of CPGL was redundant and he had begun to behave in an erratic and unpredictable manner which was damaging to CPGL. They say that at all times they and their nominee directors acted in good faith, and so were not in breach of any provisions of the relevant shareholders agreement or, in the case of the directors, of the articles or of any Companies Act duties. They deny that Newton Aycliffe was sold at an undervalue.

9. At an earlier stage in the action, the Investors pursued a Counterclaim against Dr Sachs. This focused on allegations of mismanagement against Dr Sachs, said to have caused losses to the Investors. These losses were put in the region of US$50m. Shortly before the trial, however, the Counterclaim was discontinued, a matter reflected in my earlier Judgment in the proceedings dated 16 November 2020: [2020] EWHC 3176 (Ch).

II The Principal Characters

10. Before going further, it is useful to identify some of the other key characters in the story. These are all on the Investor side.

11. At the time of the IPO of EVRAZ plc, Dr Abramov and Dr Frolov were represented by Mr Jeremy Fletcher, who was a senior figure at Credit Suisse in London. Through that process, Mr Fletcher became a trusted adviser to Dr Abramov, and Dr Abramov then suggested Mr Fletcher leave Credit Suisse and help manage his personal investments and those of Dr Frolov. An entity called Kew Capital LLP ("*Kew*") was formed, based in London. Mr Fletcher was CEO and a partner in Kew at all times material to these proceedings. Kew became an investment adviser to Vollin pursuant to an Investment Advisory Agreement between Kew and two other entities in the Vollin investment structure, namely Whiteclif Enterprises Limited and Dunvegan Assets Ltd.

12. Mr Fletcher was joined at Kew by another senior colleague from Credit Suisse, Mr Nathan Burkey. Shortly thereafter, two other colleagues also joined Kew, namely Ms

Penny McDermid and Mr Brian Bolger. Thus, they became part of the team managing investments associated with both Dr Abramov and Dr Frolov. It was common ground that the fees which Kew Capital received from time-to-time were linked to the value of the investment portfolio it managed, and thus that the interests of (in particular) Mr Fletcher and Mr Burkey were aligned with those of Dr Abramov and Dr Frolov. I will need to come back to this point below.

13. On the Minden side, there was a similar investment structure. A company called MHC (Services) Limited ("*MHC*") provides consulting services and associated support to a number of clients, including Minden. At the times material to these proceedings, Mr Eugene Tenenbaum was a director of MHC. Like Mr Fletcher, Mr Tenenbaum has a background in finance and previously worked at KPMG and Salomon Brothers. The legal counsel to MHC was Mr Andre De Cort.

14. Mr Yaron Valler is the Managing General Partner at Target Global ("*Target*"), an international venture capital firm. Target was initially founded in 2010 by Mr Alexander Frolov Junior, who is the son of Dr Frolov. Mr Frolov Junior is a General Partner and CEO of Target, for which Dr Frolov has provided funding. Target is relevant because, as I will explain below, it was Target which in the Summer of 2016 introduced a potential merger partner to CPGL, namely Kaiam Corp. ("*Kaiam*"). The merger discussions fell through but Kaiam went on to acquire Newton Aycliffe in May 2017, which is the sale the Petitioners now allege was a sale at an undervalue.

15. Mr Richard Jackson is presently Co-CEO of CPGL, but in 2016 and early 2017, he was based at Newton Aycliffe where he had worked for a number of years, including under its previous owners. He assisted in the efforts to dispose of Newton Aycliffe, which eventually resulted in its sale to Kaiam.

16. Mr Edmund Passon is also presently Co-CEO of CPGL, but in 2016 he was Vice-President of Product Development in Phoenix, Arizona. He gave detailed written evidence on product development initiatives in the period prior to Dr Sachs' departure in March 2016, and in particular evidence on likely production costs (reflected in so-called "*Bills of Materials*" or "*BoMs*"). Much of this evidence was relevant to the Investors' discontinued Counterclaim, and so although Passon gave evidence at trial, he was cross-examined only briefly.

III The Scope of the Trial

17. The present is effectively a trial on liability only. Its purpose is to determine whether the Petitioners are correct that, in one way or another, they have been the subject of treatment which can properly be characterised as *unfairly prejudicial*, within the meaning of that phrase in section 994 of the Companies Act. It was agreed by the parties during trial that the question of remedies should be left over to a separate hearing, following the handing-down of this Judgment. The scope of this Judgment will be limited accordingly.

IV The Evidence

18. I will summarise my views of the parties' witnesses.

The Petitioners' Witnesses

19. *Dr Sachs*: Dr Sachs is plainly a highly intelligent man and an accomplished scientist. He is plainly also still bruised by the circumstances which led to his departure from CPGL, and therefore has a high degree of mistrust of the Investors. The combination of these factors, in my view, led to him being a very guarded witness. Mr Hollington described him as giving his evidence in a painstakingly precise manner. That is true, but in my judgment, this tendency led him on occasion to give a very limited account of certain of the events he was involved in. I have in mind in particular the exchanges he must have had with Mr Faulkner in the Summer of 2016 (see, e.g., below at [274]) as to their own positions and their possible plans for the Newton Aycliffe plant. On one view, a degree of care about this period was understandable because the events were informed by legal advice and therefore questions of privilege arose. On the other hand, Dr Sachs' guarded account left one having to fill in some of the important gaps for oneself in a way which could easily have been avoided. Overall, my judgment is that I must assess Dr Sachs' evidence with some care, although for the most part a clear enough picture of the relevant events can be gleaned from the contemporaneous documents.

20. *Mr Faulkner*: In terms of overall impression, Mr Faulkner was in many ways the opposite of Dr Sachs. He was often fulsome in his answers, sometimes to the extent of providing lengthy and rambling responses. He spoke with great conviction about certain parts of the case, and in particular about the early discussions with Vollin and the sense of excitement the parties felt about the potential for their business relationship. On occasion, however, Mr Faulkner was also guarded and defensive. That was so most particularly as regards his evidence about his visit to Newton Aycliffe on 7 September 2016, and the background to his request to see the Newton Aycliffe visitors book (see below at [262]-[265]). I found his account of those events unpersuasive. On other occasions, however, I felt that Mr Faulkner grasped the nettle and gave honest evidence even when it did not suit his case to do so, for example in connection with his making contact with the "*Let's Grow Grant*" foundation in the early Spring of 2017 (see below at [319]). Overall, as with Dr Sachs, my judgment is that I must assess Mr Faulkner's evidence with some care, and measure his oral evidence against the documentary evidence. Thankfully, that is possible in most if not all instances which are relevant to the outcome of this trial.

The Respondents' Witnesses

21. *Mr Fletcher*: Mr Fletcher is a highly experienced businessman. He was focused and perceptive in the way he gave his evidence. That evidence suggests that at times he could be abrasive in his dealings with others, and it is plain that he lost patience with Dr Sachs for, as he saw it, poor management of what had at one time seemed a very promising investment for his client Vollin. Mr Fletcher was frank about that however, and about other matters which did not necessarily suit his case – for example, his characterisation of the way in which CPGL was managed in the period immediately after Dr Sachs' departure (see below at [449]). I therefore regard him as an honest and reliable witness.

22. *Mr Bolger*: The Petitioners were very critical of Mr Bolger in their closing submissions, largely as a result of his admitted deception of Mr Faulkner in relation to a presentation made to Vollin and Minden on 15 August 2016 (which was later sent to Mr Faulkner in amended form but purported to be the same document provided to the Investors– see below at [246]). I agree that that deception was an unfortunate incident, and one which does Mr Bolger no credit, although at the time he felt he had good reasons for it. All the same, I do not think it follows that Mr Bolger was deceptive in the way in which he gave his evidence to the Court. He gave a full account at trial of the relevant events and, as noted, accepted the fact of his deception straightforwardly. It is true that the point was not originally addressed in his witness statement (see below at [249]), but I did not detect in that an intention to mislead. My overall assessment therefore was that Mr Bolger sought to give his evidence straightforwardly and accepted points which counted against the Investors' case and which must have involved some discomfort for him personally.

23. *Ms McDermid*: Similar points arise as regards Ms McDermid. The Petitioners in closing invited me to treat her as an unreliable witness because she was aware of the admitted further deception of Mr Faulkner in relation to his proposed visit to Newton Aycliffe on 11 August 2016 (see below at [219]). Again, however, unfortunate though that incident was, no attempt was made to conceal it. In other ways too Ms McDermid was straightforward in her evidence, for example as to Mr Fletcher's character and the concerns she had about the potential for conflict between him and Dr Sachs. I found her a reliable witness.

24. *Mr Jackson*: Mr Jackson was a careful and intelligent witness and I accept the evidence he gave. He was well prepared and had a good memory of the relevant events. He was focused and articulate in his answers, and took seriously his role in providing assistance to the Court. That included his accepting straightforwardly the deception of Mr Faulkner in relation to his proposed meeting at Newton Aycliffe on 11 August 2016. Overall I consider Mr Jackson an impressive witness and I accept the evidence he gave.

25. *Mr Passon*: In the event, following the abandonment of the counterclaim, Mr Passon's cross-examination was short. He gave careful and considered evidence on the few points that were put to him. Again, I accept the evidence he gave.

26. *Mr Valler*: Mr Valler gave evidence as to the involvement of his business, Target, with CPGL in the Summer of 2016. Mr Valler struck me as an intelligent and perceptive witness who was straightforward in the evidence he gave. The Petitioners in their closing criticised him for not telling the whole story as regards Target's promotion of the proposed transaction with Kaiam. I do not agree. Mr Valler straightforwardly accepted Target's interest in introducing Kaiam to CPGL, as a possible way of solving a serious problem which CPGL had and which in turn might enable Target to obtain a wider mandate from Vollin in managing its technology-related investments. That strikes me as an entirely plausible account which is supported by the documentary records. I do not accept the Petitioners' suggestion that some other key part of the story remains untold.

27. *Mr De Cort*: Mr De Cort was a careful and considered witness. I accept the evidence he gave. The Petitioners' main point about him in closing was that his evidence was of limited relevance because his role as a director of CPGL was limited. I will

comment further below on the manner in which the board of CPGL conducted itself in the periods after Dr Sachs' departure, and will deal there with the position of Mr De Cort and of the other Vollin and Minden nominee directors.

28. *Mr Tenenbaum*: Mr Tenenbaum was an impressive witness. He is plainly an intelligent and astute businessman. He was questioned in cross-examination principally about the events immediately prior to Dr Sachs' departure. His evidence on these events was clear and convincing, as I will explain below at [133]-[135].

The Experts

29. I will deal below at [534]-[568] with the evidence of the expert witnesses, Mr Indge and Mr Mackie. Both gave evidence straightforwardly and I am satisfied did their best to assist the Court. Nonetheless I have come to the view, as I will explain, that overall I prefer Mr Indge's evidence as to the valuation of Newton Aycliffe.

V Factual background

Compound Photonics Prior to 2010

30. The Compound Photonics business was formed initially in 2004 by Dr Sachs and two colleagues, including Dr Robert Lind, effectively as a start-up. Through Create, a fund which specialised in investing in tech start-ups, Dr Sachs was introduced to Mr Faulkner, who was an independent financial adviser with a firm called Roundhouse. CPUK was formed in 2005, and Create became one of its early investors. As already noted, the Minorities were introduced by Mr Faulkner. These were individuals who invested in their own names or via SIPPs managed by Guinness Mahon.

31. In 2009, CPGL was incorporated. The CPUK shareholdings were "*flipped up*", and CPUK became a subsidiary of CPGL.

Vollin's 2010 Investment

32. Vollin was identified as a further potential investor in about 2010. CPGL needed further capital investment, including in order to fund some prospective patent litigation against Sony, and Vollin's advisers at Kew thought CPGL had commercial potential. The investment sought was some US$20m.

33. At the time, CPGL's main development focus was on something called the "*pico*" projector, i.e. a projector small enough to be embedded in an iPhone. It was also working on the possible commercialisation of a light engine (or "*OASLM*") standalone projector: the idea there was to be able to produce something which was much brighter than other market offerings and at a fraction of the cost. Dr Sachs had an ambitious plan, which was for CPGL to become a vertically integrated manufacturer of projector products – i.e., the relevant components would be manufactured within the Group, rather than purchased from third parties.

34. The evidence as to the period of Vollin's original investment focused on two inter-related topics, namely what assurances had been given (if any) as regards the *entrenchment* of the then existing management team (meaning in particular Dr Sachs

and Mr Faulkner), and as regards the availability of future funding by Vollin, beyond the amounts it agreed to subscribe initially.

35. As to the first point, it is clear that there were detailed discussions as to the position of the existing team, since this was a point of real sensitivity for Dr Sachs. One can quite understand that. The commercial venture contemplated was designed to exploit technology he had largely been responsible for developing. He had his own vision as to how that commercial exploitation might best be handled. He was obviously concerned about the potential for the fruits of his labour to be wrenched away from him by his very well resourced new investor. Both he and Mr Faulkner gave evidence to that effect, and said that they were concerned about being ousted from the business at some critical point in its future development, for example just before an IPO. Mr Faulkner said he recalled being given assurances that he and Dr Sachs would not be treated capriciously in that way. Mr Faulkner described graphically the sense of excitement he felt at having such a major investor on-board, and the sense of confidence everyone felt that they were "*off to the promised land*."

36. In a general sense, at least, Mr Bolger's evidence in his Witness Statement is consistent with the accounts given by Dr Sachs and Mr Faulkner:

> *"As discussions progressed it became clear that Jonathan was very sensitive about the idea of him retaining control of the Compound Photonics business. There were lots of discussions about this leading up to and at the time of investment. He explained to us that venture capitalists had invested in a previous business of his (called Steradian) and that he felt they had then pushed him out for no reason and run the company into the ground. As a result, he was extremely protective of his position, and almost paranoid about it. He was particularly focused on the idea that the business might get to the point of an IPO and he would be pushed out and lose his stake."*

37. At the same time, however, Mr Bolger's evidence was that it was never the intention to entrench the positions of Dr Sachs and Mr Faulkner completely. He said it would have been unthinkable for him as a professional investment adviser to have allowed his client to invest substantial sums in a structure which involved such a lack of flexibility. At one point he said he recalled discussing with Dr Sachs the possibility of his being removed from the business, for example in the event of serious wrongdoing, such as theft or fraud. Mr Fletcher described the business of negotiation with Dr Sachs as akin to a courtship, and recalled giving general assurances to the effect that Vollin would not act capriciously, and to the effect that they were serious investors and in it for the long-haul. He did not recall discussing with Dr Sachs the possibility of his removal, since that would not have been appropriate during the course of his courtship ritual.

38. I am not satisfied on the evidence that any unequivocal oral assurances were given by anyone on the Vollin side that Dr Sachs and Mr Faulkner would remain "*entrenched*" in the business - it seems to me implausible that the experienced business people negotiating on Vollin's behalf would have gone that far. That said, the point seems to me to be irrelevant to the exercise I have to conduct, which is to construe the contractual documents the parties eventually entered into. In conducting that

exercise, I am concerned with the general background or "*factual matrix*", but I am not concerned with the parties' detailed negotiations. That is consistent with the position eventually reached in Mr Faulkner's cross-examination on this topic, which was his acceptance that any *"copper bottomed assurances"* were in *"the documents themselves"* and not in any oral promises made during the course of negotiations. It is also consistent with the fact that the contractual documents contain entire agreement clauses, as I will mention below at [66].

39. I reach a similar conclusion as regards the related topic of continued funding. The Petition at para. 31 says that it was:

> *" …understood and agreed at the time of Vollin's original investment that CPGL would require very substantial further investment in order to further research, develop and bring to market its products, over and above Vollin's original investment."*

40. Against that, the Investors point to the term sheet signed by the parties on 28 June 2010, which stated that the intention was to "*finance the Company [CPGL] and its subsidiaries through to breakeven of its projector products*." The Investors made the point that Vollin's initial investment was in total some $20m, and thus said that the commitment was only to invest that sum, and there was no understanding or agreement (to use the wording of the Petition) as to the provision of further amounts beyond that. Mr Fletcher said that once the company reached breakeven, the expectation was that it would then become self-funding – i.e., that CPGL would be able to finance its own growth.

41. Dr Sachs' recollection was different. When shown the term sheet, he said:

> "*That is a very different statement than that the company would never require additional funding, and it was a term sheet that we needed to finish drafting a full document set on, so I think it is a little bit of a stretch to suggest that it means what you are leading to."*

42. On this point, it seems to me the reality is as follows. There was no firm commitment given by Vollin to make further funding available beyond the amount of its initial investment. It would have made little sense commercially for Vollin to have committed to give a blank cheque to Dr Sachs and CPGL. No doubt the hope and expectation at the time was that the $20m investment would be enough to see CPGL through to break-even; but at the same time, given the nature of the venture, it must have been clear to all concerned that there was a risk that that would not happen, and consequently a risk that more funding would be needed in order to keep the business on track. While no firm commitment was given that such funding would be made available, it seems to me logical to think that an understanding arose from the parties' discussions, and in particular from the assurances given by Vollin that they were a long-term investor, that in the event of a funding need arising, Vollin would at least consider it. The proof of the pudding was in the eating, and as the facts reveal, the need for further funding did arise, and Vollin responded by making funding available.

43. Against that background, Vollin's initial investment in CPGL comprised a US$15m capital investment and a litigation fund of up to $5m for conduct of the patent

litigation mentioned above. The parties disagreed as to the overall percentage shareholding this initial investment gave to Vollin – it was either 23% or 30%. At any rate, it was at that stage itself a minority shareholder.

44. It is common ground that there were detailed discussions as to the terms of a shareholders agreement (the "*2010 SHA*"), and proposed articles of association (the "*2010 Articles*"), with both sides being represented by legal advisers. The 2010 SHA and 2010 Articles contained a number of key provisions which were later carried through, without amendment, into a later shareholders agreement and later articles (the "*2013 SHA*" and the "*2013 Articles*"), which I will come on to below. I set out the text of the relevant provisions below, starting at [56]. For now, it is sufficient to note that both the 2010 SHA dated 25 August 2010, and the Articles adopted on 14 September 2010, contained detailed provisions as to the composition of the board of CPGL, and as to the conduct of the business of CPGL by the board. I will need to come back to these points below. I also note that the original aim, set out in the 2010 SHA, was that the shareholders were to aim for an "*Exit*" – by way of an IPO or similar – within four years, i.e. by August 2014.

45. Certain other agreements deserve mention at this stage, however.

46. On 25 August 2010 Dr Sachs entered into an employment contract with CPGL's US subsidiary, Compound Photonics US Corporation ("*Compound US*"). By clause 4.2, Dr Sachs agreed to use his best endeavours to act in the best interests of Compound US or any other "*Group Company*", including CPGL. He was to be paid a salary of $260,000 per annum (clause 6.1). Clause 12.2 then provided that Compound US "*may terminate this Agreement for Cause … at any time on written notice effective immediately*". "*Cause*" was defined in clause 12.2.1, and included matters such as material breach, embezzlement or theft, and "*gross negligence, fraud or breach of fiduciary duty to [Compound US]*."

47. Clause 12.5 then provided as follows:

> *"The Company [i.e., Compound US] may by a majority vote of the board of [CPGL] also terminate this Agreement for any reason on one year's written notice and may relieve the Executive [i.e., Dr Sachs] of all duties to [Compound US] at any time prior to the expiry of that one year notice period."*

48. As to Mr Faulkner, he signed a Consultancy Agreement on the same day, but with CPGL not CPUS. Mr Faulkner was appointed as non-executive director and Chairman of the board of directors of CPGL (clause 1.1). He was to use his "*best endeavours to promote the best interests of CPGL*" (clause 3), and he was to be paid an annual fee of US$150,000 per annum (clause 4.1).

49. Termination was dealt with in clause 1, which provided at clause 1.1 that the appointment was to be for an initial term of three years, "*unless terminated earlier by either party giving to the other three month's prior written notice*." Clause 1.2 then provided:

> *"Notwithstanding paragraph 1.1, [CPGL] may terminate your appointment with immediate effect if you are removed as a*

> *director in accordance with the articles of association from time to time of [CPGL] or if you have committed any serious or repeated breaches of the terms of this letter."*

2010-2013

50. Vollin was entitled to nominate two directors to the board of CPGL, and accordingly its nominees, Mr Fletcher and Mr Bolger, were appointed as directors on 25 August 2010. At the same time, Dr Sachs' contact and associate Dr Robert Lind was also appointed. At that point, therefore, the board comprised Dr Sachs and Mr Faulkner (as CEO and Chairman respectively), Dr Lind, and Mr Fletcher and Mr Bolger (as the two Vollin nominees).

51. Vollin's shareholding soon increased, as further capital came to be needed for the ongoing business. There was a rights issue in August 2011, as a result of which Vollin acquired a further 4,935,171 shares in CPGL, and this took it to having a majority stake of around 51%. Thereafter, in February 2012 and August 2012, Vollin purchased the shares of a number of the existing minority shareholders in CPGL, including Create.

52. It seems that good progress was made during this early period, and confidence was high. This no doubt explains Vollin's willingness to continue investing on Kew's advice. The following extract from the report for September 2012 gives a flavour of the sense of optimism felt at the time:

> *"Original expectation, which we currently report here, reflected a valuation at exit of $500m (Vollin's share $275m) + EV based on a combination of IP, Pico and OASLM revenue streams which would deliver 10x+ returns. That was based on expected EBITDA of more than $200m as products come online.*
>
> *However it is our ambition and belief that each of the Pico and, over time, OASLM products can be grown into multi-billion dollar businesses. This value will only be reflected in this report when we can detail the go-to-market plan to capture that value"*

53. Another feature of the business during this period, and indeed generally, is that it was managed in an informal way. That is to say there is no record of any board meetings taking place at any point in the six year period between the time of Vollin's original investment and the departure of Dr Sachs in March 2016. Where necessary – for example in relation to subscriptions for further shares by Vollin – there were written board resolutions. But the day-to-day management of the company was left to Dr Sachs and those working for him, supported (it seems) in managing the ongoing relationship with their major investor, Vollin, by Mr Bolger and Ms McDermid from Kew.

The 2013 Constitution

54. Vollin's investment increased again in April 2013, pursuant to a further rights issue. This brought Vollin's overall shareholding to around 80%.

55. At the same time, the revised 2013 SHA and 2013 Articles were agreed. Since they are critical to the legal analysis, it is necessary to set out some of the key provisions of the 2013 SHA and Articles in some detail.

The 2013 SHA

56. Dealing with the 2013 SHA first of all. The definitions section contained the following provisions:

    i) *"**Business** means the production and supply of projection products and technologies and all activities reasonably ancillary and necessary in relation to the production and supply of projection products and technologies."*

    ii) *"**CEO** means Jonathan Sachs who shall be a Director and the Chief Executive Officer of the Company."*

    iii) *"**Founder Director** means Mark Faulkner."*

    iv) *"**Management** means Jonathan Sachs, Mark Faulkner and Robert Lind."*

57. Clause 3 recorded an agreement to create a new category of B Shares. These had no voting rights attached to them, but instead carried certain rights to participate on a defined "*Exit*", meaning such matters as a listing of CPGL or any Group company. The B shares were allocated to Dr Sachs and Mr Faulkner.

58. Clause 4 of the SHA is headed "*Warranties*", but contains the following at clause 4.2:

> *"Each Shareholder undertakes to the other Shareholders and the Company that it will at all times act in good faith in all dealings with the other Shareholders and with the Company in relation to the matters contained in this Agreement."*

59. Clause 5 is headed "*Business of the Company*". It contains a number of important provisions:

> *"5.1 The Shareholders shall procure that the only business of the Company and each CPG Group company shall, unless otherwise agreed in writing by the Shareholders, be the Business. The Shareholders shall each co-operate with the Board in the running and operation of the company and each CPG Group Company.*
>
> *5.2 The Shareholders shall exercise their respective rights and powers to ensure, so far as they are lawfully able to do so, that the Company complies with its obligations under this Agreement and any other agreements to which the Company is a party, and that the Business is conducted in accordance with good business practice and on sound commercial and profit making principles.*
>
> *5.3 Without prejudice to the foregoing provisions of this clause 5, the Shareholders agree that the Company and each CPG Group Company will be run in accordance with the following general principles, as varied from time to time with the written agreement of the shareholders:*

> *(a) the Company and each CPG group company shall carry on and conduct its business and affairs in a proper and efficient manner and for their own benefit;*
>
> *(b) the Company and each CPG Group Company shall transact all of their business on arm's-length terms;*
>
> *(c) the Business shall be carried on in accordance with policies laid down from time to time by the Board and in accordance with the Annual Budget;*
>
> *…*
>
> *(f) the company and each CPG group company shall keep the shareholders (except the B shareholders) fully informed as to all their material financial and business affairs.*
>
> *5.4 From the date of service of a Transfer Notice, a Compulsory Transfer Notice, Disenfranchisement Notice or a Deemed Transfer Notice until the date on which the procedures and actions relating to that notice have been completed, each of the Shareholders shall do all things in their power to continue to co-operate with the Board in its running and operation of the Company and each CPG Group Company in the ordinary course of business as existed at the relevant time the notice was served (and not otherwise)"*

60. Clause 7 is headed "*The Board*", and again contains a number of important provisions ("*the Investor*" referred to is Vollin):

> *"7.1. Subject to clause 7.3, the maximum number of Directors holding office at any one time shall be six.*
>
> *7.2 The Investor shall have the right (but not the obligation) to appoint and maintain in office two of those directors (the 'Investor Directors').*
>
> *7.3 If the Board resolves to increase the maximum number of Directors beyond six Directors, the Investor shall have the right (but not the obligation) to appoint and maintain in office one additional Director for every two additional non-Investor Directors appointed.*
>
> *7.4 As at the date of this Agreement, the Directors are Jonathan Sachs, Mark Faulkner, Brian Bolger, Jeremy Fletcher and Robert Lind.*
>
> *7.8 Subject to clause 7.9, the quorum for the transaction of business at any board meeting shall be three directors and shall include (insofar as they each remain a director) the*

> *Founder Director, the CEO and, if one or more has been appointed, an investor director.*
>
> …
>
> *7.13 Subject to clause 7.16, resolutions arising at any meeting of the Directors shall be decided by a majority of votes provided that both of the Founder Director and the CEO must at all times form part of that majority. If the number of votes for and against a proposal are equal, the Chairman of the Board or other Director chairing the meeting shall not have a casting vote in addition to his own vote.*
>
> *7.14 The Chairman of the Board shall be appointed by the majority of Directors. The first Chairman of the Board shall be Mark Faulkner.*
>
> *7.15 If a resolution submitted to a duly convened Board Meeting is not carried by a resolution of the Board at that meeting then, without prejudice to the Board's ability to consider any other business put it put to it at that meeting, a new meeting may (on the written request of any Director or his alternate present at the meeting) be convened for the same day or the next week at the same time and place to consider and thought fit, pass that resolution.*
>
> *7.16 If a Director is of the opinion (acting reasonably) that there is a conflict between his fiduciary duties to the Company and his role as an appointed Director of a Shareholder in voting on any particular matter to be considered by the Board, he shall disclose that interest to the Board and shall abstain from voting on that matter and they will not be required to form part of the majority required under clause 7.13.*
>
> *7.17 If a Shareholder, who has voting rights attaching to the Shares that he holds, is an Interested Shareholder (as defined in clause 20.1), the quorum shall be not less than two Directors appointed by the non-Interested Shareholders and a resolution may be passed at a Board Meeting if it is voted in favour of by the Directors present (excluding for these purposes any Director appointed by the Interested Shareholder)."*

61. Clause 14.8(a) re-set the target production/exit date: "*The Company and the Shareholders agree that they will work together and use their reasonable endeavours to achieve an Exit as soon as reasonably practicable after 2 years from the date of this Agreement*." Two years from the date of the SHA was April 2015.

62. Clause 16 is headed "*Compulsory transfer and disenfranchisement*", and contains particular provisions applicable to the newly created category of B Shares. Broadly speaking, the effect was that if any holder of B Shares came to be characterised as a

"*Bad Leaver*", that shareholder would be required to sell all of his B Shares either to CPGL or a nominated party. On the other hand, a person designated a "*Good Leaver*" would be required only to relinquish half of his B Shares.

63. "*Good Leaver*" and "*Bad Leaver*" are defined in clause 16.1. It is easiest to begin with the definition of "*Good Leaver*", which is as follows:

> "***Good Leaver*** *means a B Shareholder who ceases to be a director, employee or consultant of the CPG group and that cessation occurs as a result of:*
>
> *(a) death; or*
>
> *(b) serious illness or physical or mental incapacity which is determined by two medical reports from independent medical specialists …*
>
> *(c) wrongful dismissal; or*
>
> *(d) termination by the relevant CPG group Company of his service agreement, employment agreement or consultancy agreement (as applicable) without Cause … ".*

64. "*Bad Leaver*" is then defined to mean anyone who is not a Good Leaver, and obviously includes a person whose employment agreement or consultancy agreement is terminated for "*Cause*." The definition of "*Cause*", in turn, mirrors that in Dr Sachs' employment contract with Compound US, and thus includes a person whose employment or consultancy agreement is terminated for material breach, or who is guilty of embezzlement or theft, or who is guilty of gross negligence, fraud or breach of fiduciary duty to any CPGL Group Company.

65. Like the 2010 SHA before it, the 2013 SHA at clause 23 contains a provision stating: "*Nothing in this agreement shall create a partnership or establish a relationship of principal and agent or any other fiduciary relationship between or among any of the parties*."

66. Clause 25 is an "*Entire Agreement clause*", which provides expressly that the SHA and the other documents to be executed in accordance with it were to "*supersede any prior written discussions, understanding or agreements between the parties.*"

The 2013 Articles

67. The 2013 Articles also contain a number of important provisions.

68. The Articles adopt the 1985 version of Table A, subject to the variations and amendments contained in the Articles themselves. The Articles contain the same definitions of Business, CEO and Founder Director as already mentioned above in the context of the SHA.

69. Article 6 is headed "*Transfer of Shares*". Article 6.1 sets out limitations on the ability of the minority shareholders to sell or transfer their shares, although the Investor (see

Article 6.4) was given a generally unrestricted right to transfer its shares to any third party.

70. Articles 14, 15 and 17 contain critical provisions relevant to the composition and activities of the board.

71. Article 14 deals with the "*Appointment and retirement of directors*", and provides as follows:

> *"14.1 The directors shall not be required to retire by rotation and regulations 73 to 80 (inclusive) of Table A shall not apply to the Company.*
>
> *14.2 Subject to the approval of both the Founder Director and the CEO, the directors may appoint a person who is willing to act to be a director, either to fill a vacancy or as an additional director."*

72. Article 15 is headed "*Disqualification and removal of directors*". Article 15.1 deals with the circumstances in which the office of a director shall be vacated. These include, at 15.1(b), the case where a director "*becomes bankrupt or makes any arrangement or composition with his creditors generally*"; at (d), the case where a director resigns his office; and at (e), the case where "*the Board passes a resolution to remove a director*."

73. Article 15.1 is however expressly subject to Article 15.2, which makes particular provision for Dr Sachs and Mr Faulkner, and provides as follows:

> *"The Board shall not be able to pass a resolution to remove the CEO as a director or the Founder Director as a director and nor shall those individuals vacate the office of director if they make any arrangement or composition with their creditors generally."*

74. "*Proceedings of the directors*" are dealt with in Article 17. Articles 17.1 and 17.2 deal with disclosure requirements and conflicts of interest; Articles 17.7 and 17.8 deal with quorum issues:

> *"17.1 Subject to the provisions of the 2006 Act and Article 17.2, a director notwithstanding his office -*
>
> *….*
>
> *(e) shall be entitled to vote on any resolution and … be counted in the quorum on any matter … which in any way concerns or related to a matter in which he has directly or indirectly any kind of interest whatsoever and if he shall vote on any resolution as aforesaid his vote shall be counted*
>
> *provided that the director has disclosed to the other directors the nature and extent of the interest arising pursuant to this*

> *Article 17.1 and the Board has resolved that the director may vote.*
>
> *17.2 If a director is of the opinion (acting reasonably) that there is a conflict between his fiduciary duties to the Company and his role as an appointed director of a Shareholder in voting on any particular matter to be considered by the Board, he shall disclose that interest to the Board and shall abstain from voting on that matter.*
>
> *…*
>
> *17.7 Subject to Article 17.8 the quorum for the transaction of the business of the directors shall be three and shall include the Founder Director, the CEO and, if one has been appointed the director appointed by the Investor.*
>
> *17.8 If one of the directors who is required to be present for a meeting of the directors to be quorate is conflicted and abstains from voting in accordance with these Articles, that meeting of the directors shall be quorate notwithstanding that abstention."*

75. As to the conduct of business and voting at board meetings, Arts 17.9 and 17.10 then provide as follows:

> *"17.9 Subject to Article 17.10 resolutions arising at any meeting of the directors shall be decided by in majority of votes provided that both the Founder Director and the CEO must at all times form part of that majority.*
>
> *17.10 If either the Founder Director or the CEO are conflicted and abstain from voting at a meeting of the directors in accordance with the Articles, they will not be required to form part of the majority required under Article 17.9."*

76. Article 22 is headed "*Compulsory transfer and disenfranchisement*", and includes provisions mirroring the Good Leaver, Bad Leaver provisions already mentioned above in the context of the SHA.

Newton Aycliffe

77. I have mentioned above the new target date for an "*Exit*", namely April 2015. Consistent with that, a later Kew Report indicated the aim was for the pico (embedded) projector to enter production in the second half of 2014, with mass production to follow in Q2/Q3 of 2014.

78. Other events at the same time speak to there being a high degree of optimism as to the CPGL business. Already, in March 2013, CPGL had acquired a commercial laser technology business called Alfalight. This was part of Dr Sachs' vision to become a vertically integrated manufacturer.

79. Then in June 2013, the Group went on to acquire Newton Aycliffe, described in the evidence as the largest gallium arsenide fabrication plant (or "*Fab*") in Europe. The acquisition cost was £3.599m. Newton Aycliffe employed a large number of staff, and so came with substantial running costs also. These were mitigated to some extent by a long-term supply contract Newton Aycliffe had with a company called Selex, which in turn had a contract with the Ministry of Defence. But even with the benefit of the Selex contract, Newton Aycliffe was loss-making as matters stood. The idea, however, was that over time it would become part of Dr Sachs' overall vision of becoming a vertically integrated manufacturer. That was obviously dependent, of course, on CPGL first developing a marketable product or products.

80. The Newton Aycliffe acquisition was carried out in the name of CPUK, and on 23 July 2013, Mr Faulkner became a director of CPUK.

The November 2013 Business Plan

81. In November 2013 Mr Fletcher, Mr Burkey, Mr Bolger and Ms McDermid travelled to Phoenix for demonstrations and a presentation of CPGL's business plan. The plan was ambitious. It contemplated the pico being launched in late 2014 and entering full-scale production in early 2015, with sales volumes increasing rapidly thereafter.

82. It also contemplated sales of the standalone projector following shortly thereafter, and emphasised the benefits of the CPGL standalone over others in the market, in terms of functionality, size and cost. Two basic models were proposed, the 1080p and the 4K. The business plan stated that CPGL's Bill of Materials or "*BoM*" for the 1080p was only US$70 per unit, and US$200 for the 4K, which in turn meant being able to sell at something like 10% of the price of the average competitor models. A compact design was proposed, comparable in size to an Apple TV.

83. In order to achieve this, however, further investment was required. This was put at some US$76m for 2013/2014. But the expected returns were tantalising: earnings predictions suggested EBITDA of $122m in that year, rising to $711m by the end of 2017. Faulkner described these as impressive figures as suggesting "*we [were] off to the Promised Land*".

84. These were significant further sums, however, and they represented more than Vollin was content to fund on its own. That explains the approach made at around this time to Mr Abramovich, to assist with CPGL's ongoing funding needs.

2014: The Minden Investment

85. In January 2014, Mr Abramovich travelled to Phoenix for a presentation given by Dr Sachs. This took place on 24 January 2014. Mr Abramovich was much impressed and gave the go-ahead in principle for an investment in CPGL. The picture presented to him was very similar to that in the November 2013 business plan. It contemplated that the business overall would become revenue generative in 2015, assuming $75m was invested in 2014 and "*likely*" the same again in 2015, to allow a ramp-up to manufacturing capacity.

86. These were exciting times, but on 7 February 2014, Mr Fletcher sent an email reflecting (in somewhat disparaging language, which he apologised for during the

trial), a concern he had about exposing Mr Faulkner to Mr Abramovich and Dr Abramov:

> *"RA and AA will attend 1st 'board meeting' themselves and I suspect all others until they get bored. If you want Mark to survive on the board even short term (which I'm guessing you do) I would strongly suggest he doesn't attend other than possibly in the role/guise of a breakfast appetiser. Maybe he tastes good with eggs! I don't think we actually need a board meeting in any official sense."*

87. In any event, in March 2014, Minden executed a Subscription Agreement and, importantly, Deed of Adherence to the 2013 SHA. Under the Subscription Agreement, Minden was given the entitlement to appoint its own (single) nominee to the board of CPGL; and by the side-letter, Vollin as majority shareholder agreed (broadly) to take all steps at its disposal to keep Minden's nominee in place.

88. The result, from March 2014 onwards, was a board comprising six members, namely Dr Sachs and Mr Faulkner (as Chairman and CEO respectively), Dr Lind, Mr Fletcher and Mr Bolger (as the Vollin nominees), and Mr de Cort (as the new Minden nominee).

The World Mobile Congress

89. At roughly the same time, however, there was something of a setback.

90. The World Mobile Congress took place in Barcelona in February 2014. This had been held out by Dr Sachs as an important opportunity to demonstrate the pico model to potential partners, i.e., manufacturers of mobile phones. Dr Sachs' evidence was that it was an impressive achievement that a fully functioning pico projector was available by February 2014. I am sure that is correct, but the evidence is that there were some problems with it, in that the display had certain imperfections, which were later sourced to a component provided by a third party manufacturer.

91. In any event, Dr Sachs' evidence was also that his efforts to engage the interest of mobile manufacturers ran into the sand, because certain of them were put up for sale and in effect became distracted by different business priorities. Dr Sachs was challenged on this aspect of his evidence, on the basis that a further cause of their lack of interest must have been the defects revealed by the Barcelona demonstration. As to this, I find it impossible to say, on the basis of the evidence before me (which did not include evidence from any of the mobile manufacturers themselves) what the real reasons were for the failure of Dr Sachs' efforts, and I do not think it relevant to do so. The important point is that the efforts were unsuccessful.

92. In consequence, it was clear by mid-June 2014 that the projections shared at the presentation in Phoenix in early 2014 were no longer achievable. Plans for the pico were effectively shelved, and attention came to be focused on the standalone projector.

93. In January 2014, the expectation had been that the 1080p would go into production at the start of Q1 2015, and the 4K would follow during the same quarter. But by June

2014, that had slipped to Q2 2015; and by September 2014, it had slipped again to Q4 2015.

2015: Vollin becomes concerned

94. It is obvious that the next phase in the development of CPGL's business was to be a critical one, but regrettably there were further setbacks. By March 2015, the projected product launch date had moved back again to Q1 2016. External consultants were engaged. One of them, Dr Gale, thought that timescale "*aggressive but possible*." By July 2015, however, the expectation was that the first customer shipment would not be until November 2016.

95. The evidence shows Mr Fletcher becoming increasingly anxious during the Spring and Summer of 2015. No doubt he felt a degree of personal responsibility, because Kew were the ones who had originally recommended the CPGL investment to Vollin. Mr Fletcher was beginning to lose confidence in Dr Sachs.

96. At this stage, however, it seems that such serious concerns were not shared by the Investors. In an effort to support Dr Sachs and to provide him with a sounding board, CPGL had engaged Sir Peter Williams as a consultant. Sir Peter had been Chairman of Oxford Instruments, the company which had manufactured the first MRI scanners. His early report to Dr Sachs following a meeting with Dr Abramov, Dr Frolov, Mr Abramovich and Mr Fletcher on 19 June 2015 was positive, notwithstanding the ongoing delays in production. He said to Dr Sachs in an email:

> *"You have their total support for the strategy of end user market penetration as opposed to becoming an oem [sc. Original Equipment Manufacturer – i.e. selling the components for another company to sell and brand] - I raised the question of the latter as I was interested to hear their views. Quite clearly, the idea of creating a new company with its own brand in the market is a key motivator for them, not just making lots of money (though the latter is of course of critical importance)."*

97. Consistently with that, there was no overt expression of concern when at the Investor update meeting on 1 July 2015, Dr Sachs presented a revised "*ask*" of the Investors for an "*additional investment to launch*" of $118,000,000 and an "*additional investment to breakeven*" of $180,000,000.

98. After that, on 7 August 2015, Vollin and Minden executed a further Subscription Agreement for $31m in monthly tranches starting on 1 August 2015. By September 2015, the Investors had subscribed in total a sum of £135 million in CPGL. Their expectation at that stage was that a product would get to market by November 2016.

99. There was a further quarterly update presentation to the Investors on 19 October 2015. The picture presented was that matters were largely on track. The section headed "*Financials*" referred to spending being within or under budget. Reference was made to further funding being required in February 2016.

Mr Bolger's Visit to Phoenix

100. In November 2015 Mr Bolger, who up until that point had worked at Kew, left that role and took on a new role as CFO of CPGL.

101. As part of that process of transition, he made a trip to Phoenix to assess how work was progressing on the demonstration model for the standalone projector, known as the "*P1*".

102. Mr Bolger's evidence, which I accept, is that he was very concerned by what he saw. The prototype itself was three or four times larger than anticipated (as Mr Bolger explained in his oral evidence, its dimensions had gone from something you could *"fit in your pocket to something that … you could fit in your briefcase … to something you would fit in your car"*).

103. There were other issues as well. The demonstration model was designed to be 2,000 lumens (whereas Mr Bolger was expecting 3,000 lumens), and perhaps more significantly, there was an internal disagreement about likely production costs.

104. In July 2015, Dr Sachs had calculated a BOM for the 4K main projector of $750, whereas Mr Passon in November calculated the BOM at somewhere between $1,500 and $2,150. These matters caused Mr Bolger to think that Dr Sachs was perhaps filtering the information made available to the Investors. At any rate, the picture presented to him in Phoenix seemed at variance to that in the recent October presentation to the Investors, and he became worried about it and says he had "*serious reservations*" about whether Dr Sachs' vision was in fact realisable.

Alternative Funding Source

105. Despite Vollin's support to date, at about this time Dr Frolov began to express concerns that the continuing requests for funding were becoming too much of a drain. He began to consider the possibility of identifying a further third-party investor (or perhaps investors) to help. On 16 November 2015 he wrote to Dr Abramov, Mr Fletcher, Mr Burkey and Mr Cochrane. He emphasised the need to have a demonstration model available to show to potential investors:

> *'1. We have discussed and* agreed *that we are not prepared to commercialise the product on our one [sic - = 'own'?]. As soon as demo is available and even earlier we need to look for the partner: financial or ideally strategic.'*

106. The need for a further investor may have been occasioned by some liquidity issues affecting Vollin, but in any event is not surprising, in light of the very extensive investments made so far by both Vollin and Minden, which were far in excess of the amounts originally contemplated in 2010.

107. What was also apparent, however, was that it was unlikely that any third party investor would come on board while the constitution remained that expressed in the 2013 Articles and 2013 SHA. This led to a number of exchanges between Mr Fletcher and Dr Sachs in late 2015, on the topic of what Mr Fletcher called "*grown-up corporate governance*". In the event, although Dr Sachs made some proposals in November 2015, and Mr Burkey responded in substance on 4 January 2016, the matter was not progressed.

Presentation to the Minorities/Year-End 2015

108. As to expectations at this stage, both Mr Bolger and Mr Jackson were cross-examined as to the contents of a presentation they gave to the Minorities in London in December 2015. This presented an image of the business consistent with Dr Sachs' vision for an integrated manufacturing structure. I do not consider that the involvement of Mr Bolger in giving this presentation leads to the conclusion that the reservations he says he was developing were not genuinely felt. For one thing, it is clear that Mr Bolger and Mr Jackson had to step in to give the presentation at the last minute, since Dr Sachs was ill and unable to travel (although he accepted that on the day of the presentation, he had lunch at an expensive restaurant in California).

109. In such circumstances, it is understandable that Mr Bolger and Mr Jackson felt compelled to try to present the picture their CEO had formulated for the Minorities. Moreover, I did not understand Mr Bolger's evidence to be that at this stage, he had already formed the categorical view that Dr Sachs' vision had to be abandoned. In his Witness Statement he said that although he "*was really set back by what I had discovered and spent a lot of time considering the options … ultimately, I remained hopeful that if we all worked together, including Jonathan, we could get the business back on track."* Thus, it seems to me that whatever was said to the Minorities, Mr Bolger's evidence as to the concerns he had was consistent with the evidence overall (including the unchallenged evidence of Mr Passon as to his BOM calculations and his own concerns arising therefrom), and I accept it.

110. In any event, it was clear as the new year approached that a careful look at the business and the overall business model would be needed. Mr Fletcher prefigured this in an email to Dr Sachs dated 16 December 2015, copied to Mr Bolger, in which he said that the next Investor update would have to include "*a fairly wide ranging discussion, including future funding, strategic partnerships and overall strategy*." This was in advance of a planned investor meeting in Phoenix in February 2016.

111. On the same day, 16 December 2015, Mr Bolger resigned as a director of CPGL. That left the board of directors of CPGL as follows: Dr Sachs and Mr Faulkner as CEO and Chairman respectively, Dr Lind, Mr Fletcher as the Vollin nominee, and Mr De Cort as the Minden nominee. Shortly afterwards, on 8 February 2016, Mr Burkey stepped into the gap left by Mr Bolger and became the second Vollin nominee.

Early 2016: the P1 Prototype

112. On 7 January 2016 Dr Sachs attended a meeting at Kew. In advance of the meeting in Phoenix in February, he was invited to give consideration to different planning scenarios, which as Mr Fletcher summarised in a later email of 20 January to Dr Sachs and Mr Bolger, were to include "*a very broad and potentially unpalatable range of options including outsourcing of manufacturing, jv'ing the business etc, as well as the high and low selling price and volume scenarios*." In the same email Mr Fletcher warned that the Investors' funding appetite was diminishing. Mr Fletcher concluded by saying:

> *"I'm sorry to chase you on all this as we recognise that you are very busy. But you should not underestimate the importance of*

> *the above. The next investor meeting is going to be key on this whole issue of financeability."*

113. Preparations for the meeting in Phoenix did not go smoothly. Mr Bolger encountered difficulties in tying Dr Sachs down and getting him to focus on the detail of the presentation to be given to the Investors. For example, on 27 January 2016, Mr Bolger sent an outline of the proposed presentation to Kew but it is apparent from his email that he had not managed to discuss it with Dr Sachs. On 3 February 2016, having sent a copy of the draft presentation which included Kew's feedback to Dr Sachs the day before, Mr Bolger emailed him asking for a call and said: "*I am just getting a little edgy about how much work there still is remaining …* ."

114. I did not understand Dr Sachs in his evidence to be resisting the proposition that he had limited input in the presentation. On the contrary, he seemed to wish to distance himself from it and to characterise it largely as Mr Bolger's work since he was the CFO. But this drew criticism from Mr Fletcher who described it as an "*abrogation of responsibility and the best indicator of why he [Sachs] should not have been CEO."*

115. There were also some continuing issues with the technology. These were summarised in an email sent by Mr Bolger to Mr Fletcher (and copied to Dr Sachs) on 12 February 2016:

> *"The demo could use more fine tuning, and there have been some issues with known good LCOS deteriorating over the space of a few days. Until the tech guys get to that bottom of the cause, with build times (approx 1 day) it makes it not entirely riskless that we have something that looks good Tuesday but not Wednesday and we have no time to fix. It is running video etc and I have seen some looking good and absolutely ready for demo viewing, but the above issue causes me concern."*

116. The upshot of this, together with Mr Bolger's view that the presentation itself required more work, in part because Dr Sachs had been heavily distracted by what Mr Bolger called "*physical demo stuff*", was that the decision was taken by Mr Fletcher to cancel the planned Investor meeting in Phoenix.

117. I reject the suggestion that this was done deliberately, with a view to creating a negative impression of Dr Sachs. The evidence is that neither the financial nor technical aspects of the demonstration were as advanced as they needed to be, and so the decision to cancel the visit by the Investors was a reasonable one. In any event, Dr Sachs raised no objection at the time. Instead, Mr Fletcher arranged to travel to Phoenix to view the demonstration, accompanied by Sir Peter Williams.

118. A presentation of the P1 prototype duly took place on 17 February 2016. Technically, this appears to have gone ahead successfully. In his reporting email to Dr Abramov, Dr Frolov and Mr Burkey on 18 February, Mr Fletcher was in fact complimentary about some aspects of the projector's performance:

> "*The P1 demo was ready and working and showing a decent display… What's remarkable is the color spectrum… The*

> *Nittoh Zoom lens is good – no blurring or distortion on the edges of the image… They are probably about 4 weeks away from having 'everything physically, in the box' and being ready to demo to a competitor/jv partner…* "

119. Certain further points are apparent from the emails which followed the presentation, however. One is that the product now contemplated, although smaller than others in the marketplace, was larger than originally expected. In his oral evidence Mr Fletcher emphasised how this meant a different business proposition to that originally contemplated:

> *"It is funny you should say that, because as I have made clear in my witness statement, my technical capabilities in terms of understanding the technology are about zero. The things that I could absolutely grasp were the critical and very simple and incredibly -- potentially incredibly exciting proposal, that Jonathan Sachs and CP were going to produce for us a projector the size of an Apple TV with the performance characteristics of a huge projector, and the price of the cost of an iPod. That is what we invested in, and those metrics were critical. So, yes, when it turned out that the projector that was actually produced, far from being four inches by four inches by one inch, was huge, approximately 100 times the cubic capacity of the projector we had been promised, which made it impossible to sell in the manner and in the volumes we had expected. This projector eventually that turned up was approximately 15 times the cost we had been offered, we had been told we would have, the whole thing is a nonsense. We found ourselves as a player in a very difficult marketplace, with 43 competitors, with a relatively 'me too' product; absolute disaster."*

120. It was also apparent that substantial further investment would be required. Mr Fletcher in his reporting email said: "*our current guesstimate, based on what was presented is that we are looking at $150m to $200m from here. This is clearly unacceptable and almost certainly unfinanceable by anyone other than a strategic. Much more to discuss here internally.*"

121. Mr Fletcher was also very concerned about Dr Sachs remaining as CEO. In both his email to the Investors, and in an email sent on the same day to Sir Peter Williams, Mr Fletcher referred graphically to Compound Photonics' management being a "*shit show*". In his email to Sir Peter he said that Dr Sachs was a "*founder tyrant*", who did not value a team approach.

122. In his email in reply, reporting on his discussions with Mr Bolger and Dr Sachs after Mr Fletcher's departure from Phoenix, Sir Peter expressed similar sentiments:

> *"I'm afraid there is no recognition yet of their own management deficiencies – even my rather gentle attempt yesterday to urge the team to 'cohere' and function better (i.e., normally) has fallen on deaf ears. This is because, as you say,*

> *Jonathan will direct and decide most matters of importance and will not change in my view. My advice to you is to encourage him to base himself in Phoenix, as he suggests, and at least take day to day control of the process from now on."*

123. On 24 February 2016 Mr Fletcher reported by email to Mr Bolger, copied to Dr Sachs, to emphasise the gravity of the situation. The critical question was to have a clear plan to commercialisation of the product which had now been taken as far as the demonstration stage. However, as Mr Fletcher explained (emphasis added):

> " *… time is running short on the need for a properly quantified and analysed discussion of the strategic options facing this business, as I mentioned in Phoenix. <u>There is no appetite to fund for more than a couple of weeks</u> until all this is understood and digested and specific proposals/options are in place for a reduction in the cash funding requirements … There is no appetite to fund for more than a couple of weeks.*"

124. Consistently with that, on 4 March 2016, when Ms McDermid came to circulate to Dr Sachs and others draft documentation for the "*next CP funding round",* **t**his included a draft Subscription Agreement for only US$8,000,000 in funding from Vollin and Minden and directors' resolutions in respect thereof. That was a long way short of the amounts needed to fund the business through to launch of a marketable product, and even if approved by the Investors, would keep CPGL running only for another few weeks.

125. This then provides the backdrop to the important events in March 2016, which ended with Dr Sachs' resignation from the business.

<u>9-14 March 2016</u>

126. On 9 March 2016, there was a critical presentation at Kew's offices, attended by all the main players (save for Mr Abramovich). In attendance were Dr Abramov, Dr Frolov, Mr Fletcher, Mr Burkey, Mr De Cort and Mr Tenenbaum, along with Ms McDermid, of Kew Capital.

127. Mr Bolger led the presentation, and his slides presented four scenarios: an '*old scenario*' and three new scenarios (1. '*Low Cost, High Volume*'; 2. '*High Cost, Low Volume*' and 3. '*Brand Partner, High Cost, Low Volume*').

128. The additional capital requirements to get to breakeven ranged between US$200 million to US$270 million. Critical to the cost analysis were the expected build costs, reflected in the BoMs. As to this, Mr Bolger thought he had reached a consensus with Dr Sachs, representing what he described as the small area of overlap between what Dr Sachs wanted and what Mr Bolger was happy to present to the Investors.

129. In the event, however, he was wrong. During the presentation, Dr Sachs openly disagreed with the figures Mr Bolger was presenting. This was a matter of disappointment and concern to Mr Bolger, who in his oral evidence said: *"Dr Sachs belatedly considered that he did not like those figures particularly, but they had been*

long and painfully negotiated over the course of some weeks, if not longer, and we all knew this was a pretty crucial presentation".

130. Much more significantly, however, it was a matter of concern to the Investors and their representatives. They were left with conflicting information about the business model they were being asked to fund, and that was essential to their decision, because the question of the build cost was linked to the question of sales volumes, and the question of sales volumes was linked to the question of whether Dr Sachs' vision of a vertically integrated business was still viable. Mr Bolger put the point as follows in his oral evidence:

> *"I would accept that the figures [Sachs] wanted [to] be presented were consistent with his vision. However, there is a big leap there and his vision was just utterly undeliverable, and he had – this is, I guess, pretty boring, but a lot of this came down to the bill of materials and Jonathan's wild optimism about the bill of materials. Unfortunately when you knocked over that domino, a number of other dominos fall over as well. When you start with a materially high bill of materials, so we are selling a projector for $3-5,000 not $1,000 to $1,500 then all of a sudden you come to the conclusion if you look at the market segmentation, these curves that plot how many projectors have sold at different price points, it is no surprise there is really a lot like 3 million projectors sold as $500 down to literally hundreds of thousands of projectors sold above $3-5,000, you end in a situation where your assumptions on vertical integration suddenly just fall over because you are not going to be able to be producing in volume to pay – for example in this case to pay the overheads of Newton Aycliffe."*

131. Dr Sachs was clearly still committed to something like his original vision of a vertically integrated business, and he saw the problem differently. For him, the issue was that his views were being filtered unfairly by Mr Fletcher and others, and he considered that the Investors were not being given a fair account of his point of view. For that reason, he initiated a private discussion with Mr Tenenbaum after the presentation, and the upshot was that a lunch was arranged for the following day, 10 March, at Hakkasan in Mayfair.

132. The attendees at the lunch were Dr Sachs, Dr Abramov and Mr Tenenbaum. Mr Tenenbaum gave a careful and considered account of the lunch in his evidence which I accept. His position, as he explained it, was that no decision had been taken going into the lunch as to the removal of Dr Sachs as CEO. Instead, the concern was a different one. It was accepted that Dr Sachs had much to contribute technically (one of the later emails refers to his providing "*pixie dust*"), but at the same time there were concerns about the effect of his management style, and more particularly about the fact that there were differing views within the business about likely build costs, and therefore about the viability of the standalone, or fully integrated, model. Thus, Mr Tenenbaum's evidence was that the Investors "*wanted to give Jonathan another chance to discuss where the company could go next.*" He said, "*It was not an aggressive 'to remove or not to remove' moment. It is to find a solution to a problem."*

133. The issue of having reliable information available, in order to make properly informed decisions, was crucial to Mr Tenenbaum. To address this problem, at some point the idea was proposed that strategic consultants be engaged. McKinsey & Co were suggested for the role. Mr Tenenbaum explained the motivation as follows:

> *"The consultants were not there to alleviate concerns… You know, as an investor, you are focused on … the reliability of the information [it] is the sacrament of what you are doing. So, when it was communicated to the investors, to myself and Dr. Abramov that the information that was given to us was not necessarily reliable, it was critical that we would get to the bottom of it. It wasn't necessarily to deal with egos; it wasn't necessarily to deal with Jeremy Fletcher or Dr. Sachs. It was to get to the bottom of the information flow… It was to actually ascertain what … information was reliable."*

134. Dr Sachs' evidence on the same topic had a different emphasis. He said that the:

> " …*suggestion of bringing in management consultants was in essence proposed as a way to alleviate my concerns about the flow of information … rather than any suggestion that management consultants should be brought in to bring financial discipline, vision or restructuring of the company*" (emphasis added).

135. If that was Dr Sachs' view of it, it seems to me it was a distorted view and I reject it. It is much more natural to suppose that Mr Tenenbaum's position was neutral, as he explained in his evidence, and that he was concerned only about obtaining a reliable and objective assessment of the Compound Photonics business, rather than that he was persuaded to adopt Dr Sachs' perception that Mr Fletcher and Kew were somehow doctoring the information flow. Dr Sachs' perception was to cause ongoing issues, however, as will be apparent shortly.

136. There was a further meeting at Kew's offices on Friday, 11 March. The attendees were Dr Sachs, Mr Fletcher, Mr Bolger, Ms McDermid, Mr Jackson and Mr Stark. Mr Tenenbaum attended by phone. I accept Mr Tenenbaum's evidence that, going into this further meeting, Dr Sachs still had his support and that of Dr Abramov. But matters changed as the meeting unfolded.

137. The cause of the further disagreement was the suggestion by Mr Fletcher that a different set of management consultants, BCG, be engaged, rather than McKinsey & Co. This was an issue for Dr Sachs because of a close association Mr Fletcher had with BCG – one of his good friends, a Mr Shanahan, was senior partner there. Mr Fletcher thought this would assist, because the personal connection would encourage BCG to put their best team on the assignment. But Dr Sachs was highly resistant. For him the concern was that the close association would allow Mr Fletcher to continue to filter the flow of information to the Investors, and thus would only exacerbate the problem not solve it.

138. In any event, on this point I accept Mr Fletcher's evidence, and that of Mr Tenenbaum, that the question of which firm of consultants to appoint quickly came to

be of secondary importance, because Dr Sachs refused to engage with the question of the level of access to be allowed to the consultants, whoever was given the job.

139. Mr Bolger said in his oral evidence that things changed when Mr Fletcher *"said something along the lines of 'It does not really matter but you understand Jonathan these guys are going to be crawling all over you, there is going to be lots of these guys here and they are going to asking everybody questions'".* Mr Bolger went on:

> "*That is the point at which I believe Dr Sachs got particularly resistant and then Eugene [Tenenbaum] chipped in from the speaker-phone very aggressively, which I have not seem him quite that aggressive before, and the meeting became very tense and it was in the end adjourned for Dr Sachs to think about consultants over the weekend… ."*

140. That account is fully consistent with that given by Mr Fletcher himself, and by Ms McDermid ("*I do very specifically remember thinking that [Sachs] was being absolutely impossible. I remember Eugene being on the phone when Jonathan was just refusing to answer to answer the question about 'Would you consider letting management consultants have full access', and Jonathan just was not answering the question.").* It is also consistent with Mr Tenenbaum's account. I think it fair to say he was disappointed in the way in which Dr Sachs, who in other ways he regarded as a highly talented and intelligent individual, was responding.

141. The upshot was that the meeting was adjourned over the weekend to allow time for Dr Sachs to consider the position further.

142. On Saturday, 12 March, there was a meeting at Kew's offices to discuss a number of Vollin's investments, including CPGL. One of the purposes was to determine whether to support the latest funding round – i.e., to execute the draft Subscription Agreement circulated by Ms McDermid on 4 March 2016.

143. No final minutes are available, but there are a number of drafts. According to these, there were five attendees, namely Dr Abramov, Dr Frolov and Mr Cochrane (all from Vollin), together with Mr Burkey and Mr Fletcher (from Kew). It seems clear from the draft minutes that it was this group who initially formed the view that Dr Sachs should be asked to step down. The last available draft of the minutes contains the following points under the heading "*Compound Photonics*":

> " *1. JF and NB to meet with Jonathan Sachs on 14 March. AA and ET to attend as passive observers.*
>
> *2. NB to prepare a briefing note for AA summarising the options re Jonathan and what will be proposed to him.*
>
> *3. Kew should formulate short term goals for interim CEO including identifying who and what assets/facilities must be retained in order to protect IP, prototype, key people i.e. all value.*
>
> *4. Permanent CEO search to start immediately*."

144. What this also shows is a decision to abandon the plan of using consultants to collect more reliable information about the business, as discussed with Dr Sachs the day before, and instead to focus on a short term strategy of seeking to retain what existing value the business had, while buying some limited time through further financing to allow future options to be considered. As to further financing, the last available draft of the minutes contains the following further paragraphs 5 and 6:

> "*5. Only US$10m financing is available for the company (until May 31st only)*
>
> *6. No later than early April Kew to prepare a paper for AA so that he can use as a basis to discuss with RA scenarios in which Vollin does not provide any further funding beyond 31 May*."

145. That reading of the minutes is consistent with an email Mr Fletcher sent to Mr Shanahan during the course of the meeting, standing him down. He said, reflecting the fact that at that point the Minden representatives had not been consulted: "*As of now, and it might just conceivably change in the next 36 hours once we inform Roman, we've decided to 'restructure' CP on our own for now. The remaining management team will extricate the 'truth' for us in the very near term – 2 to 3 weeks*."

146. Mr Fletcher however was concerned about the mechanics for removing Dr Sachs. He emailed Mr Bolger:

> *"I am worried about the board. We don't just need Mark's cooperation from memory but also the other guy whose name I can't remember [viz. Dr Lind]."*

147. Mr Bolger replied (emphasis added):

> *"I'm pretty sure we just need Marks co-operation. I think it is just Jonathan and Mark that had special powers and JS should be conflicted from voting on himself. I have the docs and will be reading them tonight to make sure. Bob Lind is to some extent senile now as I understand it so might be tricky if we need him for something. It should be majority (JF,NB and Andre would qualify with JS conflicted), plus Marks super vote.*
>
> *I gave Mark a heads up tonight and asked him to think about his position; it's a lot of changing perception for Mark to do and giving him a night for it to sink in probably helps. I think he will do the right thing; that was his instinct tonight. He's in South Africa until Thursday. I asked him not to talk to Jonathan as there is currently no certainty about what happens next. I think a call to mark with a JS = no more money will be persuasive."*

148. What is obvious from these exchanges is that Mr Fletcher and Mr Bolger regarded it as important to have Mr Faulkner's support for what was proposed. According to Mr Bolger, Mr Faulkner was inclined to provide that support, and when cross-examined,

Mr Faulkner did not deny it. He said he would "*follow the money.*" The other important point is that the question of continued funding for the business was thought to be important in getting Mr Faulkner on board.

149. Following Mr Bolger's prompt, on the following day, Sunday 13 March 2016, at 15:07, Mr Burkey wrote to Mr Faulkner, cc Mr Fletcher, in the following terms (emphasis added):

> "*We are writing to you in your capacity as Chairman and Founder Director of Compound Photonics Group Limited (the 'Company'). In the past week, Kew Capital LLP, as advisor to Vollin Holdings Ltd, has held extensive discussions between the management team of the Company and with representatives of Vollin Holdings Limited and of Minden Worldwide Limited, collectively the 'Majority Investors' in the Company.*
>
> *Based upon the business plan put forward by the management team on Weds 9th March, their preferred strategic option calls for $165m additional capital in the base case, with aspirations to achieve Revenue and EBITDA in 2018 of $209m and $404 respectively. This base case is predicated on certain assumptions (BOM, projector design, sales and timeline) that we derived little to no comfort as being within the existing capability of the Company. Indeed, our experience to date has been one of persistent delays and underachievement relative to the projector specification envisaged when the Majority Investors provided capital to the Company in the past.*
>
> *Scenario analysis provided by the Company suggested that taking these factors into account would increase the capital required to break even to rise to $250m.*
>
> *The Company has a small cash balance but will be unable to make March UK payroll.*
>
> *The Majority Investors have lost confidence in the CEO, Jonathan Sachs, and as a result, will not provide further funding to the Company under the existing management arrangements.*
>
> *Since personally, we are also Directors of the Company, the above obviously goes to whether the Company can remain as a going concern, and we therefore urge you to call an immediate Board Meeting with the agenda item of discussing Jonathan's position.*"

150. Mr Fletcher and Mr Burkey then telephoned Mr Faulkner. As Fletcher describes the conversation, Mr Faulkner "*said that ultimately if it was between Jonathan or the company going bust, he agreed Jonathan needed to go*"; and as Mr Faulkner describes the conversation he was told that "*no further funding would occur unless Jonathan was no longer the CEO and a director of CPGL group companies*".

151. I accept Mr Hollington's submission these communications with Mr Faulkner must have happened before Mr Tenenbaum was contacted, because it was only at 17.15 on the same day that Mr Fletcher sent an email to Mr Abramov preparing him for a call to Mr Tenenbaum (he said, "*I guess the question that ET will ask you is 'so we fire JS and then what?*"). Before that, at 16.48, Mr Burkey had emailed Dr Abramov on a related topic and referred to having already "*discussed the situation with the chairman*."

152. The evidence on the Minden side as to precisely what their position was is rather opaque. Mr Tenenbaum could not recall when he had spoken to Dr Abramov, or to Mr Abramovich, and the Court was not assisted by evidence from Dr Abramov or Mr Abramovich themselves.

153. In any event, in the same email at 17:15, Mr Fletcher made clear who he thought should take over management after Dr Sachs' removal. His proposal was: "*Brian to be interim CEO*", which is in fact what happened, presumably following discussion with Mr Tenenbaum, but without any other formality including any board meeting.

154. At approximately 1:30 pm on Monday 14 March, anticipating a meeting starting at 4 pm, Dr Sachs wrote to Mr Fletcher and others saying he had spent time over the weekend considering various approaches in light of the discussions the previous week. He attached a summary "*that I wanted to review with you today*". Plainly, Dr Sachs was totally unaware in sending this email that a decision had already been reached to remove him. About 10 minutes later, Mr Fletcher responded and said: "*Jonathan, thank you for this. I can confirm that we are still expecting to meet at 4 pm at Kew's offices*."

155. Before the 4 pm meeting Mr Bolger produced a draft email to Mr Stark, a CPGL employee who was friendly with Dr Sachs. As Mr Bolger explained in his oral evidence, the idea was to have a briefing available for Mr Stark in the event that Dr Sachs approached him for guidance after the 4 pm meeting. On the topic of continued funding, the draft email said:

> "*The alternative is no more funding and insolvency this week mostly likely (the directors will have to call time as its clear there is no more funding under Jonathan's leadership), and a liquidator called in.*"

156. The attendees at the meeting were Dr Sachs, Dr Abramov, Mr Fletcher, Mr Burkey and Mr Tenenbaum. A number of accounts of the meeting are given in the evidence, but the differences between them are largely matters of emphasis rather than substance.

157. Mr Fletcher's account in his witness statement is that he invited Dr Sachs to resign, and made it clear that the entire board, including Mr Faulkner, was in support of that outcome.

158. Dr Sachs' account in his evidence was not challenged. According to him Mr Fletcher took out a piece of paper and said "*We are not going to fund the company unless you are no longer CEO*". This was a term sheet for Dr Sachs' removal. Dr Abramov then asked Dr Sachs to respond, and Dr Sachs said "*This is 180 degrees from what you told*

me on Thursday at lunch." Dr Abramov said "*Yes.*" Mr Burkey then said that Dr Sachs had to conclude his removal by close of business on 17 March 2016 and that if he did not go voluntarily he would be forcibly removed by the procedure under the Companies Act. I accept Dr Sachs' evidence on these points, which is largely consistent it seems to me both with that of Mr Fletcher and that of Mr Tenenbaum.

159. In the circumstances, Dr Sachs felt he had little option but to go. He felt that he was given no opportunity for discussion and in effect was presented with a *fait accompli*. There were discussions over a period of about a week regarding his settlement terms, during which he was represented by Fieldfisher, and CPGL were represented by Allen & Overy. On 21 March 2021 he executed a settlement agreement for the termination of his employment by CPUS and removal as CEO from CPGL. The settlement agreement provided for him to be treated as a "*Good Leaver*", in the terms of the 2013 SHA. It also provided for the full and final settlement of all claims arising out of his employment with CPUS and/or the services rendered to CPGL.

160. The settlement agreement was approved by means of a written resolution of the board of CPGL, signed by all the then directors including Dr Sachs and Mr Faulkner himself, and dated 21 March 2016.

161. On 22 March 2016, the Subscription Agreement for the further round of investment by the Investors was concluded, resulting in a further injection of US$8m into the business.

Management of CPGL: 13 April Investor Update Meeting

162. Consistently with Mr Fletcher's email of 13 March 2016, Mr Bolger took on the role of interim CEO.

163. Even in this early period, and indeed before the formal departure of Dr Sachs as CEO, it is clear Mr Bolger was responding to an agenda set by Vollin/Kew. In an email dated 16 March 2016, for example, Mr Bolger wrote to Mr Stark, saying "*I had a long talk with NB & JF today and my main takeaways were: we are going to come under a lot of time pressure (because Kew are).*" On the following day, 17 March 2016, Mr Fletcher said in an email to Mr Bolger: '*mission critical is that burn is cut hard as poss*." By "*burn*" he obviously meant the ongoing cash burn of the business.

164. By 23 March 2016, two days after Dr Sachs' formal resignation, Mr Bolger was able to send an email to all Compound Photonics employees referring to the establishment of a new Executive Committee, comprising Mr Richer, Mr Jackson, Mr Passon and himself.

165. About three weeks later, Mr Bolger presented a Reconstruction Plan to the Investors at an Investor update meeting on Wednesday 13 April. This proposed the abandonment of Dr Sachs' vertically integrated vision for the business, given the very heavy capital investment required. Instead, Mr Bolger proposed a "*Lower Risk, Lower Burn Broader Business Model: Partners and Co-financiers.*" This alternative vision was to be achieved by minimising costs and entering into joint development agreements with third parties.

166. On 18 April 2016 Mr Fletcher circulated to Mr Cochrane, copying Mr Burkey, an email entitled "*CP—minutes*", detailing "*CP Marching Orders/action plan*" arising out of the Investor presentation meeting on 13 April. The bullet points in the email identified a series of strategic decisions and objectives for the CP business, for example: "*1. Focus on micro display business as core value driver … 2. Identify minimum target cost base for CP based on its future as a micro-display (and projector systems) supplier … .*" After identifying other points, the summary then said: "*All the above to form the agenda for next meeting; June 2nd (already confirmed with AA) …*".

Newton Aycliffe & the Last Time Buy Notice

167. As to minimising costs, an important element was a proposal to close Newton Aycliffe. At the time the Fab was costing US$19m per annum to run, but was generating only US$7m per annum from the contract with Selex.

168. Under the heading "*Operating Plan*", Mr Bolger's slide deck for the 13 April meeting proposed: "*Close Newton Aycliffe – save US$14 million p.a./$1.2m per month effective in 3-6 months*." Later, under the heading "*Newton Aycliffe*", the slides said: "*Can call Selex Last Time Buy now. They have six months to respond*". The narrative went on: "*Reduce headcount to the level required to fulfil Selex order; Plant closes finally early/mid 2017*."

169. The reference to the "*Selex Last Time Buy*" was to a mechanism for terminating the supply contract with Selex. Once a Last Time Buy Notice was served, Selex had a period of two months to place any final orders (a grace period to allow it to identify a new source of supply), and thereafter CPUK had a further period of six months to fulfil those orders.

170. Service of the Last Time Buy Notice would thus set the clock ticking on an overall period of about 8 months. During that time, the expectation was that the volume of orders from Selex would increase, bringing the Fab to breakeven, but once the run-off period came to an end, CPUK's main income source would dry up. That would then give rise to further issues. Closure of the Fab would obviously give rise to job losses, and would itself be an expensive exercise (later, in August 2016, closure costs were put at US$8.4m gross, including repayment of the US$3.9m grant from a regional development fund, the "*Let's Grow*" fund). Moreover, once closed, it would be a very expensive exercise to make the Fab operational again.

171. In any event, matters moved quickly after the Investor update meeting on 13 April. On the following day, 14 April, Mr Bolger attended a meeting at Newton Aycliffe with Mr Jackson and Selex and they flagged the likelihood of the Last Time Buy Notice being served.

172. At about the same time, however, Mr Bolger and Mr Jackson began to consider a possible lifeline for Newton Aycliffe. The idea was a management buy-out ("*MBO*"). The broad concept was to try to spin off the Newton Aycliffe Fab into a new company, separate from CPGL, in which Mr Jackson and possibly Mr Bolger would have an interest. The structure was dependent, however, on increasing the volume of business under the Selex contract to make it more profitable, and that was not a certainty.

173. In the event, following a further meeting involving Mr Jackson, Mr Bolger and Selex on 10 May 2016, at which Mr Jackson and Mr Bolger again foreshadowed service of a Last Time Buy Notice, the Notice was eventually served on 16 May 2016. The clock therefore began ticking and the pressure slowly began to increase to find a solution.

Mr Faulkner

174. What of Mr Faulkner during this period?

175. He did not attend the presentation with the Investors on 13 April 2016, to discuss the Reconstruction Plan, and in fact recalled being excluded from it. He said in his evidence, "*I think I know what this is. I actually I think phoned Jeremy Fletcher to ask if I could attend and I was actually told that it was an investor meeting and I cannot attend*." That Mr Fletcher would have discouraged him from attending seems to me consistent with Mr Fletcher's view more generally of Mr Faulkner, and with the idea that Mr Fletcher would not have wished Mr Faulkner to be involved in the Investors' deliberations and decision-making. I therefore accept Mr Faulkner's evidence on this point.

176. Nonetheless, the Restructuring Plan slide deck was provided by email to Mr Faulkner on 18 April 2016, in advance of a meeting he had with Mr Bolger on the same day. Mr Bolger's evidence was that in fact he spoke to Mr Faulkner about the Plan before the presentation to the Investors; he said he had a cordial relationship with Mr Faulkner at the time and spoke to him regularly to update him on CPGL's business. I accept Mr Bolger's evidence on these points, which seems to me consistent with the inherent probabilities, and consistent with the friendly tone of the contemporaneous email exchanges between the two of them.

177. It must follow that Mr Faulkner was aware of the proposals in relation to Newton Aycliffe and the Last Time Buy, since they were mentioned in the slide deck. There is a difference, however, between being provided with updates and information, and being involved in the decision-making process to which that information relates.

178. Mr Faulkner was obviously developing concerns about this, and on 4 May 2016, he wrote to Mr Fletcher to propose a board meeting on either 23 or 24 May, saying that Dr Lind might also want to attend.

179. In a telling response, Mr Fletcher was lukewarm about the idea, although frank enough about the reasons why. He said:

> *" ... given that you are already extremely well briefed about the company and have full access to Brian as the interim CEO, as well as the rest of the management team, I wonder if a board meeting isn't excessively formal. Wouldn't it make much more sense for you just to come in and meet with Nathan and I. It's obvious, following the departure of JS, and the discovery of the serious condition that the company now finds itself in, that changes to both governance and the board structure and composition are required and inevitable if the company is going to continue to attract funding from its funding majority*

> *shareholders. This funding is essential for CP's survival. Previous corporate governance has manifestly failed and I don't currently see much, if any, scope for negotiation on the changes required*."

180. Mr Faulkner agreed to come in to Kew to discuss matters with Mr Fletcher on 23 May, and indicated that one matter he was concerned about was finalisation of the statutory accounts for 2015, which were under preparation by BDO. He said he was particularly concerned about how the "*forward looking statement*" would be dealt with, i.e. a statement as to the ability to continue as a going concern. In the past there had been an understanding as to ongoing investment by the Investors, but Mr Faulkner was concerned to know whether that understanding remained and suggested it needed to be given some thought. Mr Fletcher replied to say he was "*not at all concerned about BDO.*"

181. When eventually they did meet on 23 May 2016, Mr Faulkner's evidence, which I accept on this point, was that Mr Fletcher said he should resign. Mr Faulkner was left to think more generally about updating corporate governance. He delayed in responding and so Mr Fletcher emailed him again a few weeks later on 5 July, reminding Mr Faulkner of their meeting on 23 May. He said:

> *"As I made clear at our meeting, we simply will not continue to fund you as Chairman or in any non exec capacity. Additionally, the governance of CP needs to be brought in line with the ownership structure."*

182. In his written Closing Submissions, Mr Hollington said that Mr Fletcher was here very clearly signalling his view that the 2013 SHA and Articles were obsolete and as far as he was concerned would "*die a death*". I respectfully agree. Mr Fletcher was entirely frank about that fact.

24 May 2016 Investor Update Meeting

183. Consistently with that, on 24 May, i.e. the day after Mr Faulkner's meeting with Mr Fletcher, there was a further Investor update meeting. Mr Faulkner was not invited and did not attend. A further presentation deck was prepared, showing progress since the last meeting and providing an update, but this was not sent to Mr Faulkner. The page on "*Newton Aycliffe/Selex*" said that Selex had responded to the Last Time Buy Notice with an order and in consequence there would be 8 months' work so "*open until Feb*."

Mr Faulkner's "*Lightbulb moment*"

184. Service of the Last Time Buy Notice was a critical step, but Mr Faulkner's evidence was that he did not know about it at the time, and came to be aware of it only later, on about 3 June 2016, when he had a discussion with Mr Jackson and underwent what he called his "*lightbulb moment*":

> *"I remember my light bulb moment. This is what I am referring to in 142 [of my witness statement]. I was actually sitting in the office at 60 Bermondsey Street, and I think I*

> *actually say here this is my light bulb moment, that Vice Air Marshal had actually attended Newton Aycliffe. This is the first time that the light bulb goes on to actually understand that there may be what has actually happened in the presentation in April, the investor presentation, things are starting to move in a certain direction that in actual fact may be the actual last time buy order or something else is actually happening. Why would Vice Air Marshal come to Newton Aycliffe? This is a key distinctive moment when you actually do have a light bulb moment and says, 'Right, there is something going on'.*
>
> *Until this time, Mr. Gledhill, your Honour, I understand that there are presentations going on. There are decisions that might be made that there are options that are being explored and it might be that because Vice Air Marshal is there, maybe this is the option that they have pulled the trigger on to actually say, we will actually provide last time buy orders or is it to increase the orders for more? These are chips that go on to the Tornado fighter jet. Maybe there is quite a lot more there. In fact, I remember that I think that the MOD actually get involved as well, because maybe it is actually there to keep the lights on at Newton Aycliffe. There is a lot to say, 'We are going to close it, is that the decision', or 'Are we going to bring some revenues in', I do not know. You see, I am excluded from the details. I am scrambling around, picking up tidbits and trying to piece things together. I am the sole director. This is really what is going on. I understand why I put this in my witness statement. It is the truth. There is so much going on. There is change; there is massive change, but I have to try to figure it out myself."*

185. I accept Mr Faulkner's evidence on this point. He was challenged on it, on the basis that he must have known earlier about the Last Time Buy Notice, given his discussions with Mr Bolger and the fact that he was sent a copy of the 13 April Restructuring Plan.

186. That is true, and it is also true that when on 16 June Mr Faulkner was copied on a round-robin email from Bolger which mentioned the Last Time Buy expressly, he did not express any obvious surprise about in his response. Nonetheless, it seems to me such matters rather miss the point of Mr Faulkner's "*lightbulb moment*", as he explained it in his oral evidence. That was not about the Last Time Buy Notice as such, but about his realisation that major decisions were being made which affected CPGL and CPUK and which he had no part in, effectively because he was being kept at arm's-length by Mr Fletcher who had little time for him and thought the existing corporate governance arrangements obsolete anyway. Mr Bolger's round-robin email prompted Mr Faulkner to contact him and to arrange a discussion. They subsequently met for lunch at the Shard in London, as I will mention below.

Kaiam Corp.

187. Another matter requiring attention was recruitment of a new CEO for the business. Efforts were being undertaken to identify suitable candidates. One party involved in such efforts was Target, the business in which Dr Frolov's son, Alexander Frolov Junior, was a partner, together with Mr Valler.

188. Target identified a Mr Woo as potential CEO, and in due course, Mr Woo came to be recruited. He was formally appointed CEO later in the year, in November 2016.

189. The important issue for present purposes, however, is that as a by-product of its involvement in the CEO search, Target also came to take a broader interest in solving the problem that the CPGL investment had come to represent for Vollin.

190. Mr Valler was entirely candid about his motivation for doing so. It was to curry favour with Dr Frolov and possibly prise away from Kew parts of the Frolov/Abramov investment portfolio, in particular those parts of it involving technology-based investments. Mr Valler worked hard to exploit this opportunity.

191. Thus, Target came to identify a potential merger partner for CPGL, namely Kaiam Corp. On 14 June 2016, Mr Frolov Junior forwarded a number of documents to Dr Frolov, including a merger term sheet and a slide deck giving some background information on Kaiam. The covering email explained that all terms were open for discussion, but the key elements included valuing Compound Photonics at US$120m, and valuing Kaiam at US$265m. The draft term sheet contemplated the Compound Photonics shareholders obtaining an approximately one-third interest in the merged entity.

192. Mr Fletcher's initial response was highly sceptical. It seems that nonetheless Dr Frolov was insistent, because on 24 June 2016 Mr Fletcher forwarded to Mr Bolger and Ms McDermid the Kaiam slide deck, and asked them both to have a look at it. His covering email hinted at his concern that Target were looking to make inroads in handling Vollin's tech investments, and also mentioned Newton Aycliffe. He said:

> *"Could you please both have a look at this. This is a company that comes out of Alex Jnr's circling around CP at Target, the Tech fund he is involved in. We are being pressed to have a meeting. They are apparently interested in our fab."*

193. This email was followed by a flurry of activity within Kew and on the part of Mr Bolger, as they sought to obtain information about Kaiam (very little was publicly available), and sought to assess whether a merger was a viable proposition.

Mr Faulkner: Lunch at the Shard with Mr Bolger

194. At this point, Mr Faulkner had not been heard of for several weeks, since his meeting with Mr Fletcher at Kew on 23 May. What is now known, but was not known at the time, is that during this period he was consulting lawyers, Bryan Cave LLP, in relation to a possible claim, along with Dr Sachs. As I have mentioned above, however, Mr Faulkner was prompted into action by a round-robin update email from Mr Bolger dated 16 June, which was copied to Mr Faulkner. This gave a general account of progress over the previous few weeks, including "*we have called a last*

Time Buy with Selex, our main RF customer in Newton Aycliffe." Mr Faulkner contacted Mr Bolger and they agreed to meet for lunch on 28 June.

195. Mr Bolger gave evidence about that lunch during his cross-examination. His account is that at this point, his relationship with Mr Faulkner remained cordial. I accept that evidence, and accept that in that sense at least, the lines of communication between them remained open. As the subsequent events show, however, that situation was to change.

196. Mr Faulkner warned of a likely change on his side during the lunch. Mr Bolger's evidence was that Mr Faulkner:

> *" ... made a comment to me about that he was under a lot of pressure from minority investors, there was going to be some unusual behaviour coming up, and I should just understand he was under a lot of pressure from the Minorities."*

197. I accept Mr Bolger's evidence on that point. It is consistent with the idea that Mr Faulkner and Dr Sachs had instructed solicitors at around this time. The making of such a statement is also, in my view, entirely typical of the unguarded manner in which Mr Faulkner often expresses himself. Moreover, his prediction was to turn out to be entirely accurate.

198. At the same time, Mr Bolger had his own developing agenda, the full details of which he felt he could not reveal to Mr Faulkner. This led to a series of dysfunctional interactions between them over the course of the next few weeks.

4 July 2016: Selex Meeting in Edinburgh

199. The first indications arose in relation to a planned meeting with Selex in Edinburgh on 4 July. This was mentioned to Mr Faulkner in a discussion he had with Mr Jackson on 28 June, the same day as his lunch with Mr Bolger. Atypically, given that he had not previously attended such meetings, Mr Faulkner expressed an interest in being there.

200. This came as a surprise to Mr Bolger and Mr Jackson, and according to Mr Faulkner, they tried to discourage him. This is consistent with a text message Mr Jackson sent to Mr Faulkner on Sunday, 3 July 2016, in which he said: " … *don't think it makes sense to come to Scotland tomorrow but let's chat*". Undeterred, Mr Faulkner insisted on attending. Mr Jackson sent him a copy of a slide pack which he said had formed the basis of discussions with Selex so far, and explained that the purpose of the meeting was to discuss the economics of continuing to supply Selex in some form after the arrangements with Compound Photonics came to an end. On the morning of 4 July, Mr Jackson then emailed Mr Balmforth of Selex to say Mr Faulkner's attendance "*Will put restraint on mtg. Particularly around mbo which he [Faulkner] is not entirely knowledgeable of.*"

201. The evidence of Mr Jackson was that the idea of an MBO was in fact discussed at the meeting, and Mr Faulkner was supportive of it. I accept that evidence. It is consistent with the slide pack sent to Mr Faulkner, which mentioned the possibility of an MBO. Nonetheless, the discussion on that particular topic seems to have been limited, and it

equally seems clear from Mr Jackson's email that he felt inhibited in terms of what could be covered at the meeting.

202. Mr Faulkner, on the other hand, was keen to obtain more information if he could. When cross-examined as to why he insisted on attending the meeting, he said he "*wanted to know what was going on*", because he was "*the last man standing ... I am trying to roll up my sleeves and genuinely understand what is going on*." That was a perfectly understandable position for Mr Faulkner to adopt, although in saying that I must acknowledge the point already made above, namely that by this time he had, or was quickly developing, an agenda of his own.

203. After this meeting in early July 2016, nothing further was heard from Mr Faulkner until early August. I will return to the narrative as it concerns Mr Faulkner below. In the meantime, other matters were progressing during July.

Dr Lind Resignation

204. One is that Dr Lind resigned. He was the other member of the CPGL board associated with Dr Sachs, who had been appointed at the time of the Vollin investment in 2013. Mr Bolger's evidence in his Witness Statement was that he visited Dr Lind in or around June 2016 to discuss his position and Dr Lind agreed to resign. That resignation seems to have been entirely consensual – Mr Faulkner accepted in cross-examination that it was. But he also said, and I accept, that Dr Lind decided to step down voluntarily because of a concern that he was not being included in the business of CPGL in a manner which allowed him to discharge his duties as a director satisfactorily, and he was concerned about the risk of litigation.

Ongoing discussions with Kaiam

205. Meanwhile, matters were progressing with Kaiam. Following an initial discussion by telephone on 5 July, Mr Bolger and Mr Passon met with Mr Bardia Pezeshki of Kaiam in San Francisco on 11 July 2016.

206. Mr Fletcher's view of the proposed transaction was somewhat sceptical. The concerns increased following a call with Alexander Frolov Junior on 15 July. An email from Mr Frolov Junior following the call summarised the nature of Kaiam's interest: *"Synergies coming from Kiam [sic] utilizing CP production facilities are clear… may be we shall just sell fabs to Kiam [sic]."* He went on however to discuss next steps, including due diligence, but Mr Fletcher thought things were moving too fast and responded to say:

> "*For reasons that I don't understand, you seem to be trying to impose a level of ongoing involvement by Target in the CP situation, both in relation to Kaiam and Mr Woo that I find rather aggressive and not particularly appropriate*."

207. This exchange is entirely consistent with the idea that Target – via Mr Frolov Junior and Mr Valler – were taking an aggressive stance in connection with the Kaiam proposal, on the footing that if it came off, and solved the ongoing problem of the Compound Photonics for Dr Frolov, that would stand them in good stead to take over Vollin's tech investment portfolio more generally.

208. Mr Fletcher's sensitivity on this topic can only have been heightened by the fact that, at the same time, the overall Vollin investment portfolio was not performing well. This may have been linked to the arrival on the scene of Mr Pavel Tatyanin, who was engaged by Kew under a consultancy agreement in August 2016 to assist with existing and future investments by Vollin. Mr Tatyanin had formerly been the CFO of EVRAZ.

209. In any event as regards Kaiam, it seems the air was cleared between Mr Fletcher and Mr Frolov Junior, and a due diligence process was agreed. On the Vollin side, this included commissioning a review by a consultant, Mr Kelvin Khoo.

210. There was a meeting of the Kaiam board on 3 August 2016, and views were split on the desirability of a merger, with some board members concerned about spending resources on such an exercise. Kaiam was undertaking fund-raising efforts at the time, and there was reluctance in some quarters to allocate financial resources to the merger proposal. In response, Mr Valler suggested: "*We can offer a $5m loan … I would also consider the desirability of an equity investment as this will make discussion with them easier.*" Mr Fletcher was not immediately keen, but on 9 August he had a call with Mr Pezeshki and made a funding proposal – *"$10m investment by way of convertible note*" - and against that background a meeting with Kaiam was scheduled at Newton Aycliffe on 11 August 2016.

Mr Faulkner Again

211. At about the same time, in late July, Mr Faulkner re-enters the story. Mr Fletcher was still waiting for him to follow-up on the question of corporate governance and his

possible resignation, after their meeting on 23 May 2016. He had chased on 5 July and then again on 17 July but had received no response.

212. Mr Faulkner's input was required in order to finalise the CPGL and CPUK accounts for the previous financial year, i.e. 2015. On 27 July 2016, Mr Jackson emailed Mr Faulkner and others (Mr Fletcher, Mr Burkey, and Mr De Cort), saying the accounts had now "*been approved by BDO*", and attaching the present draft. Earlier drafts had been provided to Mr Faulkner on 7 April and 18 May. Mr Jackson offered a call with BDO if anyone had questions, but evidently expected the process of sign-off to be straightforward.

213. Matters were to turn out to be more complicated, however. On 2 August, Mr Faulkner broke his period of silence by sending an email to Mr Jackson. With no explanation it said simply "*Please send*", and then listed 16 categories of information or documents, including not only up-to-date financial information on CPGL, CPUK and CPUS, but also lists of both CPUS and CPUK employees ("*to include name, DOB, title, salary, employment start date"*), and:

> "*Selex contract*
>
> *Selex purchase order*
>
> *Documents/Presentation sent/received to/from Selex/Leonardo since Jan 2016*."

214. The email concluded: "*I need this by COB tomorrow. I will see you in Newton Aycliffe on Thursday 11 July and expect you will be able to answer any questions I will have.*" Mr Faulkner then corrected this and said: "*Sorry – should read 11 August …"*.

215. In one sense, of course, there was nothing surprising or irregular in Mr Faulkner asking for such information, given his roles both as director of CPGL and of CPUK. On the other hand, looked at against the background of the period of silence which preceded it, the email's peremptory tone read rather oddly.

216. When cross-examined as to why the email had been written, Mr Faulkner gave an unconvincing explanation. He said that the email simply demonstrated "*that I am asking for information and not being given it.*" He evaded answering the question whether anyone had assisted him in putting the list together. It seems to me very likely he did have assistance, perhaps from a lawyer or perhaps from Dr Sachs, it is impossible to say which. It also seems to me very likely that the information sought was not simply part of an exercise of Mr Faulkner flexing his muscles, to try and test what information he could get. Rather, he was pressing for information as part of a process going on behind the scenes. It is impossible to decode precisely what was happening, but it very likely involved assessing litigation options and other strategies with Dr Sachs for trying to take the initiative – with Newton Aycliffe and the Selex relationship as a particular focus of attention.

217. That is consistent with other evidence given by Mr Faulkner during his cross-examination. He accepted that the acquisition of Newton Aycliffe in a venture with Dr Sachs was *"another option that could be considered, yes",* and when it was put to

him that he stayed on as a director of CPGL and CPUK in order to assist Dr Sachs in that *"option"*, he said: *"To be honest, we were just getting absolutely railroaded. This might be something that might be on the table, it might work it might not. I do not know. It was clutching at straws."*

218. In any event, when he gave evidence orally, Mr Jackson said that Mr Faulkner's email of 2 August 2016 raised real concerns. Mr Faulkner proposed meeting Mr Jackson at Newton Aycliffe on 11 August. That was the same day fixed for a visit by Kaiam, as part of the merger discussions. Moreover, receipt of Mr Faulkner's email coincided with a conversation Mr Jackson had with an individual called Mike Hebbron, who was known to be close to Dr Sachs and who was based (together with Mr Jackson) at the Newton Aycliffe plant. Mr Jackson described the discussion with Mr Hebbron as rather strange, in particular given a somewhat Delphic suggestion by Mr Hebbron that Mr Jackson should take care to ensure that his official job title fully reflected his full range of roles and responsibilities. Mr Jackson said Mr Hebbron hinted at something going on in the background, but would not be drawn into giving details.

219. This all presented Mr Jackson with a problem, because he did not want Mr Faulkner to visit Newton Aycliffe at the same time as Kaiam. He exchanged emails with Ms McDermid, who told him to say he was on holiday. In the event Mr Jackson decided (as he candidly accepted in his evidence) to lie to Mr Faulkner and said in an email that the "*CP management team are gathered in London next week*", as a way of deflecting Mr Faulkner's request for a meeting. Mr Jackson thought that was justified in the overall interests of the business, or in any event was the least worst option available to him. The deception was successful and Mr Faulkner did not travel to Newton Aycliffe on 11 August, although he made a visit later, in early September, as I will mention below.

220. Mr Jackson must also have had discussions with Mr Bolger about his decision, because Mr Bolger gave the following evidence during the course of his cross-examination:

> *"Well, this is where I guess I get back to the earlier conversation where he [Mr Faulkner] told me things were going to get a bit strange, he turned up at Selex strangely. He sent a strange email to Richard asking for a whole lot of information I would not have expected from him, and trying to insert himself into Newton Aycliffe, which was probably the second time he had ever visited it, on a date that we were hosting what was still at that stage a very early meeting from a potential counter-party that might provide a future for Newton Aycliffe. So, I agree I was being extremely paranoid, and I would not characterise what I have just set out as being particularly hard evidence, but I was left in a position where I could mislead Faulkner for a little while, and if it turned out I was wrong in fact he was acting in the best interest of the company, then I would have to patch things up with Mark and, you know, if I got it wrong and he managed to derail discussions with Kaiam and my view at this stage was not much chance of Newton Aycliffe staying open and not much comeback to that. I took the view that I would treat Mr*

Faulkner with caution at that stage, until it was clear what was happening."

11 August 2016: Kaiam visit to Newton Aycliffe

221. Mr Pezeshki visited Aycliffe on 11 August and was impressed at what he saw. An email from Alexander Frolov Junior shortly afterwards, on 15 August, shows Mr Frolov Junior trying to push matters forward: he identifies a number of action points, including the drawing up of a business plan and the opening up of a data room, which would enable Kew and others to conduct detailed due diligence on Kaiam.

222. It seems clear that Mr Pezeshki was keen on the idea of some sort of venture with CPGL, although not necessarily a full merger, if that was not practicable. His particular interest was in Newton Aycliffe as a manufacturing facility. Thus on the same day, 15 August, Mr Fletcher said in an email to Dr Frolov and others: *'... one case that Bardia is clearly very focussed on – because he mentioned it on the call – is what he calls a 'partial merger'. This simply means folding Newton Aycliffe into Kaiam and leaving the rest of CP outside...*'.

223. I must mention one other aspect of the visit to Newton Aycliffe, which is that Mr Jackson took the decision to remove from the Newton Aycliffe visitors' book the page for 11 August showing that Kaiam had been in attendance. His evidence was that this was not done with a view to deceiving Mr Faulkner, but instead was taken as a routine precaution to limit the risk of news of the Kaiam visit leaking inadvertently, in particular to employees at Newton Aycliffe or other visitors there. I should say immediately that I accept that explanation. It seems to me entirely likely that Mr Jackson would have wanted to take steps to try and limit the circulation of what he saw as sensitive and confidential information, and Mr Jackson explained that similar precautions had been taken in the past in other cases.

Early August 2016: Mr Faulkner's solvency concerns

224. It is now convenient to return to the position of Mr Faulkner, and to deal with a number of important events involving him during August and early September 2016. The pressures created by the dysfunctionality I have mentioned above were building, and his position was becoming intolerable.

225. On 5 August CPGL's solicitors, Fieldfisher, circulated by email a draft board resolution, proposing the addition of Mr Fletcher as a further director of CPUK. At the time Mr Faulkner was CPGL's sole director.

226. Mr Faulkner was alarmed. He wrote to Mr Fletcher on 6 August to say: *"...We have spoken regularly about lack of governance and this is yet another example as this is the first I have heard of a proposal to add yourself to CPUK.*" He asked for an urgent meeting to discuss the CPUK board "*and other matters*." In his response on 8 August, Mr Fletcher said: "*Mark, I've no idea what you are getting so exercised about. You are Chairman (for the moment) and have been for years. If you are unhappy about governance you've had ample opportunity to do something about it. You haven't.*" If I may say so this exchange rather exemplifies the stand-off between the two sides which had developed by this stage.

227. In an effort to try and break the deadlock, Mr Faulkner emailed Mr De Cort on 8 August, asking to meet him urgently about CPGL and its associated companies, "*some of which are insolvent*." He also referred to "*governance issues*" which he had been trying to speak to Mr Fletcher about. He concluded: "*So, lots to talk about (including 86 minority shareholders) – and I am hoping to have a meaningful direct conversation with you.*"

228. Subsequent emails between Mr De Cort and Mr Fletcher show Mr De Cort thinking this quite odd, not least because he had not previously had direct contact with Mr Faulkner. Mr Faulkner in his oral evidence explained that his email was an attempt to engage the interest of Minden as a possible peace-broker. I accept that evidence, which seems to me to reflect a natural way of reading the email against the background of the events I have described.

229. A call with Mr De Cort was duly arranged for 9 August, although in the event, due to travel difficulties, Mr De Cort was not able to join the call. Instead, Mr Bolger and Mr Fletcher spoke to Mr Faulkner. Although he did not disclose it at the outset of the call, Mr Faulkner was also accompanied by a lawyer, Rebecca Ferguson, from Gordon Dadds. Mr Fletcher reported on the call in an email to Mr De Cort after it was finished. He said that Mr Faulkner had seemed "*terrified that CPUK is insolvent. He doesn't understand accounts*." After referring to Mr Faulkner's detailed request to Mr Jackson on 2 August, Mr Fletcher went on: " *... there are lots of rumours around Jonathan Sachs trying to buy Newton Aycliffe. Mark also feels that he doesn't understand what's going on and therefore can't advise his 89 investors etc*." He concluded as follows:

> *"Anyway, he agreed to copy the fellow directors on his questions so that we can share his issues and concerns. He's also agreed to sign off on me being a director of CP UK. We've agreed to hold board meetings if he gets off his arse and calls them. Bla bla bla. All emotional bullshit."*

230. In the event, Mr Faulkner did not call any board meeting of CPGL, or CPUK.

15 August 2016: Investor Update Meeting

231. What did happen, however, is that there was a further presentation to the Investors given by Kew on 15 August.

232. A slide deck was prepared by Mr Bolger, headed "*Investor update 15 August*". The first main section is headed "*Business Vision*". The vision described involved "*Streamlining the operations*", which included (as Item 1) exiting Newton Aycliffe in order to save costs. A slide headed "*Rationale for streamlining*" said that the "*truly core parts of the business are the electronics design, the Liquid Crystal expertise and the system design*", and consistent with that, the view expressed was that "*if we can outsource all manufacturing then, we should.*" A slide headed "*Creating value*" identified two markets as targets for the business, the standalone projector market and "*AR/VR/Pico*", which had the "*growth and hype required for an exit*."

233. A later slide is headed "*What we have achieved since April*." This gave updates on a number of key areas. The following gives a sufficient flavour:

> " *1. Implemented LTB and have NA closure plan*
>
> - *Cash breakeven but for closure costs in September*
>
> *2. Closed the software group in Redmond ($3.3m pa).*
>
> *3. Are working to avoid the NA closure costs (approx. $6m) with an extended deal with Selex*
>
> - *Would still see us exit the $19m per annum costs (approx. $14m net after usual Selex revenue).*
>
> …
>
> *5. Have shutdown most Capex and had a hiring freeze*
>
> …
>
> *7. Have identified new areas of focus – holographic AR/VR …"*

234. After a section on "*Technical Update*", there was then a section headed "*Kaiam Discussions.*"

235. The first slide in this section gave some background on Kaiam. It said that Kaiam was in a process of "*rapid ramp*", but was at "*near capacity in their Scottish fab which is 25% of NA size.*" In describing the rationale of a deal from Kaiam's point of view, the slide said: "*They need a bigger facility and NA is interesting.*" After listing other possible benefits for Kaiam, the slide concluded by saying: "*But: They would get a lot of these benefits just from buying NA.*" More detailed information is then given on the following slides as to the status of the discussions and next steps, including that Kew were in the process of carrying out due diligence on Kaiam, and were using an industry expert to review Kaiam's current business.

236. The final section of the slide deck was titled "*Financial Forecasts*", and included projected cash requirements. The "*ask*" of investors was for US$4.5m in August, and then a further US$11m for the remainder of the year, resulting in an overall total for 2016 of some US$31m.

237. What is obvious from the slide deck is that the Investor presentation meeting was a forum for discussion and agreement on matters of key strategic importance to the Compound Photonics Group. It seems from an email sent by Mr Bolger on 16 August that the attendees were Mr Fletcher, Mr De Cort, Mr Tenenbaum, Ms McDermid, Mr Tatyanin and Dr Frolov. Mr Faulkner was again not invited and did not attend.

238. Part of the purpose of the meeting was to discuss immediate funding needs. A further equity raise of US$4.5m was proposed, among other things "*to enable the payroll to be met.*" This was to be achieved by Vollin subscribing for further new shares in CPGL having an aggregate prince of US$4.5m, pursuant to a Subscription Agreement with CPGL to which Minden would also be a party.

<u>The clause 20.1 SHA issue</u>

239. This funding proposal was to give rise to further complications in light of Mr Faulkner's position, however. In part that was because of some advice he received from Ms Ferguson at Gordon Dadds, which gave rise to a question of interpretation of the 2013 SHA which had not previously been raised.

240. This was a point about clause 20.1 of the SHA. The language is somewhat ambiguous, and that gave rise to the question whether approval of the proposed Subscription Agreement by Vollin and Minden was a matter for the board, or a matter for the shareholders – and if the latter, whether it was a matter which Vollin and Minden could vote on, or whether they were effectively conflicted, given that they were the intended counterparties to the Subscription Agreement.

241. Ms Ferguson's construction supported the latter interpretation (and the idea that Vollin and Minden were conflicted), while CPGL's solicitors, Fieldfisher, supported the former. Fieldfisher also advised that, if approval was a matter for the board, then Mr Faulkner's approval was required as the sole, non-interested director (by this time the board comprised Mr Faulkner, Mr Fletcher, Mr Burkey and Mr De Cort, the latter three all being nominees of course of either Vollin or Minden).

242. The point of immediate relevance is the slide deck prepared by Mr Bolger for the 15 August presentation. Mr Bolger had mentioned this to Mr Faulkner, and indeed before the 15 August meeting, on 12 August, Mr Faulkner had written to Mr Bolger to ask for a copy. Mr Bolger said he would provide it, but in the event did not do so.

243. On 16 August, Mr Faulkner was in contact with Mr Blankfield of Fieldfisher about the clause 20.1 SHA issue. The upshot seemed to be that Mr Faulkner would proceed on the basis of Blankfield's advice, but on certain conditions, which Mr Blankfield explained in an email (emphasis added below):

> *" … before releasing his signature, he wishes to receive the outstanding data requested in his email to Richard Jackson of 2 August … forwarded to you on 12 August … <u>together with the investor presentation referred to in that latter email</u>."*

244. The final paragraph of Mr Blankfield's email gives the broader context of the request, and I think is important. As I read it, the relevant passage is a recital by Mr Blankfield of concerns expressed to him by Mr Faulkner (or perhaps by Ms Ferguson), rather than advice by Mr Blankfield himself. Nonetheless, Mr Blankfield did not express disagreement with anything that was said:

> *"He does so in recognition of the fact that the interests of the Company are most likely to be served by an immediate injection of cash to enable the payroll to be met, but with continuing serious misgivings about the governance of the group, and its solvency. It is clearly unsatisfactory for a director to be asked to approve a share allotment – particularly where he is the sole director empowered to give that approval – without any involvement in decisions as to the future direction of the company, or any information as to the likely future funding of the group, and thus its solvency. These are matters*

> *on which he continues to take independent advice, and which I know are very much on the agenda."*

245. The result was that Mr Bolger sent an email to Mr Faulkner, on the face of it complying with his request for a copy of the presentation, and saying: "*Mark, Please find attached the presentation to Vollin and Minden*."

246. In fact, that was an untrue statement, because the presentation as sent to Mr Faulkner was *not* the same presentation used at the meeting with Vollin and Minden. All references to Kaiam were deleted, including the section described above headed "*Kaiam discussions.*" Also deleted was the page headed, "*What we have achieved since April.*" Mr Faulkner, needless to say, was quite unaware of this.

247. When cross-examined, Mr Fletcher, Ms McDermid and Mr Jackson, who were all sent a copy of the email to Mr Faulkner and of what Mr Hollington characterised as the "*doctored presentation*", were asked whether they knew it had been amended before being supplied to Mr Faulkner. They all denied it, and said that almost certainly, although copied on the email, they would not have opened and reviewed the attachment.

248. I accept their evidence on that point. It seems to me very likely that a recipient of such an email, who was copied in for information, would not open the attachment or spend time reviewing it unless asked to, in particular where that attachment was a copy of a presentation which had already happened. What is significant on that basis, however, as Mr Hollington pointed out in argument, is that Mr Bolger apparently felt it appropriate to amend the presentation without consulting anyone else about it, or informing them afterwards. He can only have done so because he felt that was consistent with what was expected generally in dealing with Mr Faulkner, i.e. it was one example of the practice which had developed of keeping Mr Faulkner at arm's-length and telling him only what Mr Bolger and others thought he needed to know.

249. I must deal with one other aspect of this part of the story before moving on. That is the question of Mr Bolger's Witness Statement which, as Mr Hollington pointed out, gave the impression, without qualification, that the version of the slide deck provided to Mr Faulkner was the same as that used in the presentation to the Investors. When asked about this in cross-examination, Mr Bolger said he had simply forgotten at the time of making his Witness Statement that the two versions of the slide deck were different. His recollection was prompted only during the course of preparations for trial, and it is true to say that the fact that an amended version was provided to Mr Faulkner was fairly reflected in the Investors' Written Opening. What did not happen, however, was any correction to Mr Bolger's Witness Statement before he affirmed the truth of its contents.

250. This is an unfortunate train of events, but I do not detect in it any intention to mislead the court. The full picture was clear before the start of the trial. The real significance of it, as it seems to me, is that in Mr Bolger's mind the original decision to amend the presentation before sending it to Mr Faulkner was so routine that he had forgotten about it. That reinforces the point already made, that it was the accepted practice at the time to limit the flow of information to Mr Faulkner, notwithstanding his status as director and chairman of CPGL and director of CPUK.

Mr Faulkner's Circular

251. In the event, although Mr Faulkner had said that he would approve the board resolution for the proposed share subscription by Vollin if given a copy of the presentation to Investors, that did not happen.

252. Instead, without warning, he took it upon himself on 17 August 2016 to circulate the Minorities with a form of written resolution to have them approve the proposed Subscription Agreement. The covering letter (in the form of a circular) appeared to come from the board of CPGL (it mentioned the existing directors, i.e., Mr Faulkner, Mr Fletcher, Mr Burkey and Mr De Cort), but of course had not come from the board and was against the advice of the Company's solicitors, Fieldfisher.

253. The next few days saw a number of fraught exchanges as efforts were made to conclude the subscription and raise the funds necessary to meet the payroll costs. Mr Faulkner took the position that he was acting in conformity with the legal advice he had received from Gordon Dadds. It is clear that he was concerned about his own position at the time, and he said as much in his email to Mr Fletcher of 19 August when he referred to the possibility of "*action from minority Shareholders for my failure to act in accordance with the shareholders agreement … I am the chairman of CPGL and sole director of CPUK … I am clear on and have obtained legal advice on my duties*." The same email contains the following, interesting passage:

> *"It is clear by your own admission and that of others that I have been excluded from the high-level information flow within and between the two companies. That is unacceptable. Even when I sought information it has been supplied late, grudgingly and with a request for an immediate response. That is not right. You will hear from me when I have had the opportunity to assimilate all that you have sent me and taken advice on the same in my position as Director/Chairman."*

254. Although Fieldfisher canvassed an alternative structure, i.e. a revised Subscription Agreement to which only Vollin was a party, Mr Faulkner pressed ahead with collecting in signatures from all the individual minority investors before giving his approval as director to the Vollin subscription. That exercise was eventually concluded, but only by lunchtime on Wednesday, 24 August 2016, very shortly before the deadline necessary to meet the payroll on Friday, 26 August 2016.

255. These events were a step too far for those at Vollin and Kew. Ms McDermid expressed her frustration in typically graphic language at the time ("*What a dic*k"). For both her and Mr Bolger, Mr Faulkner seemed to be erecting obstacles in the way of an exercise which was obviously in the interests of the Compound Photonics Group, and indeed essential to the Group's continued operations. When asked about the decision finally made to remove Mr Faulkner as a director, Mr Bolger recalled that the decision *"was made about five minutes after we received the e-mail that he sent to the minority investors purporting to come from the board of the company."* Sure enough, steps were soon after put in train to investigate the process for Mr Faulkner's removal.

Mr Bolger's Alleged Threat

256. In his witness statement served for trial, Mr Faulkner made a particular allegation about the events of this period which I must mention. He said that Mr Bolger had said to him that his actions "*were akin to me 'running across a motorway' and that he was surprised by my actions as I 'knew who I was dealing with.'*"

257. In other words, Mr Faulkner claimed that Mr Bolger had threatened him, and said he had become so concerned at one point that he had reported the matter to the police, which resulted in him being given a Victim Care Card, although that is dated some seven months after the time when Mr Bolger is said to have made his statement.

258. I have no doubt that Mr Bolger was frustrated at the time and that he expressed himself in forthright terms to Mr Faulkner, but I reject the notion that Mr Bolger sought to threaten him physically, either overtly or implicitly. Such conduct would be entirely out of character, it seems to me, based on the other available evidence relating to Mr Bolger's involvement in this case. I consider the most likely explanation is that Mr Faulkner over-reacted to whatever was said to him. He was under considerable pressure at the time and misinterpreted what he was told. I am sure he acted in good faith in doing so, but all the same the reaction was unwarranted.

Finalising the Accounts and Mr Faulkner's Visit to Newton Aycliffe

259. To resume the narrative concerning Mr Faulkner, there remained the question of signing off on the previous year's accounts. On 18 August 2016, during the course of the discussions over the proposed further subscription by Vollin, Mr Bolger had provided a support or comfort letter addressed to "*The Directors, Compound Photonics UK Limited*." This said that the directors should assume that the practice of CPGL funding its subsidiary would continue, so that as long as CPGL was funded by its investors (i.e., the Investors), CPUK would remain solvent and could trade as a going concern. On 22 August Mr Faulkner had a meeting with BDO, but it seems still had some concerns and at his insistence a further meeting was arranged for 7 September, this time at Newton Aycliffe. Mr Faulkner travelled up to Newton Aycliffe with a Ms Small from BDO, and Mr Bolger joined by telephone.

260. In the event, the issue of CPUK's ongoing solvency was easily addressed, in light of the comfort letter and other information showing Vollin and Minden's funding plans. In an email to Mr Blankfield and others, Mr Bolger reported that BDO had been comfortable and that no concerns about insolvency had been expressed by Mr Faulkner. His email is most notable, however, for this section at the end:

> *"Little bit of weirdness post-call when he [Mr Faulkner] asked the NA staff for the visitors book for a specific day (11 August) which indicated he is sniffing around a specific meeting with a potential counterparty that he is unlikely to have known about without JS acting as a conduit for information. Which keeps me on my toes."*

261. It will be recalled from the narrative above that 11 August was the day of Kaiam's visit. It was also the date Mr Faulkner had originally proposed for a meeting at Newton Aycliffe, in his email to Mr Jackson of 2 August, resulting in Mr Jackson's deceiving him by saying that the management team were in London that day and could not meet.

262. In cross-examination, Mr Faulkner was asked about his request to see the Newton Aycliffe visitors book. I am afraid his responses can only be described as evasive. In his Witness Statement, Mr Faulkner had suggested that both he and Ms Small from BDO had required sight of the visitors book. When this was challenged on the basis that the visitors book would have been of no interest to Ms Small, Mr Faulkner responded as follows:

> *"She [Ms Small] is an auditor. She can do I guess anything and I had not been to the plant for a while and I wanted to actually show that I could actually still go to the building, I would be respected, and we could actually do what we needed to do at the actual facility itself*"

263. When asked why he had wanted to inspect the page for 11 August 2016 in particular, Mr Faulkner was similarly unconvincing:

> *"I think it was – part of it was to actually have the independent auditor with me and saying 'Look, this is who I am, I want to go through certain steps while were are here. We are at the plant and let us ask for information as we go through.' I had no idea that there would not be in anything there but there could have been something and these were certain dates that I actually asked for."*

264. This was a puzzling piece of evidence for Mr Faulkner to give, not least because in his Witness Statement he gave a different explanation for the same events. This was that conversations with the staff at Newton Aycliffe during his visit led him to think he had perhaps been misled by Mr Jackson about the proposed meeting on 11 August, and he wanted to check.

265. I have concluded I must reject Mr Faulkner's evidence on all these points. The strong likelihood, it seems to me, is that the real reason for his visit to Newton Aycliffe was to investigate a suspicion or concern he had already formed about what had happened on 11 August. He was the one who sought inspection of the visitors book, and he asked to see the entries for 11 August, not Ms Small from BDO. He wanted to check who had visited on that day, and that in turn was because of concerns he had – no doubt shared by Dr Sachs – that something was afoot in connection with Newton Aycliffe which was being kept from them and which they wanted to know more about. As it happens, they were right.

Mr Faulkner is Removed

266. In any event, as I have already mentioned above, as far as Mr Bolger and others were concerned, the die was cast in relation to Mr Faulkner. The decision had been taken to remove him, and immediately after the meeting at Newton Aycliffe on 7 September, steps were taken to implement that decision. That same evening, Vollin requisitioned a meeting under CA 2006 section 303, to pass a resolution removing Mr Faulkner as a director of CPGL. In the event, this was a false start, because the notice was defective, for reasons which are presently immaterial. A further notice was sent on 30 September, and a meeting convened for 18 October.

267. On 9 September, Mr Fletcher offered the CEO role to Mr Woo. Mr Faulkner of course was not involved in any relevant decision to do so, although he was still director and Chairman of CPGL. Although he did not know what was happening vis-à-vis Mr Woo, his concerns were expressed in a letter from Gordon Dadds on 9 September in which they said:

> *"Mr Faulkner is concerned that what appears to be happening is an orchestrated takeover of all the management and board functions of the Group by Vollin and Minden and their appointed directors, further illustrated by the demand made that he resign his directorships."*

268. On the day of the intended meeting, Mr Faulkner produced a letter, in accordance with his entitlement under CA 2006 s169 to be heard on any resolution to remove him, setting out the representations he wished to make to shareholders. This is a long and interesting document, which sets out a detailed history of Mr Faulkner's involvement with CPGL.

269. The Investors rely on it for what it does not say – i.e., it makes no express reference to the positions of Dr Sachs and Mr Faulkner as directors of CPGL being *entrenched*, which was one of their basic submissions at trial. What Mr Faulkner did do, however, was to refer to the powers conferred on him under the 2013 SHA, which he said were unusual, and were "*at the core of the governance structure for the company now and since its inception*." He made the point that the other directors were nominees of Vollin and Minden, and described the importance of his own role as follows:

> *"You will no doubt recognise that there is an inherent conflict in the role of an investor-nominated director having to be mindful of the interests of his appointee (sic.) as well as his statutory duty to the Company as a whole. This is one fundamental reason why my role as independent director and Chairman of the Group has always been deemed to be so important.*
>
> *I am the counter-balance to the investor-nominated directors. If the Resolution is passed there will be no counterbalance and no independent voice on the Board and it will be wholly contrary to the spirit and intent of the 2013 SHA."*

270. In the event, Dr Sachs chose not to attend the meeting on 18 October (although Mr Faulkner was there), with the result that the meeting was inquorate, having regard to the SHA 2013 clause 8.1.

271. Nonetheless, the meeting continued and Mr Bolger presented essentially the same "*New Business Vision*" reflected in his presentation to the Investors of 15 August 2016. This comprised two components, namely "*streamlining the operations*" and a "*New Direction*" as regards products: "*Focus on embedded projection … In the near term, the most exciting is AR/VR/Mobile/HUD Markets.*" The Petitioners claim that this heralded a wholesale and illegitimate change from the business the Minorities had invested in. I will need to revert to that point later in this Judgment.

272. Returning to the narrative for now, the EGM was duly reconvened for the following week, on 25 October 2016, and on that occasion the meeting was quorate notwithstanding Dr Sachs' continued absence (see SHA 2013 clause 8.2). Vollin and Minden voted their shares in favour of Mr Faulkner's removal, and the resolution passed by a majority of 97.5%. Minority investors holding 1,086,257 shares voted against.

273. Mr Faulkner approached Mr Fletcher after the meeting and told him that there was a minority shareholder group preparing to litigate for minority oppression, but he held out an olive branch and said that that might be interested in a deal whereby they acquired Newton Aycliffe plus some cash. Mr Fletcher's response was typically emphatic. He said that "*the minorities can f--- off*", and that any proceedings would be fought tooth and nail. That has proved to be the case.

274. In cross-examination, Mr Faulkner was asked about the offer he made concerning Newton Aycliffe, and accepted, as one would expect, that that was something he had discussed with Dr Sachs beforehand. In his own evidence, given before that of Mr Faulkner, Dr Sachs had been much more coy in dealing with the same point, and it was only after the same question was put to him several times and following an intervention from the Court that Dr Sachs said: "*I am sure [Faulkner] suggested that would be a graceful exit for all of us.*" In light of the narrative set out above, that very obviously understated the importance of Newton Aycliffe to Dr Sachs and Mr Faulkner at the time, and the extent of the efforts they must have been engaged in, in seeking to acquire some interest in Newton Aycliffe for themselves and for the Minorities.

275. To complete the picture, on the following day, 26 October 2016, CPGL held a members' meeting of CPUK, at which Mr Faulkner was removed as a director of that subsidiary, and Mr Fletcher was appointed instead. In a subsequent letter dated 9 December 2016, Mr Faulkner, like Dr Sachs before him, was classified as a "*Good Leaver*" for the purposes of the SHA 2013.

Newton Aycliffe: Revisited

276. It is appropriate at this stage to pick up a number of the open strands relating to Kaiam and Newton Aycliffe.

277. The commercial factors in play have been summarised above: Newton Aycliffe was loss making, even with the benefit of the Selex contract; the Last Time Buy Notice had been served in May 2016, which produced an increase in orders and took the Fab to breakeven, but only temporarily; and in the meantime, the clock was ticking. When the Selex contract came to an end a difficult decision would need to be made. Mr Bolger explained the position as follows in his oral evidence, which I accept:

> *"We had at that stage called the last time buy … We had this hard stop in summer of 2017, and so [after that] we would have been either losing a million dollars a month to keep the facility idle, and leaving staff sitting around playing cards and the like, you know, with nothing to do. Or we would have had to turn the power off. With these facility, the big issue is power and purified water. If you have to shut the power off and turn the*

> *purified water off it is probably a $50 million job to turn it back on, because everything becomes contaminated, in terms of these are super clean facilities. So you get to these uncomfortable decision points where you cannot really mothball them at a very low cost, you need to shut them down and then the plant would be bowled over, you know, it would have been sold as a brownfield site."*

278. Mr Bolger and Mr Jackson, keen to avoid that situation arising, and keen also to avoid the job losses which would follow in the event of closure of the Fab, had been pursuing their MBO idea with Selex – but that depended on renegotiating the Selex contract (or its replacement) on more profitable terms.

279. The other possible solution was the proposed merger with Kaiam, who were interested in the increased manufacturing capacity the Fab would provide for their own business. By mid-September 2016, however, the proposed structure which involved a merger was effectively off the table. The consultant engaged by Compound Photonics, Mr Khoo, made a presentation by telephone conference call on 15 September, but his assessment was negative. He was unconvinced by Kaiam's stated order book/customer links. He provided further feedback on 25 September, but from 15 September, the prospect of a full merger taking effect began to diminish.

280. A modified proposal soon emerged, however. That was a straightforward asset sale to Kaiam – i.e., a sale of the Fab.

281. It will be recalled there was scepticism in the Kaiam camp given its own cash needs at the time. A proposal was developed which involved sale of the Fab for US$10m in Kaiam shares as consideration, plus a further investment by CPGL of US$10m in Kaiam, to be in the form of convertible loan stock. Mr Bolger put this proposal to Mr Pezeshki of Kaiam at a meeting in Edinburgh on 29 September 2016.

282. Behind the scenes, however, Mr Jackson and Mr Bolger had concerns about whether the sale to Kaiam would ultimately be achievable. Mr Bolger said in his evidence that he thought Kaiam *"were making the same mistake as Dr Sachs had made in buying a plant for lasers, and Newton Aycliffe, in my view, and my view to this day, is inappropriately sized as a laser fab."* Thus, he said, "*I was wary that Newton Aycliffe was not a good buy for Kaiam…[but] the priority was to keep Newton Aycliffe open and functional and not leave us in a position of having to shut it down."* I accept Mr Bolger's evidence on those points.

283. That being so, Mr Bolger and Mr Jackson began to consider yet another option. That was the possibility of a sale of Newton Aycliffe to a third party, other than Kaiam.

ATREG

284. Against that background, in late September 2016, Mr Jackson made contact with Mr Saif Khan of an organisation called ATREG. ATREG are specialists in the field of marketing and selling facilities like Newton Aycliffe. In fact they described themselves as having, "*the only team focused on advising semiconductor companies in the acquisition and disposition of operational semiconductor fabs and related business units.*"

285. They were interested in the project, and on 14 October put forward terms of a proposed retainer, but warned of possible challenges. Under the heading, "*Scope of Services*", their proposal said the following:

> *"Semiconductor wafer fabrication divestitures tend to languish on the market for extended periods of time, especially those located in the United States, Europe or Japan. This is due in large part to the migration of production to less costly manufacturing regions such as Taiwan, Singapore, Malaysia and China."*

286. They therefore said that a global campaign would be required, and under the separate heading, "*Methodology & Timing*", gave some more detail on what that would involve. The steps proposed were over a 12 month timescale, and involved "*Pre-Marketing*" in Month 1; "*Marketing Commencement*" in Month 2; "*Marketing Management*" in Months 3-8; and then "*Bid, Negotiation & Transaction Close*" in Months 9-12.

287. The commercial terms proposed were as follows:

i) Term: 12 months (or until a transaction occurred, whichever was the sooner), and on the basis that the agreement would automatically renew month-on-month after the initial 12 month period, subject to either party giving 30 days' notice to terminate.

ii) Advisory fee: a monthly retainer of US$50,000.

iii) Success fee: 4% of transaction value, with a minimum success fee of US$1.5m.

iv) Marketing Budget: "*In addition to reimbursement for ATREG's travel expenses associated with the assignment, ATREG will propose a marketing budget to be mutually agreed*."

288. ATREG made an initial visit to Newton Aycliffe on 25 October 2016, and gave what Mr Jackson described to Mr Bolger as "*good input*". Shortly afterwards, Mr Khan of ATREG followed up with an email on 28 October. He was keen to make progress with ATREG's proposal, and warned against the dangers of going it alone. Under the heading, "*Why do transactions fail*", he said:

> "*The wrong approach is taken*
>
> - *Do it ourselves*
> - *Not a core focus, little experience within the company*
> - *Companies usually underestimate the time-intensive nature of these projects, and their cumbersome nature can lead to internal productivity lag … ."*

Newton Aycliffe: Considering the Options

289. It follows that by this stage, three options were in play as regards the Fab – the MBO, sale to Kaiam, or a wider marketing initiative. Managing the options was something of a juggling exercise, and ultimately of course, some decisions would have to be made.

290. The demands of the juggling exercise are referred to in a draft email sent by Mr Bolger to Mr Jackson on 20 October. Kaiam had asked for a period of exclusivity as negotiating partner. Mr Bolger's email was ultimately intended for Mr Fletcher and Mr Tatyanin, but Mr Bolger sent it first to Mr Jackson and Ms McDermid, asking for their comments. In his "*Conclusion*", dealing with the competing benefits of the potential Kaiam sale and the MBO, he said:

> *" … the key issue is we should consider whether a $0 cost deal [MBO] is preferred to the Kaiam $10m cash cost deal. If so, we need to be careful in how we respond to Kaiam's request for exclusivity. To be clear – we cannot afford to simply drop Kaiam even if $0 outlay is preferred as its maybe 30% Selex falls over. Equally we should not kill this MBO plan as there are many risks to Kaiam's completion. In addition, it is a useful negotiating foil to Kaiam being aware that our alternative to Kaiam is a costly shutdown."*

291. In her short reply, Ms McDermid commented on the fact that the Kaiam sale option was more expensive than the MBO option, because of the investment in Kaiam likely to be needed as a "s*weetener*." She said:

> *"the principals … are happy to invest in Kaiam to get rid of NA, but I get the feeling that they would be even happier to not invest."*

292. The other issue was whether to instruct ATREG. The equation here had something of a chicken and egg quality about it. Instructing ATREG would be expensive. Their proposal involved payment of minimum total fees over the initial 12 month term of US$600,000, or US$2.1m if a buyer was found, at whatever value, and possibly more if a sale was achieved at a level which triggered something above the minimum success fee (i.e. if there was a sale in excess of £37,500,000).

293. The commitment might be worth it, but that obviously depended on a number of factors. The question was whether there was any serious expectation of finding an alternative buyer within a timescale, and at a value, which would make sound economic sense.

294. Timescale was relevant not only in terms of the ongoing fees payable to ATREG, but also of course in terms of the cost of keeping the Fab open, beyond the point at which the Selex contract came to an end. I have mentioned above that Mr Bolger put those costs at US$1m per month, in order (as he expressed it) to keep the facility idle.

295. Mr Bolger and Mr Jackson were both sceptical about whether any buyer could be found in the short term. Mr Bolger said that ATREG were *"also steering us towards that [i.e. a sale within 12 months] being pretty optimistic"* because *"they recently sold something in the north of England that had taken them three years."* Mr Jackson

said ATREG gave "*negative signals in terms of the prospect of a sale of Newton Aycliffe within 8-12 months*". I accept that evidence, which seems to me consistent with the terms of the proposal overall, and its generally cautious tone (for example, "*Selling a fab is a difficult and time intensive process; numerous complexities and competing interests can arise and derail a successful disposition.*")

296. There was also the question of the likely sale value, to an alternative purchaser. Mr Bolger was not hopeful of achieving a high price, based on what he knew both of the price paid by CPGL itself, and of the prices paid by prior owners of the Fab (first Filtronics, and then RFMD, who sold it to CPGL). He said:

> *"We had bought the Newton Aycliffe for 4 million and I think we had that 1.5 million up-front and 2.5 that was paid when I was CEO three years later. I think that the agreement had been that they would leave 1.7 million of gold in the safe, so really a net price of $2.3 million. I believe that RFMD had been the previous purchaser, and they had bought it from a company called Filtronics, and I think the transaction price in that was 12 million, and I confess I do not know if that was $12 million or £12 million. That would have been 2008-ish. At the time they were running a thousand [wafer] a week there. The previous purchaser was [Filtronics] and they bought it for £13.5 million when it was just a few years old. Of course it cost £350 million ... to build originally."*

297. The value of the Fab being an important factor, Mr Jackson tried to draw ATREG out on that point. He raised a query with Mr Khan, namely whether they could engage ATREG on a more limited basis, (for "*Phase 1*" only, "*Pre-Marketing*"), to include a valuation of the site, while discussions were ongoing in relation to the other two alternatives.

298. ATREG would not commit to provide a valuation on that limited basis, however. When they responded on 1 November, they proposed a different structure. The proposal was that if either of the two existing alternatives came off within the course of the 12 month term, then ATREG would still be paid a fee but at a lower rate, to increase though on a sliding scale as time went on: so, for example, if either of the two alternatives was realised within months 1-2 of the retainer period, then ATREG would be paid US$250,000; if within months 3-4, then US$500,000; and so on.

299. There was also a further twist, to accommodate the possibility that ATREG might find another potential purchaser willing to make a higher bid than whichever of the existing alternatives was in play at the time, prompting that alternative (referred to as the "*excluded entity*") to increase its own bid. The twist was:

> *"ATREG would receive a bonus amount of 50% of the resulting increase in overall transaction value. As an example, if the original bid by the excluded entity is $8m, and due to the competing offer that ATREG brings to the table, the excluded entity increases their bid to $9m, ATREG would receive an incremental bonus of $500K."*

The Sale to Kaiam

300. In the event, of the options in play, attention came to be focused on the Kaiam sale as the favoured option.

301. Mr Hollington in his submissions was critical of the fact that the evidential trail relating to this period is sparse, and in particular made the point that it seemed to be Mr Jackson, or possibly Mr Jackson and Mr Bolger, who eventually made the decision not to instruct ATREG, whereas this should have been a matter for the CPGL board.

302. I agree that the evidential trail is somewhat sparse, but there are sufficient indications in the documents to enable at least the broad picture to be pieced together.

303. As to the decision not to engage ATREG, it seems to me that very likely this was a decision taken jointly by Mr Bolger and Mr Jackson. The evidence shows them communicating closely in connection with Newton Aycliffe, and it is logical to think that that general practice applied specifically as regards the ATREG proposal. It also seems clear to me that the decision they took was a pragmatic one. As they saw it, the ATREG proposal was expensive; their remit was to cut costs not increase them; there were great uncertainties about whether the likely costs would be worth it; and in the meantime, although undoubtedly there were uncertainties, progress was being made with Kaiam, and indeed by early November 2016 a draft term sheet was under discussion.

304. As to Kaiam, I think it is certainly true that Alexander Frolov Junior and Target were encouraging the Kaiam alternative. That comes across from a number of documents. For example, in an email from Mr Pezeshki to Mr Bolger dated 4 November 2016, Mr Pezeshki reported on a conversation he had had with Mr Valler and said:

> *"FYI, I had a call with Yaron today. I guess he has two interests, the first is to make sure that his partners are being taken care of, as they have money in Kew, and the second is that Target Global is also a potential investor in Kaiam. So he is trying to keep abreast of the situation. I gave him a summary of where we are. BTW - Just wondering if there was any progress on the next rev of the term sheet. As I saw it, we either want the exclusivity language put in, or a really good alternative is to go with the term sheet as is with $2m of the investment on signing the termsheet..."*.

305. The reference to Mr Valler's partners, who had money in Kew, must have been a reference to Dr Frolov, who was both a funder of Kew and also an investor in projects sourced by Kew. Dr Frolov of course was also a funder of Target Global, in which his son was a partner, and this email makes clear that Target was a potential investor in Kaiam.

306. There is then an interesting exchange between Mr Bolger and Mr Jackson on 10 November 2016. On the evening of 10 November, Mr Bolger wrote to Mr Jackson reporting on a conversation he had had with Mr Tatyanin, in which Mr Tatyanin had

conveyed how keen Kaiam were to own Newton Aycliffe. Mr Bolger was still sceptical it was a good idea for them. He said to Mr Jackson:

> "*Pavel [Tatyanin] told me Frolov Junior said Chris Rush (Kaiam board) said they really want to own NA so they look credible to Facebook et cetera.*
>
> *….*
>
> *I don't really see that working – Facebook will ask what they make there and Kaiam will have to admit it's the worlds largest laser R&D facility and Facebook will go uh on these guys are going bust.*"

307. Mr Jackson replied:

> "*Their costs will be huge.*
>
> *Frolov Junior is out to do this deal for his own good, do they get that?*
>
> *I would say to Kaiam, take it at zero cost but we will not put any money in …"*

308. Mr Bolger's response suggested a pragmatic view of things:

> *"I told Pavel that there is having NA will sink Kaiam if they are not careful but I don't want to completely torpedo deal in case selex choke …".*

309. As I read this exchange, Mr Bolger and Mr Jackson between them were sceptical about the benefits of Kaiam acquiring Newton Aycliffe, looked at from Kaiam's point of view, but were content to let matters play out because that kept alive one possible outcome which would save Newton Aycliffe from closure.

310. In the event a term Sheet ("*Asset Sale and Convertible Note Investment*") was signed between Kaiam and "*Compound Photonics*" on 24 November 2016. It provided for a 60 day period of exclusivity, during which the parties would seek to conclude a sale of the Newton Aycliffe facility. The purchase consideration was to be US$10m, payable in Series F shares in Kaiam.

311. An additional component of the transaction involved CPGL agreeing to invest in US$10m of Convertible Loan Notes issued by Kaiam, $5m to be invested on transfer of Newton Aycliffe and US$5m six months later. The notes would be repayable after 18 months, or at CPGL's option could be converted into Series F Preferred Shares. The term sheet assumed a current valuation of Kaiam of US$265m.

312. Negotiations with Kaiam did not run entirely smoothly, and indeed as late as 15 February 2017, Mr Bolger had to address the Kaiam board about a number of concerns they had, and according to his evidence the meeting was not an easy sell.

313. It was in the context of this ongoing uncertainty that Mr Bolger sent an email to Mr de Cort and Mr Tenenbaum on 27 February 2017 saying that "*while there is still a possibility that [the MBO] might be happen [sic] (and would generally be a better outcome for CP/NA), it does not seem likely at this point*."

314. In a later email in April 2017, at a point when the ongoing discussions with Kaiam were again becoming strained, Mr Bolger then said: "*Kaiam management are having a tough enough job getting approval (it seems 2 of the 6 directors are opposed to the deal) and I'm very nervous about doing anything that strengthens the negative side given we will have no options other than closure if they fall away*" (emphasis added).

315. It is thus clear that by this stage, in April 2017, the MBO option had dissolved entirely, presumably because it had not been possible to negotiate an amended arrangement with Selex on terms which were economically viable.

The Intended Kaiam Acquisition of Newton Aycliffe is Announced

316. Finally, on about 21 March 2017, the proposed transaction with Kaiam was publicly announced. A Press Release was headed "*Kaiam Intends to Expand Manufacturing Capacity in the UK with the Acquisition of New Facility*". The first paragraph read as follows:

> *"Kaiam Corporation, a leader in advanced data center transceivers, today announced that it intends to acquire the manufacturing facilities of Compound Photonics in Newton Aycliffe in the UK. The acquisition includes investment by CP into Kaiam to further develop the facility. The agreement is subject to final approvals, but is expected to close in the coming quarter."*

317. Two events at around this time concerning Mr Faulkner and Dr Sachs deserve mention.

318. First, in an email dated 28 March 2017, Ms McDermid reported to Mr Fletcher that Dr Sachs had been trying to get hold of Mr Pezeshki about the Newton Aycliffe sale, "*saying that there are lawsuits threatened, etc*." When cross-examined, Dr Sachs admitted to seeking to contact Kaiam as he was *"interested"* whether he *"could be involved one way or another."*

319. Second, Mr Faulkner acknowledged in cross-examination that, following the Kaiam announcement, he had contacted the development agency behind the *"Let's Grow Grant"* for Newton Aycliffe. This is recorded in an email from Mr Bolger to Ms McDermid dated 21 April 2017, in which he said: "*Faulkner called the lets grow grant people saying [t]he minorities are disputing the sale and there is a conflict of interest apparently … "*. When asked about this in cross-examination, Mr Faulkner did not deny it. He was asked why he contacted them but there was a long pause and he simply did not answer the question; when it was then asked what legitimate reason he had for contacting them, he answered *"None"*.

The Sale to Kaiam Completes

320. The transaction with Kaiam completed on 3 May 2017. Newton Aycliffe was acquired by a company, Kaiam Laser Limited, which had been incorporated in January 2017 as the proposed acquisition vehicle. The commercial terms were a slightly modified version of those in the term sheet, that is to say:

i) CPUK sold Newton Aycliffe to Kaiam Laser Limited and received US$10,000,000 as the sale price, paid in 2,198,381 new Preferred Shares Kaiam Corp Series F Preferred Stock; and

ii) CPGL committed to subscribe for shares in Kaiam in two tranches, the first on completion to be for US$7,500,000 (equivalent to 1,648,786 Kaiam Corp Series F Preferred Stock, par value US$0.0001), and the second six months later to be for US$2,500,000 (549,595 Kaiam Corp Series F Preferred Stock, par value US$0.0001)

Re-Sale of Newton Aycliffe by Kaiam

321. That is not the end of the story, however.

322. On 5 June 2017, Apple held its annual Worldwide Developers Conference, and according to Mr Bolger announced that it was looking to incorporate augmented reality hardware tools into some Apple products.

323. Two days later, on 7 June 2017, Mr Bolger attended a Kaiam board meeting in California. The focus of the meeting was on Kaiam's liquidity difficulties.

324. Very shortly after that, a company called Finisar Corporation approached Kaiam with an offer to purchase Newton Aycliffe for US$20m. Finisar manufactures vertical-cavity surface-emitting lasers, which it was thought would be needed by Apple in light of its announcement. Mr Bolger's evidence is that he spoke to Mr Pezeshki about this, and his view was that the offer was attractive, but he (Mr Pezeshki) thought it might be possible to get more, because a bidding contest was possible in light of the developments at Apple.

325. As events transpired, Mr Pezeshki was correct, because by 30 June another bidder had appeared. This was a further laser manufacturer, Lumentum Holdings Inc. In an email to Mr Woo and others, Mr Bolger said that the interest arose as a result of the Apple conference, in light of which "*the major laser businesses … are scrambling for laser capacity.*"

326. Over the course of the next few weeks, a third bidder emerged. This was a company called II-VI. As Mr Pezeshki had predicted, a bidding contest developed, from which II-VI emerged the victor.

327. The upshot is that on 7 August 2017, II-VI Inc. announced its acquisition of Kaiam Laser Limited for US$80,000,000 in cash. The announcement via NASDAQ read as follows:

> *"PITTSBURGH, Aug. 07, 20'17 (GLOBE NEWSWIRE) -- II-VI Incorporated (NASDAQ:ILLI), a leader in engineered materials and optoelectronic components, today announced its acquisition of Kaiam Laser Limited, a 6-inch wafer fabrication facility in Newton Aycliffe in the United Kingdom. The purchase price of the transaction was $80.0 million, and paid for from the Company's cash reserves. The acquisition is expected to be breakeven at the EBITDA level within 12 months."*

328. Naturally enough, this gave rise to some consternation at the Vollin end.

329. Mr Tatyanin was soon quizzing Mr Valler by email. They had a series of short exchanges on the same day as the announcement, 7 August 2017. Mr Valler said: "*It was a deal that came together in the last couple of months and largely based on Kaiam's equipment and manufacturing continuing to run there*", but Mr Tatyanin was not to be mollified and replied: "*We sold it to them for 10 and they resold it for 80??"* In another email he directed his ire at Mr Bolger: "*So Brian … effectively blew 70*

million?' According to Mr Valler's evidence, Dr Abramov was also "*furious at the news*."

330. What is also now apparent is that, despite the sense of irritation and concern within the Vollin camp, Minden were not told about what happened at the time. In fact, for reasons which are not apparent but perhaps do not matter, it was only a year or so later, in September 2018, that Mr Tenenbaum came to learn about the sale to II-VI.

331. On 6 September 2018, he emailed Mr Fletcher, Mr Abramov and Dr Frolov and said: *"… did you know that six months after we sold it to Kaiam they sold it to Apple for 80M apparently? Is this true? If yes, then I think something is rotten in Denmark. As Shakespeare said*."

332. The situation had to be explained to Mr Tenenbaum, who was obviously very concerned, but whose evidence was that eventually he was persuaded that nothing untoward had gone on, and that the situation was just '*tremendous bad luck*."

333. To complete the story, and although the detail of it is somewhat obscure, it seems that Kaiam's liquidity problems continued during 2018. This may have been influenced, as Mr Valler suggested, by erosion of its market position resulting from cheaper alternatives to its technology produced in China. Whatever the underlying reasons, the problems increased and by the end of 2018 were terminal. Two of Kaiam's English subsidiaries entered into administration in December 2018, and the parent company entered into an insolvency process in California in January 2019.

VI The Petitioners' Case in Outline

334. The Petitioner's case involves alleged unfair prejudice arising from two sources, namely:

    i) breaches by the Investors of material terms of the SHA 3013, and in particular clauses 4.2 (good faith), 5.1 (good business practice), 5.3(a) (business to be conducted in a proper and efficient manner), 5.3(b) (business to be transacted on arm's-length terms), and 5.3(f) (duty to keep shareholders informed);

    ii) breaches by the Vollin and Minden nominee directors from time to time (including Mr Bolger, who the Petitioners alleged to have been a shadow director) both of key provisions of the Articles (Art 17.1 and 17.2), and of certain of the duties owed by them as directors under the Companies Act (i.e., the duties under ss. 171, 172, 173 and 175).

335. Critical to both sets of submissions is a proper understanding of what can be called *the parties' bargain* – i.e. the constitutional settlement arrived at first in 2010 and then endorsed in 2013.

336. Mr Hollington's contention on this general point of characterisation was that the 2013 constitution gave rise to what he called a *contractual quasi-partnership*. Mr Hollington clarified that in making that submission, he was not seeking to rely on any oral assurances given to Dr Sachs and Mr Faulkner as to their continued involvement in the management of CPGL. Instead, his case was based on a reading of the constitutional documents, looked at in the round, and of course against the

background of the factual matrix as it stood at the time of contracting. Mr Hollington said that reading the constitutional documents in this way disclosed two particular agreed common purposes, namely (1) entrenchment of the positions in management of Dr Sachs and Mr Faulkner, and, as its corollary, (2) the prevention of Vollin and Minden from obtaining control of the CPGL board. Mr Hollington argued that both those purposes had been overridden or frustrated by the actions taken by the Investors from March 2016 onwards, in breach of their obligation of good faith under SHA clause 4.2, and that consequently the Petitioners had been treated in a manner which was both unfair and prejudicial.

337. Mr Gledhill for the Investors disagreed fundamentally. He said there was no analogy to be drawn with the quasi-partnership type case. Such cases involved the Court recognising the existence of an equitable constraint, which inhibited in some way the otherwise unrestricted right of a shareholder to exercise its legal rights however it sees fit. In the present case, no such equitable constraint was alleged. Instead, the case in the Petition is that the Investors breached the Petitioners' legal rights under the 2013 Articles or the 2013 SHA. But there is nothing in those agreements which gave Dr Sachs or Mr Faulkner an entrenched right to remain as directors and managers of CPGL, and nothing which inhibited the statutory entitlement of the majority shareholders under CA section 168 to remove the directors if they saw fit to do so, for whatever reason. At most the Investors were subject only to the obligation under SHA clause 4.2 to act in good faith, but here the Investors had acted in good faith, because they had acted honestly and in a manner which was commercially justified: commercially, it was entirely right to have required Dr Sachs to step down as a director of CPGL in March 2016, given the state of the business at the time which (as CEO) Dr Sachs must have contributed to.

VII Applicable Legal Principles

338. Given the parties' polarised positions on these key issues, it seems to me sensible to address certain points of principle, before looking at the particular events relied on as constituting acts of unfair prejudice. Consequently, I will proceed as follows:

i) first, I will summarise the legal principles relevant to determining the content of *the parties' bargain* (which will involve looking in particular at the authorities on contractual good faith clauses);

ii) second, I will summarise the legal principles relevant to the directors duties relied on;

iii) third, I will mention briefly the authorities on prejudice in the context of sections 994 and 996 of the Companies Act 2006.

339. I will then summarise my views on the key elements of *the parties' bargain* in this case.

Defining the Parties' Bargain

340. Central to Mr Gledhill's submissions is Companies Act 2006 section 168. Section 168(1) provides as follows:

> "*A company may by ordinary resolution at a meeting remove a director before the expiration of his period of office, notwithstanding anything in any agreement between it and him.*"

341. The section thus gives to the majority shareholders in a company an inalienable right to remove a director from office, notwithstanding any agreement to the contrary with the director.

342. Notwithstanding that, it is well established that in some cases there can be another dimension, meaning that although the effectiveness of the decision to remove the director cannot be impugned, the act of doing so may nonetheless infringe some other right of the director/shareholder in question. That infringement does not undo the legal effect of the majority vote, but can give rise to other remedies in light of it having happened.

343. The paradigm case is that of the quasi-partnership, exemplified by Ebrahimi v. Westbourne Galleries [1973] AC 360 where the right infringed arose from an agreement, binding in equity, that the majority shareholders would not exercise their undoubted power to expel the minority shareholder from their business. That agreement, in turn, had its origins in the fact that, prior to incorporation, the parties' business had been carried on as a partnership. That gave rise to an understanding, binding in equity, that post-incorporation the minority shareholder, Mr Ebrahimi, would be entitled to remain involved in management, just as he had done before. Mr Ebrahimi's expulsion by majority vote, although legally effective, nonetheless entitled him to an order for the just and equitable winding up of the company through which the business traded. In a celebrated passage, Lord Wilberforce said:

> *"My Lords, this is an expulsion case, and I must briefly justify the application in such cases of the just and equitable clause. The question is, as always, whether it is equitable to allow one (or two) to make use of his legal rights to the prejudice of his associate(s). The law of companies recognises the right, in many ways, to remove a director from the board. Section 184 of the Companies Act 1948 [the predecessor of s. 168] confers this right upon the company in general meeting whatever the articles may say. Some articles may prescribe other methods: for example, a governing director may have the power to remove (compare In re Wondoflex Textiles Pty. Ltd. [1951] V.L.R. 458), and quite apart from removal powers, there are normally provisions for retirement of directors by rotation so that their re-election can be opposed and defeated by a majority, or even by a casting vote. In all these ways a particular director-member may find himself no longer a director, through removal, or non-re-election: this situation he must normally accept, unless he undertakes the burden of proving fraud or mala fides. The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management*

> *participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved."*

344. Ebrahimi was a just and equitable winding up case, but it is well settled that the same approach applies in the context of the unfair prejudice remedy: see. e.g., per Lord Hoffmann in O'Neill v. Phillips [1999] 1 WLR 1092. The question is whether the exercise of the majority's undoubted right under section 168 nonetheless infringes some other right or entitlement of the expelled director (or perhaps of other affected shareholders). The legal effectiveness of the expulsion is not unwound, but other legal consequences may follow.

345. In Ebrahimi, the right or entitlement invoked by Mr Ebrahimi was based on an agreement or understanding binding in equity, but it seems to me there is no reason why the right cannot be a legal right, arising as a result of an agreement between shareholders that they will exercise their voting rights (or not exercise them) in a particular way: see for example Russell v. Northern Bank Corp [1992] 1 WLR 588. In that case shareholders entered into an agreement that the company would not issue further share capital. Notice was nonetheless given of a proposed resolution to increase the share capital. At first instance an application for an injunction to restrain voting on the proposed resolution was granted, on the basis that under its constitution the company had an unfettered entitlement to issue new share capital. On appeal that was overturned. At p. 593 Lord Jauncey of Tullichettle drew a distinction between the position under the company's constitution and the position as between the parties to the shareholders' agreement. He said:

> *"My Lords while a provision in a company's articles which restricts its statutory power to alter those articles is invalid an agreement dehors the articles between shareholders as to how they shall exercise their voting rights on a resolution to alter the articles is not necessarily so. In Welton v. Saffrey [1897] AC 299, 331, which concerned an ultra vires provision in the articles of association authorising the company to issue shares at a discount, Lord Davey said:*
>
> *'Of course, individual shareholders may deal with their own interests by contract in such way as they may think fit. But such contracts, whether made by all or some only of the shareholders, would create personal obligations, or an exceptio personalis against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or non-assenting shareholders.'"*

346. In the present case, it seems to me that Mr Hollington's argument is really based on this same logic. No equitable constraint is relied on (cf. Ebrahimi). Mr Hollington instead says that there was a contractual commitment binding on the majority shareholders – Vollin and Minden – that they would not use their majority voting power to exclude either Dr Sachs or Mr Faulkner from their offices as directors of CPGL. He says that, consequently, although Vollin and Minden must be taken to have had the power as a matter of company law to exclude Dr Sachs and Mr Faulkner

from office, at the same time, as a matter of private contract between the shareholders, they had agreed not to exercise or otherwise rely on that power.

347. Mr Hollington's argument is focused on the good faith provision in clause 4.2 of the SHA, when read together with the other provisions of the SHA and indeed the Articles of CPGL. The central question, therefore, is whether the good faith provision can be read in that way, and whether it can bear the weight which Mr Hollington places on it.

Contractual Obligations of Good Faith

348. This question is essentially one of contractual construction. As to that, the parties were agreed on the principles to be applied to the construction of contracts (Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896, at 912H, *per* Lord Hoffmann, also see Arnold v Britton [2015] AC 1619, at [17]-[23], *per* Lord Neuberger). They were also agreed that since articles of association of a limited company have contractual effect among the shareholders, they should be construed in the same manner as a contract: Zavarco Plc v Nasir [2019] EWHC 1837 at [48], [52] and [59].

349. Taking that as the starting point, the main contest between the parties is about precisely what content to inject into the contractual obligation of good faith in this case, i.e., that in clause 4.2 of the 2013 SHA. I was addressed at some length on the proper meaning and effect of a contractual duty of good faith, and was referred to a number of examples and formulations of the duty. It is convenient to refer to a number of the key authorities, and the principles derived from them.

Good Faith Clauses: Scope

350. In some cases, the issue is as to the scope or reach of a good faith provision, which may be something different than the question of the content of the obligation.

351. In Compass Group UK and Ireland Ltd. v. Mid-Essex Hospital Services NHS Trust [2013] BLR 200, for example, the relevant clause obliged the parties to "*co-operate with each other in good faith and ... take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust ... to derive the full benefit of the Contract*." The issue was whether the good faith obligation was a general one or was more limited in scope. The Court of Appeal thought the latter. Jackson LJ said:

> *"... I have come to the conclusion that the Trust's reading of clause 3.5 is correct. The obligation to co-operate in good faith is not a general one which qualifies or reinforces all of the obligations on the parties in all situations where they interact. The obligation to co-operate in good faith is specifically focused upon the two purposes stated in the second half of that sentence."*

352. A similar result obtained in Re Coroin Ltd [2014] BCC 14, like the present an unfair prejudice petition. A shareholders' agreement contained pre-emption provisions. The petitioner said he had been unfairly prejudiced by a disposal of shares by his fellow

shareholder which on the face of it was consistent with those provisions, but which he said nonetheless was inconsistent with an obligation of good faith expressed in the following terms: " … *each of [the parties] shall at all times act in good faith towards the others and shall use all reasonable endeavours to ensure the observance of the terms of this Agreement."* The Petition was dismissed by David Richards J. (as he then was). In upholding his decision in the Court of Appeal, Arden LJ said at [51]:

> *"I do not consider that the obligation to act in good faith can impose a binding general obligation to act in a manner outside the terms of the shareholders' agreement because there is no indication of the circumstances in which the obligation to act in good faith obliges the parties to go beyond the obligations in the shareholders' agreement. There is, therefore, no benchmark against which the court could enforce the obligation"*

353. If I may respectfully say so, I agree with the explanation of Re Coroin recently set out by HHJ Klein in Unwin v. Bond [2020] EWHC 1768 (Comm), who at [224] said:

> *"As I read the judgment*:
>
> *i) [Arden LJ] decided that, in the particular circumstances of that case, the duty of good faith did not cover the activity complained of. The Judge decided that, as a matter of construction, the good faith obligation did not indirectly prevent what a different provision of the contract allowed;*
>
> *ii) [Arden LJ] did not intend to set out what, as a matter of principle, a duty of good faith comprises. Rather, she decided which of the two competing arguments advanced by counsel was right in the circumstances of that case."*

Good Faith Clauses: Content

354. Other cases are more directly concerned with the question of the *content* of the obligation, if the activity in question is within scope.

355. In one early decision, Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd. [1989] 1 QB 433, Bingham LJ explained that the concept of good faith in the civil law tradition goes beyond a simple requirement of honesty:

> *"In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair and open dealing."*

356. One must treat this statement with some care since it is a statement of the civil law approach, not the English law approach, but nonetheless I think it is a useful touchstone of what is generally understood by the idea of good faith, and indeed it is consistent with the formulations in later authorities dealing with the common law position.

357. In Berkeley Community Villages Ltd v. Pullen [2007] EWHC 1330 (Ch), for example, Morgan J at [97] said that good faith connoted adherence to:

> *"(1) reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also … (2) faithfulness to the agreed common purpose and (3) consistency with the justified expectations of the First Claimant."*

358. The Petitioners referred me to the following statement by Vos J. (as he then was) in CPC Group Ltd v Qatari Diar Real Estate Investment Co. [2010] EWHC 1535 (Ch). Vos J said that good faith required one:

> "*… to adhere to the spirit of the contract, which was to seek to obtain planning consent for the maximum Development Area in the shortest possible time, and to observe reasonable commercial standards of fair dealing, and to be faithful to the agreed common purpose, and to act consistently with the justified expectations of the parties."*

359. Later, in F & C Alternative Investments (Holdings) Ltd. v. Barthelemy (No.2) [2012] Ch 613, Sales J. (as he then was) cited with apparent approval the following passages from the Judgment of Hodgson JA in an earlier Australian decision, Macquarie International Health Clinic Pty. Ltd. v. Sydney South West Area Health Service [2010] NSWCA 268:

> *"146. Writing extra-curially, Sir Anthony Mason has argued that a contractual obligation of good faith embraces no less than three related notions: (1) An obligation on the parties to co-operate in achieving the contractual objects; (2) Compliance with honest standards of conduct; and (3) Compliance with standards of conduct that are reasonable having regard to the interests of the parties. See A. F. Mason 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 LQR 66, 69. …*
>
> *147. However, a contractual obligation of good faith does not require a party to act in the interests of the other party or to subordinate its own legitimate interest to the interests of the other party; although it does require it to have due regard to the legitimate interests of both parties: cf Overlook v. Foxtel [2002] NSWSC 17 at [65]-[67] (Barrett J)."*

360. To my mind, both the Macquarie case and the later F & C Alternative Investments illustrate the flexibility of the concept of good faith, and in consequence, its particular suitability in the context of long term contracts where there is a risk that the parties' interests may diverge, perhaps in unforeseen ways.

361. Macquarie, for example, concerned a long-term PFI arrangement between an area health authority and private investors and contractors. The Court held that the good

faith obligation in that case included an obligation to make available key information. Just after the passages cited above, Hodgson JA said as follows:

> *"148. Applying that approach to the HOA, in my opinion the obligation of utmost good faith did not go so far as to require Area Health to defer to the interests of MHC and/or Macquarie in developing its own plans for [the hospital], or to include MHC and/or Macquarie in its own planning processes. But in my opinion, when Area Health's planning processes would make a substantial difference to what MHC and/or Macquarie could reasonably expect concerning the flow of persons between the hospitals or the creation of a campus concept, the obligation of utmost good faith would require that MHC and/or Macquarie be informed of this, at least to enable them to take account of it in the design and construction of the works contemplated by the HOA."*

362. F&C Investments concerned a contractual joint venture. The good faith obligation was also interpreted to require, on the facts of that case, the disclosure of information by one party to the other. The following passages in the judgment of Sales J. are interesting and instructive in the context of the present case, insofar as they describe the particular function and utility of good faith clauses in certain types of agreement:

> *"The balance of interests established by a contractual duty of utmost good faith in the context of a commercial joint venture, which permits Holdings to have regard to F & C's own commercial interests while also imposing an obligation upon it to have due regard to the legitimate interests of the other parties to the agreement, represented the parties' considered reconciliation of the interests of F & C and the LLP and the defendants under the agreement. This was the essence of the bargain which they made ... The adoption of such a standard of conduct made sense in the context of an arrangement which sought to marry together the disparate strengths of the defendants and F & C through the vehicle of the LLP in a relationship intended to last a long time (and which therefore required considerable flexibility of application to cope with the wide range of unforeseeable business challenges which might arise), where they were each required to have regard to the legitimate interests of the other parties to the agreement while at the same time being entitled to take into account their own self-interest.*
>
> *The dividing line set out in the Macquarie International Health Clinic case, at paragraph 148, as regards the extent of the obligation of disclosure inherent in the obligation of utmost good faith provides broad support for the dividing line which I find applies in the present case, between information relating to the routine marketing operations of F & C and information about the decision in relation to marketing strategy taken on 20 August 2008: see paragraphs 251ff above. The decision of 20*

> *August 2008 was a major strategic decision which had the potential to make a substantial difference to what the LLP could reasonably expect concerning a flow of business to it, and so fell into a category of information which ought to have been disclosed by Holdings under clause 13.6 of the agreement …".*

363. Other cases have emphasised that the duty of good faith can be concerned not only with substantive outcomes but also with procedural deficiencies. A good example is a partnership case, Mullins v. Laughton [2002] EWHC 2761. Clause 27.1 of the partnership agreement required the partners to be "*just and faithful to the other partners in all ... matters relating to the partnership.*" Neuberger J found a breach not so much in the outcome of a meeting of partners but in the process by which the meeting was handled. He said the following, at [96] and [100]:

> *"96. In the present case, I do not consider that it could fairly be said, at least on the basis of the evidence I have heard, that a properly constituted meeting of the partners could not have resolved to serve a retirement notice on Mr Mullins pursuant to clause 21.1 of the partnership agreement …*
>
> *…*
>
> *100. Over and above this, the conduct of the meeting by Messrs. Laughton, Travers and Clements did not, to my mind, comply with the duty of good faith to Mr Mullins. I accept that one must avoid the danger of being unrealistic, and that one must judge the behaviour of Messrs. Laughton, Travers and Clements by reference to the relatively tough, and abrasive regime which prevailed at BKR. However, even taking that into account, I consider that the way in which Mr Mullins was 'bounced', both into and at the meeting, was outside the comparatively wide range of acceptable behaviour, which accords with the duty of good-faith between partners. He was not only set up in terms of attending the meeting without any significant warning, but the conduct of the meeting similarly involved a set up. I think that the meeting was arranged with a view to shocking or surprising Mr Mullins into agreeing to resign (which I accept he got near to doing), and then, while he was still in a state of shock, telling him the financial consequences, by the exercise of the Defendants' purported rights under clause 7 of the Protocol. That is not the way in which partners should behave to each other. Bullying, seeking to trap, and intentionally taking by surprise with a view to shock, in hope of obtaining an advantage for the co-partners and a disadvantage for the partner concerned, must, in my view, amount to a breach of good faith."*

364. Similarly in Re Audas Group Ltd [2019] EWHC 2304 (Ch), an unfair prejudice case, the shareholders agreement contained an express duty of good faith. The majority shareholders were in breach in having decided to exclude the minority shareholder from management without fair and proper process. At [120] the Judge said:

> "*In my judgment, Messrs Bray and Sharp committed and caused AGL to commit serious breaches of their contractual good faith obligations, under Clauses 18.1-18.3 of the Shareholders Agreement, in dismissing Mr Brown as an employee. This is on the basis that the decision was made covertly before initiating the 'disciplinary' process against him and without first clarifying and investigating with Mr Brown the substance of their concerns, exploring the range of options that might be available and providing him with at least some form of warning. No doubt, Messrs Bray and Sharp were by then exasperated with Mr Brown and the stance he had taken in the negotiations for the sale of his shares. In all likelihood, they believed he was no longer fully pulling his weight in the business and they perceived he was demanding too high a price for his shares. However, it was a breach of their duties of good faith, for them to peremptorily dismiss Mr Brown when they did*."

365. In Unwin v. Bond [2020] EWHC 1768 (Comm), after an impressive analysis of the authorities, HH Judge Klein (sitting as a Judge of the High Court) summarised the overall position in three propositions (or sets of propositions) at [229]-[232].

366. The first, reflecting the point already made above, was about the scope of the obligation: " *... the extent of the obligation, that is, what prospective acts of a defendant may be subject to a duty of good faith, is a matter of construction of the contract*."

367. The Judge's further points were about the content of the obligation. At [230]-[231] he said:

> "*230. Secondly, once it is established that a prospective act of a defendant is subject to a duty of good faith, the defendant is bound to observe the following minimum standards:*
>
> *i) they must act honestly;*
>
> *ii) they must be faithful to the parties' agreed common purpose as derived from their agreement;*
>
> *iii) they must not use their powers for an ulterior purpose;*
>
> *iv) when acting they must deal fairly and openly with the claimant;*
>
> *v) they can consider and take into account their own interests but they must also have regard to the claimant's interest.*

> *These minimum standards are not entirely distinct from one another. Rather, they tend to overlap."*
>
> *231. Fair and open dealing is a broad concept and what it means in practice in any case will again depend on context. It is likely that, in many cases, the claimant is entitled to have fair warning of what the defendant proposes. In those cases where the defendant is contemplating taking a decision which will affect the claimant, fair and open dealing is likely to require that the claimant is given an opportunity to put their case before the defendant makes the decision and the defendant is likely to be required to consider the claimant's case with an open mind."*

368. He then said at [232]:

> *"Thirdly, and very much linked to the second point, the fact that a defendant could have achieved the same result in a procedurally compliant way does not amount to a defence where the approach they adopt does not meet the minimum standards I have set out."*

369. I respectfully agree with those statements of principle.

370. On the facts, they led the Judge to conclude that the Defendant had acted in breach of his good faith duty in terminating the Claimant's contract of employment in the way he did. Even though there had been no dishonesty or ulterior purpose in terminating the Claimant's employment, nonetheless:

> *"Mr Jory persuaded me in closing that Mr Bond did breach his duty of good faith when he terminated Mr Unwin's employment; in particular because did not deal fairly and openly with Mr Unwin and because he did not have regard to Mr Unwin's interests.*
>
> *It is not disputed that Mr Unwin was given no notice of the possibility that his employment might be terminated. There was no or no proper investigation into how come the project management team was in a state of disorder or into the extent of Mr Unwin's role in its poor performance. Mr Unwin was given no, or no real, opportunity, before his employment was terminated, to respond to Mr Bond's complaints about him in relation to the TKM projects or the Aldwych project. Mr Unwin had no opportunity to reveal that his poor performance, if any, was due to the pressure of his mother's illness or the tragedy of her death. Mr Bond did not consider or explore with Mr Unwin whether any steps could be taken to improve Mr Unwin's performance, if necessary, or the project management team's performance, short of the replacement of Mr Unwin. As the Employee Handbook makes clear, that was something junior employees could expect and so, even more so in Mr Unwin's*

> *case, fairness required that there be a proper investigation and a consideration of remedial action.*
>
> *The truth of the matter is that Mr Bond did not consider his decision from Mr Unwin's perspective. Mr Bond's sole focus was on what he perceived to be the real risk that a substantial portion of Mechanical's business might be lost if he did not take drastic action.*
>
> *The termination of Mr Unwin's employment was not so urgent that it had to take place without informing Mr Unwin of the complaints against him, without carrying out a proper investigation into those complaints, without giving Mr Unwin an opportunity to participate in the investigation and without exploring the possibility of remedial action."*

Directors Duties

371. The duties relied on by the Petitioners are as follows.

372. Companies Act Section 171 is headed, "*Duty to act within powers*", and provides:

> "*A director of a company must—*
>
> *(a) act in accordance with the company's constitution, and*
>
> *(b) only exercise powers for the purposes for which they are conferred.*"

373. As Mr Hollington pointed out, by virtue of the Companies Act 2006 section 17, the Company's constitution for the purposes of section 171(a) means the 2013 Articles and the 2013 SHA.

374. Companies Act Section 172 is headed "*Duty to promote the success of the company*", and provides relevantly:

> *"(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to*
>
> *(a) the likely consequences of any decision in the long term,*
>
> *(b) the interests of the company's employees,*
>
> *(c) …*
>
> *(d) …*

> *(e) the desirability of the company maintaining a reputation for high standards of business conduct, and*
>
> *(f) the need to act fairly as between members of the company.*
>
> *(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes."*

375. The parties were agreed on the legal principles relevant to the section 172 duty, and to the assessment whether a director has acted in breach of the duty. Such an assessment involves an enquiry into the director's subjective state of mind. The question is whether the director "*honestly believed that his act or omission was in the interests of the company*": Re Southern Counties Fresh Food Ltd [2008] EWHC 2810 (Ch), at [53]. That said, it is not necessary to show conscious dishonesty in order for a breach to occur, because a failure to direct one's mind to the interests of the company may be sufficient: see, e.g., Re CF Booth Ltd [2017] EWHC 457 (Ch) at [91]-[95].

376. The parties were also agreed that the assessment under section 172 is not an outcome driven exercise – i.e., the Court does not, with the benefit of hindsight, look at a director's decision and decide whether it was prudent or correct in light of what happened thereafter (see Re Regentcrest plc [2001] BCC 494, at [120], per Jonathan Parker J (as he then was)). Nonetheless, it is obvious that if a decision is made which results in a catastrophic outcome for a company, that is likely at least to give rise to the question whether the directors who took it were acting in the company's best interests.

377. Companies Act Section 173 is headed, "*Duty to exercise independent judgment*", and provides:

> *"(1) A director of a company must exercise independent judgment.*
>
> *(2) This duty is not infringed by his acting -*
>
> *(a) in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors, or*
>
> *(b) in a way authorised by the company's constitution*".

378. For present purposes, the content of the duty is self-explanatory. It is obviously breached if there is evidence that a director is accustomed to act on the instructions of another person who is not a director.

379. Companies Act Section 175 is headed, "*Duty to avoid conflicts of interest*", and provides:

> *(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.*
>
> *(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).*
>
> *(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.*
>
> *(4) This duty is not infringed—*
>
> > *(a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or*
> >
> > *(b) if the matter has been authorised by the directors.*
>
> *(5) Authorisation may be given by the directors—*
>
> > *(a) where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or*
> >
> > *(b) where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.*
>
> *(6) The authorisation is effective only if—*
>
> > *(a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and*
> >
> > *(b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.*
>
> *(7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties."*

380. This duty reflects the obligation of single-minded loyalty to the company owed by all directors, and which results in company directors having fiduciary status: see per

Millett LJ in Bristol & West Building Society v Mothew (t/a Stapley & Co) [1998] Ch. 1 CA (Civ. Div.) at 18.

Prejudice

381. In Re Coroin [2012] EWHC 2343 (Ch) David Richards J (as he then was) provided the following summary of the types of prejudice which may be relevant in the context of an unfair prejudice Petition. These are not confined to financial prejudice. At [630]-[631] he said:

> *"Prejudice*
>
> *630. Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. So, for example, removal from participation in the management of a company and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where the members have rights recognised in equity if not at law, to participate in that way. Similarly, damage to the financial position of a member in relation to a debt due to him from the company can in the appropriate circumstances amount to prejudice. The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section.*
>
> *631. Where the acts complained of have no adverse financial consequence, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omissions are breaches of duty owed to the company rather than to shareholders individually. If it is said that the directors or some of them had been in breach of duty to the company but no loss to the company has resulted, the company would not have a claim against those directors. It may therefore be difficult for a shareholder to show that nonetheless as a member he has suffered prejudice. In Rock (Nominees) Limited v RCO Holdings Plc [2004] BCC 466 the respondent directors of the company procured the sale of an asset to a company of which they were also directors. It was alleged to be a sale at an undervalue and procured in breach of the respondent directors' fiduciary duties to the company. The evidence established that the price paid was not an undervalue but was the best price reasonably obtainable, and the Court of Appeal upheld the decision at first instance that no prejudice had been caused to the*

> *petitioner. At paragraph 79 of this judgment, with which the other members of the Court agreed, Jonathan Parker LJ said:*
>
> > *'As to the judge's finding of breach of fiduciary duty on the part of the respondent directors, it is plain that, as the judge found, the respondent directors were 'in a position of hopeless conflict'. Further, they would undoubtedly have been well advised to obtain an independent valuation. However, no harm was in fact done and no damage or prejudice was caused. Nor is there any question of the respondent directors being personally accountable in any way. That being so, it seems to me to be inappropriate to reach a conclusion that they breached their fiduciary duties, as it were, in the abstract'."*

VIII The Parties' Bargain in this Case & the Role of the Good Faith Clause

382. I come on then to analyse the parties' bargain in this case.

383. I approach the matter on the basis that the content of any pre-contractual negotiations is irrelevant, in light of the entire agreement clauses in both the 2010 SHA and the 2013 SHA. But it is relevant to consider the factual background, or factual matrix, as it stood at the time of contracting.

384. The context here includes the following:

i) At the time of the original 2010 SHA and Articles, Dr Sachs' vision was still embryonic, although it was thought to have great potential. Nonetheless, the future was uncertain. After all, the venture was intended to try to commercialise a form of new technology; although there was a hope of success, there was no guarantee;

ii) The parties envisaged a potentially long term arrangement, which in light of the uncertainties was likely to become subject to pressures over time.

iii) From the point of view of the existing investors in 2010 (now the Minorities, but they were not in the minority at the time), Dr Sachs was the man whose vision they had bought into. To use Mr Faulkner's terminology, he was the *jockey they were backing*. Or to put it another way, they were not investors in a technology business; they were investors in a start-up business headed by Dr Sachs, whose purpose was to realise the vision he had set out. Mr Faulkner had introduced them to Dr Sachs and in that sense was responsible for bringing them into the venture in the first place. As far as the Minorities were concerned, these were two key individuals in terms of realising the business vision they had invested in.

iv) I accept the proposition that the idea was to arrive at a breakeven point with the initial funding to be provided by Vollin (see above at [42]), but it was not certain that would be achieved, and the parties must have anticipated the

likelihood that if it were not, then further capital injections from Vollin might be needed, although there was no obligation on Vollin to supply them.

v) This meant that the introduction of Vollin as a major new investor carried with it certain risks, from the point of view of the existing investors. One important risk was that there might well be a shift in the balance of power at shareholder level over time, and that might result in Dr Sachs' efforts to implement his vision being derailed.

vi) At the same time Vollin, as (potentially, in 2010) majority investor, no doubt wished to have latitude to take decisions in its own commercial interests. It was taking a material financial risk in venturing its capital in a business which was unproven. There were many uncertainties and plenty of opportunity for things to go wrong, not only with the technology but with the management of the business more generally.

vii) Of course by 2013, things had moved on and by then Vollin *was* a majority investor. The April 2013 rights issue brought its shareholding up to 80% of the issued share capital. By that stage, therefore, the potential risks for the Minorities had much greater potency. They were comprehensively outnumbered at shareholder level, and there was obvious potential for them being marginalised and their interests overlooked or overridden.

385. It seems to me, approaching it broadly, that the structure arrived at, and contained in the 2010 and the 2013 constitutions, was a compromise designed to hold a balance between these (potentially) differing sets of interests.

386. A cornerstone of this constitutional settlement, designed as it was to maintain an acceptable balance of power between the existing and new shareholders, was the allocation of management responsibility for the business to CPGL's board of directors. More specifically, the allocation of responsibility was to a board having the particular characteristics described in the SHA and the Articles. Critically, those characteristics included the following:

i) Under the 2013 constitution (as with the 2010 constitution), Vollin's representatives were to be in a minority on the board. That follows expressly from clauses 7.1 to 7.3 of the 2013 SHA: the maximum number of directors was to be six, with Vollin entitled to nominate only two; and even in the event that the overall number was increased beyond six, Vollin's entitlement would increase only in a manner designed to ensure it remained in a minority ("*the Investor shall have the right … to appoint and maintain in office one additional Investor Director for every two additional non-Investor Directors appointed.*")

ii) Granted, that balance shifted slightly in 2014 when Minden came on board and obtained the right to appoint its own nominee (a 3/3 split in the overall board of six), but at the same time, the constitutional balance at board level was still weighted in favour of Dr Sachs and Mr Faulkner.

iii) That is because, under SHA clause 7.8 (and Art 17.7), <u>both</u> Dr Sachs and Mr Faulkner had to be present in order for any meeting of the board to be quorate;

and under clause 7.13 (and Art 17.9), both of them had to be in the majority in order for a resolution to be passed. Their joint approval was needed in order for any new director to be appointed (Article 14.2).

iv) Moreover, other protections were built into the overall arrangement to ensure that Dr Sachs and Mr Faulkner could *not* be removed from office as directors.

v) Like the other directors, they were not to retire by rotation (Article 14.1); but exceptionally, and unlike the other directors, by virtue of Article 15.2 neither could they be removed from office by a resolution of the board ("*The Board shall not be able to pass a resolution to remove the CEO as a director or the Founder Director as a director …"*), or by virtue of their making any "*arrangement or composition with their creditors generally*".

vi) Thus, they were to vacate office only in the other, more limited circumstances identified in clause 15.1. These included bankruptcy (Art 15.1(b)), mental incapacity (Art 15.1(c)) and resignation (Art 15.1(d)), and also (Art 15.1(a)) on their ceasing to be a director "*by virtue of any provision of the 2006 Act or these Articles, or [becoming] prohibited by law from being a director.*" It seems clear that "*any provision of the 2006 Act*" includes by virtue of any resolution of shareholders passed under CA 2006 section 168.

387. That is the position at board level. The balance of power between *the shareholders* and the board is then dealt with in SHA clause 5.

388. The text is set out above, but it deserves emphasis here that the general primacy of the board in terms of management responsibility, and indeed its freedom in general terms to manage the business of CPGL free from interference by the shareholders, is underscored by a number of provisions in clause 5.

389. First, there is the second sentence of clause 5.1: "*The Shareholders shall each co-operate with the Board in the running and operation of the Company and each CPG Group Company.*" Second, there is the reference in clause 5.2 to "*the Business*" being conducted "*in accordance with good business practice.*" Third, there is the commitment in clause 5.3(a) that CPGL and the CPGL group companies should conduct their affairs "*in a proper and efficient manner and for their own benefit*" – "*proper*" to my mind being a reference to proper corporate governance. Fourth, there is the provision in clause 5.3(c): " … *the Business shall be carried on in accordance with the policies laid down from time to time by the Board and in accordance with the Annual Budget.*" And fifth, there is clause 5.4, which makes it clear that the duty to co-operate with the board continues even if the relevant shareholder has become subject to an obligation to transfer his shares, for example under a Transfer Notice or Compulsory Transfer Notice (as defined): even in such cases, the shareholders affected were required to "*do all things in their power to continue to co-operate with the board in its running and operation of the Company …*".

390. Thus, the overall structure is clear: the business of CPGL and its subsidiaries was to be managed by the board; Vollin and Minden between them were to nominate three of the six board members; but Dr Sachs and Mr Faulkner were to be central figures on the board with and were to hold the balance of power in the company at that level;

and the board was to be able to operate free from shareholder interference, because the shareholders were bound to co-operate with it.

391. Viewed in that light, I have concluded that I am persuaded by Mr Hollington's submissions on the scope and content of the good faith duty in this case.

392. First of all as to scope, the good faith provision in clause 4.2 is in a section of the SHA headed "*Warranties*." Given both its position within the SHA as a whole, set as it is among other, general undertakings, and given also its language which could not be broader ("*act in good faith in all dealings with the other Shareholders and with the Company in relation to the matters contained in this Agreement*"), clause 4.2 seems to me in principle wide enough in scope to capture the exercise of voting rights by the majority shareholder(s) in a manner which has an impact on the overall balance of interests achieved by the 2010 and 2013 Constitutions.

393. As to content, it seems to me that Mr Hollington must be right that the good faith obligation was intended to impose a contractual restriction, binding as between the shareholders, on the otherwise untrammelled rights of Vollin and Minden to exercise their majority power under Companies Act section 168(1) as they saw fit. They were bound to act with fidelity to the bargain (see [357]-[358] above), and that meant respecting the balance of power achieved by means of the overall constitutional settlement. Critical parts of that were the special positions occupied by Dr Sachs and by Mr Faulkner. It makes no real sense to say that the Investors retained an entirely unrestricted right to drive a coach and horses through that constitutional settlement by virtue of their majority voting power.

394. True, they had such an unrestricted right as a matter of company law, which could not be excluded; but as a matter of private contract it could, and it makes perfect sense to conclude that it was, because otherwise the protections built into the overall scheme by virtue of Dr Sachs' and Mr Faulkner's special positions could be swept away at will. That cannot have been what the parties intended. The upshot is that the Investors could of course exercise their majority power to remove Dr Sachs and Mr Faulkner, and such removals would be effective and not susceptible to revocation; but at the same time, they would constitute a breach of contract as between the shareholders, entitling the disadvantaged shareholders in an appropriate case to claim a remedy – as they do in this case, in the form of relief for unfair prejudice under CA section 994.

395. I should say further on this point that I am not persuaded by the two principal points made by Mr Gledhill in response.

396. The first was reliance on the words, in clause 7.8 of the SHA, " ... *insofar as they each remain a Director*," the "*they*" referred to including Dr Sachs and Mr Faulkner. Mr Gledhill said this wording was consistent with the idea that Dr Sachs and Mr Faulkner were vulnerable to removal by the majority shareholders. The short point is that they were, but that is not the same as saying that such removal might not also give rise to other legal consequences, such as a breach of contract between the shareholders. The two are not inconsistent, as cases like Ebrahimi demonstrate.

397. Mr Gledhill's second point concerned the terms of Dr Sachs' employment contract with CPUS, of Mr Faulkner's consultancy agreement with CPGL, and of the Good

Leaver/Bad Leaver provisions under the 2013 Constitution. In short what was said was that the employment contract and the consultancy agreement recognised the potential for those agreements to be terminated on notice, expressly in the case of Dr Sachs' consultancy agreement following a resolution of CPGL's Board. The idea that the CPGL Board was empowered to cancel Dr Sachs' employment contract and Mr Faulkner's consultancy agreement was in turn consistent with the 2013 SHA, which required them both to be in the majority for any vote to be carried (cl. 7.13), but not in a case in which there was a conflict (cl. 7.16), which would obviously be the case if the proposal was for their arrangements as executives to be cancelled (with the consequence that Dr Sachs' arrangements could be cancelled if Mr Faulkner agreed and vice versa). It followed that it made sense to make provision in the 2013 constitution for what would happen as regards Dr Sachs' and Mr Faulkner's B Shares in the event of them being classified as "*Good Leavers*", and the idea that they might be so classified and were thus vulnerable to removal at will was inconsistent with the idea that their positions were entrenched.

398. This strikes me as a somewhat contrived argument. First of all, it bears emphasis that under Article 15.2 of the 2013 Articles, the board of CPGL had no power to remove either Dr Sachs or Mr Faulkner from their *offices* as director. That could occur only in other circumstances, such as death, mental incapacity, bankruptcy or on a vote of the majority shareholders. I accept of course that the question of the executive arrangements under which Dr Sachs and Mr Faulkner were engaged was something different, and that on one view, such matters are not affected by Article 15.2 which is concerned with the *office* of director. All the same, however, it cannot seriously have been contemplated that circumstances would arise in which the board would be called upon to consider termination of the executive arrangements as a freestanding matter, absent some other event giving rise to termination of the office of director. It would be an odd and perhaps perverse exercise of power for a board to terminate a director's employment contract without him or her also being removed from office. That being so, in my view the scenario contemplated by Mr Gledhill's argument is an entirely artificial one, even if theoretically possible. If that is right, then it provides very thin justification for taking a contrary view of the content of the good faith provision in clause 4.2.

399. At its highest, all that is said is that there would have been no purpose providing for what should happen to Dr Sachs and Mr Faulkner's B shares upon their being removed as directors, if the correct position is that they could never be removed. The short answer, again, is that they *always could* be removed by majority shareholder vote – there was nothing to be done to prevent that – but that is not the same as saying that if they were, there could be no claim for unfair prejudice.

400. That deals with what seems to me to be a critical component of the good faith obligation in this case, which is probably best expressed as the requirement of fidelity to the bargain. Before moving on to look at the facts, I should again make it clear that I regard the duty as wider than that, and I gratefully adopt in full HHJ Klein's articulation of the overall content of the duty, as set out at [367]-[368] above. I emphasise in particular the obligation to deal fairly and openly, the need to take into account the interests of the other party as well as one's own interests, and the fact that the duty may be breached where an otherwise justifiable result is achieved in procedurally non-compliant way.

IX The Removal of Dr Sachs

401. I must consider the removal of Dr Sachs both in terms of the Petitioners' complaints against the Investors, and in terms of their complaints against the Vollin nominee directors at the time (Mr Fletcher and Mr Burkey).

The Investors

402. It follows from the views I have already expressed that in my judgment, the actions taken by the Investors to exclude Dr Sachs in March 2016 were unfairly prejudicial to the Petitioners. They were unfair in the sense that, in breach of the obligation of good faith, they involved the Investors exerting their power to exclude Dr Sachs in a manner expressly designed to override the carefully calibrated constitutional balance; it was prejudicial because the effect was to deprive the Petitioners not only of the benefit of Dr Sachs' technical expertise, but also of the protections which his presence on the CPGL board were designed to achieve.

403. In my judgment, there is nothing in the point that in formal terms Dr Sachs agreed to his resignation, and executed terms of a compromise on 21 March 2016. That may be the formal position, but the substance is obviously that he was pushed rather than jumped.

404. At the trial before me, the relevance in Dr Sachs' mind of the threat to withdraw funding from CPGL developed some prominence, and I will come back to that below. But even more significant, in my view, was the threat to use the majority voting power to remove Dr Sachs if he did not go. Dr Sachs' written evidence, which was not challenged on this point, was that he was told expressly at the meeting on 14 March 2016 that if he did not go he would be removed forcibly under the relevant procedure in the Companies Act. I accept that evidence, which seems to be entirely consistent with the inherent probabilities. In the event there was no vote of shareholders, but that would have been a sterile exercise because the result was a foregone conclusion. The effect is that although the formalities had to be tied up, Dr Sachs' position was effectively terminated as of 14 March 2016, when he was told that the Investors had lost confidence in him and had decided to exercise their voting power in favour of his removal. But that is just what, in my view, the good faith provision, importing as it did the requirement of fidelity to the parties' bargain, inhibited them from doing.

405. I would also go further and say that the process by which Dr Sachs' removal was achieved involved a breach of the good faith duty. In my judgment there was a failure to deal fairly and openly with Dr Sachs, and a failure by the Investors to take into account the interests of the Minorities as well as their own interests. The effect was a result which, even if it had otherwise been justifiable, was achieved in a procedurally non-compliant way.

406. As to the failure to deal fairly and openly, it is obvious that the meeting on 14 March 2016 was set up to take Dr Sachs by surprise. Matters had been left on Friday afternoon, 11 March, on the basis that he would think further over the weekend about the question of management consultants and about the state of the business generally. True it is that this came against the background of the serious disagreement earlier in the week with Mr Bolger, and true it is also that Dr Sachs' stubbornness on the issue

of allowing full access to management consultants had been a cause of serious frustration to everyone, including in particular Mr Fletcher and Mr Tenenbaum. All the same, Dr Sachs was not expecting at the meeting on Monday 14 March to be presented with an ultimatum that he resign from the business he had founded and which he still believed might deliver his vision. Mr Fletcher's email to him confirming the meeting gave no indication of what was in store. He was taken by surprise and deliberately so.

407. There is also the question of the threat to withdraw funding. This topic had been raised with Mr Faulkner when Mr Bolger, and then Mr Fletcher and Mr Burkey, spoke to him over the course of the weekend of 12 and 13 March 2016. The same threat to withdraw funding was used in the meeting with Dr Sachs. Again to refer to Dr Sachs' unchallenged evidence, he said that Mr Fletcher took out a piece of paper (the term sheet for his removal) and said "*We are not going to fund the company unless you are no longer CEO.*" Once more, that evidence was not challenged and I accept it.

408. The question is, what exactly was meant by the threat to withdraw funding? Did that mean long term funding, or did it include a threat to withdraw the short term funding – in the region of US$8m – final approval of which was pending and which was necessary to meet the March 2016 payroll? Dr Sachs' evidence was that he understood the threat to mean that the pending US$8m subscription would not proceed unless he stepped down.

409. Mr Gledhill described Dr Sachs' evidence on this point as a fabrication, but I disagree and I accept it. It seems to me that there was at least ambiguity about what the threat to withdraw funding involved. Mr Faulkner in his cross-examination said he understood it to be a reference to long-term funding, but that is not inconsistent with the idea that Dr Sachs – to whom Mr Faulkner did not speak before the 14 March meeting – interpreted differently what he was told, and the critical player in this part of the story is Dr Sachs not Mr Faulkner. The evidence overall is consistent with a degree of ambiguity which it would have been easy for Dr Sachs to interpret in the way he did. First, there is the tone of the letter sent by Mr Burkey to Mr Faulkner on the afternoon of 13 March 2016 (see [149] above: "*The Company has a small cash balance but will be unable to make March UK payroll … The Majority Investors have lost confidence in the CEO, Jonathan Sachs, and as a result, will not provide further funding to the Company under the existing management arrangements")*. Second, there is the tone of the draft email prepared by Mr Bolger on the morning of 14 March 2016, to be sent if needed to Mr Stark (see [155] above: "*The alternative is no more funding and insolvency this week mostly likely")*. Third, there is the fact that the completion of the Subscription Agreement for the short term injection of funding was held off pending Dr Sachs' departure (in an email dated 22 March 2016, the day after Dr Sachs' compromise agreement was executed, Ms McDermid sent an email referring to the "*next round of financing for CP, that has been left until Jonathan's agreement had been signed.*")

410. It is true that Dr Sachs did not see either Mr Burkey's letter or Mr Bolger's draft email, but they are consistent with the idea that the impression given to Dr Sachs was that funding would be withdrawn immediately if he did not resign. That was incorrect, because at the meeting on Saturday, 12 March 2016, Vollin had already taken the decision that it would provide funding at least until 31 May.

411. I do not go as far as to say that Dr Sachs was deliberately misled. It is not necessary for me to do so. I say only that the information given to him was ambiguous, and he acted (reasonably in my view) by interpreting what he was told as including the risk of an imminent and peremptory withdrawal of funding. That created a degree of urgency which meant Dr Sachs felt he had no room for manoeuvre and was no doubt a weighty factor in his decision to resign, which was then documented in short order over the course of the next few days. It also helps to explain the surprise Mr Faulkner said he felt at the fact that Dr Sachs agreed to go so easily: his evidence was that he thought Dr Sachs would put up a fight and was surprised when he did not. The explanation is that Dr Sachs did not think he had time for it. He might have thought differently had he been made aware that funding would be available until 31 May.

412. In short, it seems to me that dealing fairly and openly with Dr Sachs required him to be told clearly of Vollin's decision already made on Saturday 12 March 2016 to provide funding to the end of May 2016. That did not happen.

413. Finally under this heading, I also think there was a failure by the Investors to take into account the interests of the Petitioners as well as their own interests. This requires me to engage with one of the Investors' principal arguments, which is that their interests were in fact always aligned with those of the Petitioners, because their real interest was only ever in making CPGL a business and financial success and that was in the interests of the Petitioners also.

414. It seems to me that is true as far as the overall success of the CPGL business was concerned, but at the same time, there was scope for a difference of view as to the best way of achieving that success. By 14 March 2016, the Investors had reached the view that success (or perhaps, as they saw it, salvaging something from failure) was possible only with Dr Sachs out of the picture. Viewed purely commercially, I have no doubt that that was a rational view to have come to: the overall project had come to be vastly more expensive than originally anticipated; there had been many setbacks including missed milestones; the P1 prototype tested in Phoenix in February was some way removed from the original vision; Dr Sachs had demonstrated a stubborn personality and limited leadership skills; and there had been the ugly disagreement with Mr Bolger at the meeting on 11 March, and then the stand-off over the appointment of management consultants, both of which – entirely reasonably in my view – had so unsettled Mr Tenenbaum.

415. All of that, however, has to be weighed against the fact that from the point of view of the Minorities, Dr Sachs was *the jockey they were backing*. It was his vision and leadership they had invested in. Moreover, they had contracted on a basis which gave him a special status in the management and direction of CPGL's business. From their point of view, removing Dr Sachs was a seismic event, not only in the sense that it would result in the loss of his technical expertise, but also in the sense that it would remove from the overall constitutional structure one of the two key individuals whose role on the board was expressly designed to counteract the possible effect of overbearing majority shareholder control. I have seen nothing to suggest that the Investors took account of any of these factors in deciding how to deal with Dr Sachs in March 2016. It was not suggested that they did.

416. The case advanced was essentially that they had finally come to the view that Dr Sachs and his vision were a busted flush. I have no doubt that that was their

legitimately held view, but I also think that in taking the action they did they failed to have regard to the facts that (1) there was at least scope for a different view – after all Dr Abramov still thought that Dr Sachs had "*pixie dust*", and at the meeting on 14 March 2016 Dr Abramov and Mr Tenenbaum sought to mollify him and explore whether his technical expertise might still be made available; and (2) excluding Dr Sachs would materially disadvantage the Minorities in terms of the balance of power at board level. What one is left with is essentially the majority Investors imposing on CPGL their own vision of what should happen to CPGL commercially. In my view, it does not matter that that vision may have been a sound one. The point is that, good or bad, it was an expression of the will of the majority only. The 2013 constitution was expressly designed to avoid the will of the majority prevailing in matters concerned with the commercial future of CPGL.

417. I do not regard the exchanges which took place with Mr Faulkner over the weekend of the 12 and 13 March 2016 as adequate, in terms of efforts by the Investors to take the interests of the Minorities into account. It is true that Mr Faulkner had acted as a point of contact for them and as a conduit for information, but it seems to me that the change envisaged by the removal of Dr Sachs was so fundamental that transparency and fair dealing really required the Minorities to be informed and actively consulted before any final decision was made. Aside from other matters, they may have had views about any successor appointment, and about whether any successor to Dr Sachs should similarly be accorded special status and voting rights on CPGL's board. It is quite unrealistic to think that Mr Faulkner had authority to speak for them in relation to such matters, and there is nothing to suggest that the Investors thought about them. On the contrary, the evidence is consistent with them having a desire to sweep away the constitutional restrictions which inhibited them from imposing on CPGL their own view of what was required commercially.

418. Finally, I should say that although I have expressed the above views in terms of what was required by the express good faith provision in the SHA 2013, they are entirely consistent with the approach taken in the more usual quasi-partnership case where exclusion of the minority shareholder is sought to be justified on the basis that his or her continued presence is damaging to the business. In the absence of some form of wrongdoing which would make an otherwise unfair exclusion fair, a difference of view about what is right for the business – however marked and whatever the good sense of the majority view – does not justify exclusion by the majority. As Lord Wilberforce put it in Ebrahimi at p. at 381F-H (emphasis added):

> "*I must deal with one final point which was much relied on by the Court of Appeal. It was said that the removal was, according to the evidence of Mr Nazar, bona fide in the interests of the company; that Mr. Ebrahimi had not shown the contrary; that he ought to do so or to demonstrate that no reasonable man could think that his removal was in the company's interest. This formula 'bona fide in the interests of the company' is one that is relevant in certain contexts of company law and I do not doubt that in many cases decisions have to be left to majorities or directors to take which the courts must assume had this basis. It may, on the other hand, become little more than an alibi for a refusal to consider the*

> *merits of the case, and in a situation such as this it seems to have little meaning other than 'in the interests of the majority.' Mr. Nazar may well have persuaded himself, quite genuinely, that the company would be better off without Mr. Ebrahimi, but if Mr. Ebrahimi disputed this, or thought the same with reference to Mr. Nazar, what prevails is simply the majority view. To confine the application of the just and equitable clause to proved cases of mala fides would be to negative the generality of the words. It is because I do not accept this that I feel myself obliged to differ from the Court of Appeal*."

419. It seems to me that that logic applies equally here. The majority investors justify the exclusion of Dr Sachs on the basis that they *bona fide* held the view that it was right for the business for him to go. I am sure they did hold that view, but even so, they were not entitled to impose it on the other shareholders. Things might have been different had Dr Sachs been guilty of wrongdoing which justified his expulsion; but in the event no wrongdoing was alleged, and the idea that he was guilty of any is inconsistent with the terms on which he left the business – i.e., as a Good Leaver, and with the benefit of a waiver of any claims against him.

The Directors

420. At the time of Dr Sachs' departure in March 2016, the Vollin appointed nominees on the Board of CPGL were Mr Fletcher and Mr Burkey. As against them, the Petitioners allege breaches of the 2013 Articles and of their duties as directors of CPGL, arising out of their involvement in the events giving rise to Dr Sachs' departure. It is also alleged that at the time, although he was not formally a director (since he had resigned from his post as a director on 16 December 2015), Mr Bolger was a shadow director of CPGL, and was in breach of the Articles and of certain of his statutory duties as a director in the same way.

421. I will deal below with the question of Mr Bolger's shadow directorship, but turning first to the breaches alleged as against Mr Fletcher and Mr Burkey, the Articles relied on are Articles 17.1 and 17.2 of the 2013 Articles (set out above at [74]), and the duties relied on are those under Companies Act ss. 171, 172, 173 and 175 (see above at [371]-[380]).

422. At this point, one runs into one of the difficulties in the way in which the Petitioners pleaded their case. It is that in a number of instances (more will be described below), the same factual matters are relied on as giving rise to multiple breaches of duty, both under the Articles and the Companies Act. This approach results in a complicated patchwork of allegations, and if I may say so, represents something of a "*cookie-cutter*" approach to pleading the case (as the Respondents described it).

423. This is exemplified by the following extract from the Petitioners' Written Closing, dealing with the topic under consideration – i.e., the multiple breaches alleged against Mr Fletcher and Mr Burkey (and possibly Mr Bolger) arising from the circumstances surrounding Dr Sachs' departure. The extract is addressing the issue: "*In the circumstances did [the directors] breach their duties as directors of CPGL and the provisions of articles 17.1 and 17.2?*" The answer given is:

> *"Yes. In all respects, they acted in the interests of the Russian investors, without any independence and not in the interests of the shareholders as a whole. There is not a scrap of evidence that they ever took into account the independent and separate interests of the Minorities (or Sachs/Faulkner as shareholders) … The truth of the matter is plain and obvious: the investor-nominated directors ensured that the business of the company was managed in such a way that the Russian investors, advised by Kew Capital (and MHC), were the effective 'board' and that the business was run at their will and direction. They ensured that the business was run as if it were the Russian investors' alone."*

424. Such generalised assertions make the Petitioners' case difficult to analyse, but doing the best I can, it seems to me the position is as follows.

425. The decision to remove Dr Sachs was really one taken by the Investors as majority shareholders, not by the directors. It was the Investors' confirmation that they had lost faith in Dr Sachs and would exercise their voting power to remove him which was terminal. Under the 2013 constitution, the question of removing a director from office was one for the shareholders only, not the directors.

426. Nonetheless, Mr Fletcher and Mr Burkey played a part, and at the time they were directors of CPGL. They were present at the meeting of the Vollin investment committee on Saturday 12 March 2016 (see above at [143]) and supported the approach of removing Dr Sachs, which was then implemented at the meeting on 14 March. Mr Fletcher delivered the Investors' decision.

427. On the facts, I do not think it automatically follows that there were breaches of *all* the Articles and directors duties the Petitioners rely on, but I do think certain consequences inevitably do follow.

428. First, it must follow that in participating in the events which led to the removal of Dr Sachs, Mr Fletcher and Mr Burkey were in breach of the duty under section 171(a) of the Companies Act. That is because, in participating in those events, they were necessarily taking steps which undermined CPGL's constitution, for all the reasons I have identified above. A company's constitution is wider than its memorandum and articles for these purposes and includes a shareholders agreement such as the 2013 SHA (see above at [373]).

429. Second, I think it must also follow that Mr Fletcher and Mr Burkey were in breach of their duty under Companies Act section 172. I say that because discharge of the section 172 duty required them specifically to have regard to "*the need to act fairly as between the members of the company*" (section 172(1)(f)). In supporting the initiative to remove Dr Sachs, Mr Fletcher and Mr Burkey must obviously have disregarded the separate and specific interest of the Minorities in having him remain in post, for all the reasons already described above, including in particular their interest in maintaining the overall constitutional balance enshrined in the 2013 SHA.

430. I am unpersuaded, however, that the Petitioners have made out a proper case that Mr Fletcher and Mr Burkey were in breach in the other ways the Petitioners compendiously allege. Briefly:

i) As regards Articles 17.1 and 17.2 of the Articles, these are concerned with proceedings of directors at board meetings. Here there was no board meeting. It is true that as directors Mr Fletcher and Mr Burkey signed the written resolution dated 21 March 2016 which approved the settlement agreement treating Dr Sachs as a "*Good Leaver*", but by then the damage was done and the substance of it was the decision of the shareholders communicated a week beforehand that they would no longer support Dr Sachs and would vote to remove him. Recognising the reality of that, even Mr Hollington during trial described the written resolution as having "*monumental insignificance*." I cannot see that anything turns on any separate alleged breach of these provisions and cannot see how the substance of the complaint is made out.

ii) Similarly, I cannot see that anything is added by the allegation of a breach of section 171(b) of the Companies Act (duty to exercise powers for proper purposes). In the circumstances, it is not clear to me what power is said to have been abused by Mr Fletcher and Mr Burkey acting *qua* director and what improper purpose was in play.

iii) As regards the section 173 duty (duty to act independently), the allegation here must be that Mr Fletcher and Mr Burkey were so deeply in the pockets of Vollin that they unquestioningly took direction from their shareholder appointers. I do not think that allegation is made out on the facts. The evidence shows, for example, that Mr Fletcher is a senior and experienced businessman and my evaluation of him is that he is very independently-minded. Mr Fletcher was certainly happy to fight his own corner against Dr Frolov and Dr Abramov when needed, and indeed had done so in pressing for the removal of Dr Sachs.

iv) As regards section 175 (duty to avoid conflicts), I am not persuaded that this was engaged. As regards the decision to remove Dr Sachs I do not see that the conflict was between the personal interests of Mr Faulkner and Mr Burkey on the one hand, and the Company on the other. Rather, any conflict was between the interests of the Investors and the Minorities as regards the composition of the board and the constitutional framework of the Company. If that is right, then as I have already said, the section 172 duty was engaged, because that required Mr Fletcher and Mr Burkey to have proper regard to the sectional interests of the minority shareholders (which they did not do). But I am not persuaded that the duty under section 175 was engaged, because there was no sufficiently clear personal interest of Mr Fletcher or Mr Burkey which was in conflict with the interests of the Company.

X The Period after Dr Sachs' Departure: Summary

431. The Petitioners make a large number of complaints about events occurring after Dr Sachs' departure, and again the same matters are relied on as giving rise to multiple breaches (1) by the Investors of the provisions of the SHA, and (2) by the Vollin and

Minden nominee directors both of the 2013 Articles and of their duties under the Companies Act.

432. Once more, the Petitioners' somewhat formulaic approach to pleading their case gives rise to some difficulties of analysis and of exposition.

433. That being so, it seems to me that the best way of proceeding is to start with a summary of the Petitioners' complaints. These run together in a continuum, and it is helpful to see the overall picture. The Petitioners' essential points are as follows.

434. In the period after Dr Sachs's departure, the agreed-upon management structure of CPGL was completely overridden by a substitute structure, which involved management and in particular strategic decisions being taken not by the board but by Vollin and Minden. The principal decision-making forum became the update meetings (on 12 April, 24 May and 15 August 2016) at which Kew reported to the Investors. The board as such was therefore effectively usurped by the majority shareholders. Their nominee directors from time-to-time were effectively in the pockets of the majority shareholders and showed no interest in the position of, or interests of, the Minorities. Mr Faulkner and Dr Lind were completely excluded from any relevant process of decision-making, and were provided either with no or with inadequate information given their roles as directors.

435. The management of the business in this way led to a number of decisions being made and/or events occurring which involved breaches of duty either by the Investors and/or by their nominee directors. These included the following main points of which specific complaint is made:

i) The withholding of information from Mr Faulkner and the Minorities, in particular as regards the Group's funding requirements, the Investors' intentions in relation to funding, and the decisions to dispose of Newton Aycliffe and to serve the Last Time Buy Notice on Selex.

ii) Thereafter, the withholding of information from Mr Faulkner in relation to the ongoing negotiations for the disposal of Newton Aycliffe, including not only the efforts by Mr Jackson and Mr Bolger as regards a possible MBO, but also, more significantly, the merger approach by Kaiam. The breach there was more egregious given that the Kaiam approach was initiated by Target, in which Dr Frolov was an investor and Dr Frolov's son a partner, and given that Target was a prospective investor in Kaiam.

iii) The failure properly to consult as regards the US$4.5m share subscription made by Vollin in August 2016 and a later loan by Minden in November 2016 which was then capitalised.

iv) The decision made to reposition the business of CPGL in favour of AR/VR products, as announced by Mr Bolger on 18 October 2016.

v) The removal of Mr Faulkner by vote of the majority Investors on 25 October 2016, which came about because he had caused difficulties for the Investors by trying to stand up for the rights of the Minorities.

vi) The ongoing lack of proper governance as regards the process for the sale of Newton Aycliffe which eventually resulted in an asset sale to Kaiam becoming the favoured option, and the possibility of a proper marketing exercise by ATREG being overlooked, which in turn resulted in Newton Aycliffe being sold at a material undervalue, and moreover for consideration in the form of shares in Kaiam when investing in companies such as Kaiam was never intended to be part of CPGL's business.

vii) An ongoing failure to abide by the terms of the 2013 constitution as regards the appointment of new directors. The constitution required the approval of Dr Sachs and Mr Faulkner for the appointment of new directors, and that was not (and could not) be provided in periods post their departure, and neither was the approval of the Minorities sought for any of the director appointments which were made.

viii) An ongoing failure to keep the Minorities informed as to the Company's material financial and business affairs, including the failure to convene any shareholders' meetings since 25 October 2016.

436. As will be obvious, since these complaints relate to what the Petitioners claim was an ongoing pattern of behaviour by the Investors, there is considerable overlap between them. I therefore propose to start with some general observations and findings about the management of CPGL in the periods after Dr Sachs' departure. In the course of those observations, I will deal with complaints (i), (ii) and (iii) above. I will also deal with the Petitioners' allegation that Mr Bolger was a shadow director of CPGL from November 2015 to December 2016.

437. I will then deal with the remaining, specific topics in the following order, *viz*.

i) Whether the repositioning announced by Mr Bolger on 18 October 2016 was unfairly prejudicial, because it involved a departure from "*the Business*" (as defined) and therefore a breach of SHA clause 5.1.

ii) Whether the Mr Faulkner's departure from the business with effect from 25 October 2016 was unfairly prejudicial.

iii) Whether the Petitioners were unfairly prejudiced thereafter as regards the appointment of new directors to the board of CPGL.

iv) Whether the Petitioners were unfairly prejudiced thereafter by an ongoing failure to provide information and/or consult.

v) Whether the Petitioners were unfairly prejudiced by the sale of Newton Aycliffe.

XI Management of CPGL After Dr Sachs' Departure

438. Again, it is necessary to look separately at the complaints made against the Investors and against the nominee directors.

The Investors

439. As regards the early period after Dr Sachs' departure, stretching through the Spring and Summer of 2016, the emphasis in the Petitioners' case is on the withholding of information from Mr Faulkner and the Minorities about a number of important matters - i.e., the decision to close Newton Aycliffe, the Selex Last Time Buy, the Group's funding needs, and of course the merger proposal received from Kaiam.

440. It seems to me that this emphasis on a failure to provide information and consult slightly obscures the true nature of the Petitioners' complaint. That is not so much about a failure to provide information as about a lack of any real involvement at all in the management of CPGL.

441. As it seems to me, much if not all of what happens later can be traced back to the decisions made by Vollin at the meeting with Kew on Saturday, 12 March 2016. It is true that the details of this meeting remain obscure, and that a proper understanding of it is hampered by the fact that the Court has received no evidence from some of the key participants, namely Dr Frolov and Dr Abramov. Nonetheless, the broad thrust is apparent from the draft minutes. Not only was the decision made to remove Dr Sachs, but also to appoint an interim CEO – shortly afterwards confirmed as Mr Bolger – and Kew were commissioned to "*formulate short term goals for interim CEO including identifying who and what assets/facilities must be retained*." Moreover, a decision was made to start a "*[p]ermanent CEO search … immediately.*"

442. What one sees here, self-evidently in my view, is one of the majority shareholders not only making decisions about its position as shareholder (i.e., whether to inject further capital), but also making decisions about the management and strategic direction of the business in which it was an investor.

443. This was followed through by Mr Bolger, once appointed, establishing his executive team and then also developing the Reconstruction Plan, presented to the Investors at the meeting on 13 April 2016. That Plan, which included the proposal to close Newton Aycliffe and call the Selex Last Time Buy, was obviously an expression in practical terms of the strategy developed in outline at the meeting between Vollin and Kew on 12 March, and which Minden later went along with.

444. As to the position of Mr Faulkner at this stage, I think it is right to say he is given *some* information about what is going on and about what is being planned, but that is as far as his involvement went.

445. The evidence shows, for example, that at least during this initial period, he had an open channel of communication with Mr Bolger, and was provided with written materials from time-to-time including the slide pack for the Investor update meeting on 13 April containing the Reconstruction Plan. The intended sale of Newton Aycliffe and the possibility of calling the Selex Last Time Buy were flagged in the Reconstruction Plan, and it seems to me that on the facts, Mr Faulkner must be taken to have known of these matters, and would have had to be very naïve not to think them likely to happen.

446. The Reconstruction Plan also set out CPGL's cash requirements for the rest of the year, and how it was hoped the funds would be raised: "*Financing Plan: $40m for 2016 + ~$1.5m/month thereafter; get partners in with Joint Development Agreements to fund $1.5-$2m per month*." Further, Mr Faulkner was sent copies of the draft

accounts for the 2015-2016 year by Mr Jackson. He was therefore aware of what the funding requirements were.

447. Likewise, it seems to me that Mr Faulkner must have known at least in principle about Mr Bolger's and Mr Jackson's plan for a possible MBO, because that was mentioned in the slide deck provided to Mr Faulkner prior to the meeting at Selex on 4 July 2016 and then discussed at that meeting.

448. It follows that I do not accept the Petitioners' generalised complaints about a lack of information, but much more significant is the fact that Mr Faulkner was given no active role in the management of the business, although that is what the 2013 constitution required. I think that is the Petitioners' real point. The Company was not being managed in the way they had been promised. That was because *de facto* control of management of the business was taken over by Vollin and Minden via the medium of the Kew Investor presentations. The sporadic information flow to Mr Faulkner was really a symptom of that wider issue, which involved Mr Faulkner being kept at arm's-length and marginalised. Over time of course, as the relationship between Mr Faulkner and Mr Bolger became more strained and indeed dysfunctional, positive efforts were made to keep information from him, specifically in connection with the approach from Kaiam. But in a sense, even these later events are only a development of the same phenomenon. They certainly had the same root cause, which was fact that the constitutional settlement contained in the 2013 Articles and 2013 SHA had collapsed.

449. That reality is exemplified by the "*CP Marching Orders/action plan"* email sent by Mr Fletcher to Mr Cochrane on 18 April, following the 13 April 2016 meeting. I have referred to that email above at [166]. It was put to Mr Fletcher in cross-examination that this email showed the process by which CPGL's board had been completely bypassed in place of decisions being at meetings attended by the majority Investors only (and their appointees and Mr Bolger), without Mr Faulkner. Mr Fletcher agreed:

> *"Q. Mr. Fletcher, can you not see that you at Kew advising your Russian investors are acting as the board of CP, Compound Photonics; can you not see that?*
>
> *A. Yes, I can see that that is the logical interpretation of that, yes.*
>
> *Q. You are doing so without involving Mr. Faulkner?*
>
> *A. I think that is right."*

450. Mr De Cort, Minden's nominee, gave evidence to similar effect. When cross-examined by Mr Hollington, Mr De Cort said it was true that strategic matters were discussed and decisions made at the Investor update meetings, but that did not mean the directors did not decide "*in which direction to go*".

451. As Mr De Cort also accepted, however, there are no minutes or resolutions of directors arising from the Investor update meetings. It is therefore impossible to be clear about the precise dynamic in those meetings between the shareholders on the one hand and the directors on the other. What is crystal clear, however, is that the

only directors present at those meetings, post Dr Sachs' departure, were the directors appointed by Vollin and Minden. Thus, even if it is correct that at the Investor update meetings, the Vollin and Minden nominee directors decided "*in which direction to go*", the agreed on constitutional balance required others to be involved in those same discussions (Mr Faulkner and Dr Lind, and possibly a replacement for Dr Sachs), but that did not happen. Mr Faulkner was not invited and did not attend, and neither did Dr Lind.

452. One can see the dynamics illustrated clearly in Mr Fletcher's response to Mr Faulkner's email of 4 May 2016, asking for a board meeting (see above at [179]), which included Mr Fletcher saying: "*I wonder if a board meeting isn't excessively formal … It's obvious, following the departure of JS, and the discovery of the serious condition that the company now finds itself in, that changes to both governance and the board structure and composition are required and inevitable … . Previous corporate governance has manifestly failed and I don't currently see much, if any, scope for negotiation on the changes required."*

453. Thus Mr Faulkner, although Chairman of CPGL and sole director of CPUK, was kept at arm's-length from the key strategic decisions made in relation to the businesses of both.

454. The Investors say that Mr Faulkner was a director and indeed Chairman of CPGL, and so had the ability to convene board meetings himself. That is true, but in the circumstances it seems to me that the reasons are plain. Mr Fletcher's view of Mr Faulkner has always been poor (see his early email above at [86]: "*I would strongly suggest he doesn't attend other than possibly in the role/guise of a breakfast appetiser. Maybe he tastes good with eggs! I don't think we actually need a board meeting in any official sense."*). There is nothing to suggest that Mr Fletcher's view had improved over time, and indeed it seems logical to think that he viewed with increasing alarm the idea of Mr Faulkner playing an active role in the management of the business, still less one which involved him having a right of veto over resolutions at board meetings. From his point of view, the existing constitutional structure was a dead letter.

455. Mr Faulkner realised that, and indeed by 23 May he knew that the Investors wanted him to resign. In a sense he was powerless to help the unfolding chain of events because the business was dependent on continuing financial support from Vollin and Minden. Thus, the die was already cast, and no doubt to him, the idea that he should seek to invoke a governance structure which his major investors considered to have "*manifestly failed*" and had already in practice overridden seemed quite unrealistic.

456. Pausing there, it seems to me that the matters of complaint identified at [435] (i), (ii) and (iii) above are all best characterised as examples, of greater or lesser severity, of this more general problem of CPGL's constitutional machinery having broken down.

457. Thus, although Mr Faulkner was given information about the closure of Newton Aycliffe, about the possible MBO, and about the Group's funding needs, nonetheless the manner in which those matters were dealt with reveals breaches by the Investors of the material terms of the SHA, and in particular clause 4.2 (good faith), clause 5.2 (good business practice), and clause 5.3(a) (proper and efficient manner). That is because in dealing with them, the constitutional structure set out in the SHA and the

2013 Articles was effectively ignored by the Investors. In my view, because they were so fundamental, those breaches were both unfair and prejudicial.

458. The same goes for the Company's fund-raising efforts in August 2016. Mr Faulkner was aware of what was needed, but had no active involvement in the relevant decision-making process. His resultant concerns informed his decision to circularise the Minorities on 17 August 2016, seeking their consent to the further US$4.5m subscription by Vollin. Given that their consent was sought and provided, it is impossible for them to say they did not know what was going on or were not consulted, but what they can say is that by this stage the proper constitutional machinery for approving new subscriptions had entirely broken down. Even assuming Fieldfisher's view of clause 20.1 of the SHA was the correct one, still, what clause 20.1 contemplated was a board constituted and operating in accordance with the 2013 constitution. Self-evidently, by August 2016 that was no longer happening. Thus, whatever they may have known, the crux of the matter is that the Minorities were deprived of the benefits of the constitutional settlement they had agreed with the Investors. The same logic can be applied to the later loan by Minden in November 2016, although that was not the subject of any detailed submissions by the parties at trial.

459. The deception of Mr Faulkner as regards the approach by Kaiam is a more serious matter, of course, but ultimately in my view symptomatic of the same basic problem. Thus, there was some debate at trial as to what Mr Faulkner should have been told about the Kaiam merger approach. It seems to me the answer to that question is clear if one imagines what would have happened in the normal course had there been a properly functioning board. In such circumstances, it is obvious that Mr Faulkner would and should have been informed about the approach by Kaiam, even at the stage when the favoured option was a merger. That is because a critical part of Kaiam's motivation was acquisition of the Newton Aycliffe Fab, and the Fab was a major asset of the Group and indeed of CPUK, of which Mr Faulkner was the sole director. I do not see that there was ever such a hard and fast division between the merger idea and the asset sale structure as to justify Mr Faulkner not being told what was going on. Mr Fletcher recognised as much in his email to Mr Bolger and Ms McDermid of 24 June 2016, when he said: "*We are being pressed to have a meeting. They are apparently interested in our fab."* In his later email of 15 July 2016, Mr Frolov Junior also recognised that an arrangement falling short of a merger was a possibility: *"Synergies coming from Kiam [sic] utilizing CP production facilities are clear… may be we shall just sell fabs to Kiam [sic]."* Mr Faulkner was still a director of CPGL and of CPUK at that stage. The failure to inform Mr Faulkner was symptomatic of the generally dysfunctional governance regime which followed in the wake of Dr Sachs' departure, and therefore a product of the ongoing breaches by the Investors which I have already referred to.

460. As to the specific instances of Mr Faulkner being misled, first in relation to the meeting at Newton Aycliffe on 11 August 2016 and second in relation to the slide deck for the Investors dated 15 August 2016, I do not see that those acts of deception can fairly or properly be justified by Mr Faulkner's own behaviour, when that behaviour had its root cause in what I have concluded was the illegitimate decision to exclude Dr Sachs and the later practice of marginalising Mr Faulkner and keeping him at arm's-length.

461. On the evidence, I accept that neither the Investors nor their appointed directors at the time were actually aware of the steps taken by Mr Jackson and Mr Bolger to deceive Mr Faulkner, but at the same time, the Investors had put in place governance arrangements and a general *modus operandi* for dealing with Mr Faulkner which no doubt encouraged and emboldened Mr Jackson and Mr Bolger to behave as they did. The result I think is that their actions are not freestanding instances of unfair prejudice, but rather, particular manifestations of the more general collapse of the constitutional framework which *is* an instance of unfair prejudice.

The Directors: Mr Bolger as Shadow Director?

462. Before considering the allegations of unfair prejudice arising from the conduct of CPGL's directors, a preliminary point arises.

463. The Petitioners advance a case that Mr Bolger was a shadow director of CPGL from the date of his resignation on 16 December 2015 until the date of his re-appointment on 7 December 2016. During that period Mr Bolger was initially CFO and then interim CEO of CPGL, prior to the appointment of Mr Woo in November 2016. The period covers all the key events in the case, including in particular the removal of Dr Sachs in March 2016, many of the steps taken to sell Newton Aycliffe which eventually led to the disposal to Kaiam, and the steps which resulted in the removal of Mr Faulkner in October 2016.

464. I am not persuaded that Mr Bolger was a shadow director of CPGL.

465. The law is well settled and was reviewed by the Supreme Court in HMRC v. Holland [2011] 1 WLR 2793. If a company has a functioning board it will require unusual facts to justify the conclusion that a person not on the board is nonetheless a shadow director, and the difficulties become greater if the acts of the relevant person are explicable by reference to his conduct in some other capacity: see Re Richborough Furniture Ltd [1996] B.C.C. 155, per Lloyd J. at p. 170B-C.

466. Here, Mr Bolger's actions as CFO and interim CEO are consistent with him having a degree of executive authority in those roles but not with him exercising strategic and overall management responsibility for the business in the manner of a director. As I see it, the proposition that he did is in fact inconsistent with the Petitioners' primary case – which I have already accepted – that the responsibilities of the CPGL board (after March 2016 at least) were being exercised by the Investor shareholders and their nominee directors via the medium of the Kew Investor update meetings.

467. In my judgment it is clear that Mr Bolger's role was really focused on the implementation of the decisions taken by the participants in that forum. They were the ones who drove the overall strategy and set the parameters within which Mr Bolger was to operate. It is true that he was given a relatively high degree of autonomy, but subject to the control of the group involved in the Kew Investor meetings.

468. Thus, he was given wide latitude to develop the proposed Reconstruction Plan, which he presented at the Investor update meeting on 13 April 2016; but the Plan was subject to discussion and approval by others, who in truth were the ones exercising overall control. Likewise, he together with Mr Jackson managed the process of

terminating the contract with Selex and (in the event) selling the Newton Aycliffe Fab to Kaiam, but that was only implementing a strategy to cut costs and reposition the business which was being driven by the Investors and indeed had its origins in the Vollin meeting held on 12 March 2016. I do not think that this basic fact pattern, which underpins the Petitioners' argument about the usurpation of the CPGL Board by the Investors and their nominees, leaves room for the conclusion that Mr Bolger was functioning as a shadow director.

The Directors

469. In this section, I will set out my general findings as to the period between March and October 2016, i.e. the period prior to Mr Faulkner being removed as a director. That involves part of the story of what eventually became the sale of CPUK (and Newton Aycliffe) to Kaiam, but not the whole of it, and so I will have to return to the Kaiam sale below.

470. Leaving that aside for now, the same general complaints are made by the Petitioners, i.e. breaches by the nominees of Arts 17.1 and 17.2 of the 2013 Articles, and breaches of various duties owed by them as directors under the Companies Act 2006, *viz*. ss 171, 172, 173 and 175. The Vollin and Minden nominees during this period were Mr Fletcher, Mr Burkey and Mr De Cort, and also Ms McDermid, who replaced Mr Burkey with effect from 6 September 2016.

471. Here again, looking at the way Mr Hollington put his argument, his point was that the breaches relied on all flowed as a matter of inevitability from the fact that the only active directors in the CPGL business from March 2016 onwards were the Vollin and Minden nominees, operating in the manner described above – i.e., largely via the medium of the Investor update meetings – and consequently without any regard to the interests of the Minorities. The logic of the Petitioners' case was that in managing the business in that way, the nominee directors were obviously in breach of duty as regards all the steps they took, and in particular as regards matters such as the decision to close Newton Aycliffe, service of the Selex Last Time Buy Notice, the raising of new capital via the Vollin subscription, and the conduct of at least the early stages of the negotiations with Kaiam.

472. Again, however, I think that such a generalised approach is rather too crude. I will take the various provisions relied on in turn.

Article 17.1 – disclosure of interests

473. I have referred to these above. Art 17.1 sets out provisions requiring the disclosure of certain directors' interests, and provides that such interests will not debar the director from voting as long as they are disclosed and "*the Board has resolved that the director may vote*." Art 17.2 deals with conflicts between a director's fiduciary duties to the Company and his role as an appointed director of a particular shareholder.

474. I will come on to Art 17.2 below, but looking for now at Art 17.1, the constitutional settlement arrived at in 2013 accepted expressly that a number of directors appointed to the board (3 in total) would be nominees of Vollin and Minden. Certainly no secret was made of the connections which existed between Kew and Vollin, and MHC and Minden. The interests of the relevant directors in that sense were disclosed, and

indeed were inherent in the roles they performed. That being so, and subject to one particular point, I see no real merit in a complaint which rests on a failure to disclose a relevant interest (Article 17.1).

475. The one particular point relates to Kaiam. Here I think Mr Hollington had a fair point that the language of Art 17.1(e) is extremely broad. This enables a director to vote on any resolution which "*concerns or relates to a matter in which he has directly or indirectly any kind of interest whatsoever*", but only provided he has "*disclosed to the other directors the nature and extent of the interest … and the Board has resolved that that director may vote.*" This goes much wider than simply requiring disclosure of a potential conflict, and in this instance I think would technically have required the disclosure by the Vollin nominees of the fact that Kaiam was recommended by Target, of which Dr Frolov was a funder and in which Mr Frolov Junior was a partner.

476. Again, however, the more fundamental point is not one about a failure to disclose information. After all, Art 17 is about "*Proceedings of the directors*" and the proper conduct of board meetings. The more fundamental point is that there were no properly constituted board meetings happening at all. In a sense, it is rather artificial for the Petitioners to complain about what procedures should have been followed if they had been.

Companies Act section 171(a) - duty to act in accordance with the constitution

477. Again, it must follow from the conclusions I have expressed already that the Vollin and Minden nominees *were* in breach of the section 171(a) duty in the periods after Dr Sachs' departure, because the balance of powers enshrined in the constitution had been entirely overridden: the machinery of the 2013 SHA and Articles had entirely broken down. The old constitution was, in a very real sense, a dead letter, and for all practical purposes was ignored in the way in which CPGL was run from March 2016 onwards.

Companies Act section 171(b) – duty to exercise powers for proper purposes

478. It seems to me the position here is different. I do not think it inevitably follows from the fact that the overall constitutional machinery had broken down that the nominee directors were *not* exercising their powers for the purposes for which they were conferred. One would need to understand more clearly what powers are in question and, in relation to their exercise, precisely what purpose is said to have been improper. No specifics are given. The directors did exercise their power to allot shares during the relevant period, but I do not think it is said specifically that the power was exercised for an improper purpose: after all, the business needed ongoing funding, and the evidence seems clear that the allotment of new shares to Vollin in August 2016 was carried out for the purpose of providing working capital, which self-evidently was a proper purpose. The same logic must apply to the later approval of the loan made by Minden in November 2016. Consequently, I see nothing in the general complaint made under this head.

Companies Act section 172 – duty to promote the success of the company

479. Section 172 provides that a director of a company must act "*in the way he considers, in good faith, would be most likely to promote the success of the company, for the benefit of its members as a whole …* ". Various matters are then set out to which directors should have regards, including in particular at (f), "*the need to act fairly as between members of the company*."

480. I have difficulty seeing how this head of complaint is made out on the facts. That is essentially for the reason developed by Mr Gledhill during his submissions, namely that the nominees honestly thought (and had good reason to think) that what they were doing was in the interests of the company as a whole.

481. In expressing that view, I leave aside the circumstances surrounding the removal of Dr Sachs, which I have already dealt with above. There, I can see that the interests of the Investors and of the Petitioners were different, and that the nominees did not have proper regard to the sectional interests of the Minorities. But the present line of analysis is not about the decision to remove Dr Sachs, it is about the general management and strategy of the business of CPGL and its subsidiaries from March 2016 onwards.

482. As to such matters, given the condition the business was in as at March 2016 – a long way behind in its plans for development of marketable products, but with significant cash requirements each month and therefore a high degree of dependence on the Investors in keeping it afloat – I find it difficult to be critical of the decisions made to cut costs and to try and reposition CPGL in its efforts to make some money (or at least, break-even), and in the meantime keep the Investors on side.

483. Newton Aycliffe was loss-making even with the Selex contract, and although a part of Dr Sachs' vision, there were sound commercial reasons at the time for thinking that vision could not be realised, given the state of development of the P1 prototype and the disagreement over production costs (i.e., the BoM). Service of the Last Time Buy Notice was defensible commercially in that sense, even though it set the clock ticking on a possible closure, and of course in the meantime brought the Fab to a breakeven position. The same goes for the early phases of the discussions with Kaiam, to the

extent the nominee directors were involved in them. Leaving aside the question of the constitutional framework within which the discussions took place, there was commercial sense at least in exploring what the Kaiam approach might involve and whether it might offer a solution.

484. I think Mr Gledhill was right to submit that in the broad sense I have described, and in the circumstances as they stood through the Spring and Summer of 2016, the interests of the Investors and of the Minorities *were* effectively the same: the interest of both was in salvaging something from the position CPGL found itself in. It seems to me the nominee directors acted in good faith in taking the steps they thought necessary to bring that about. Certainly, I have seen nothing to persuade me that they did not honestly believe they were acting in the best interests of the Company. The evidence of Mr Tenenbaum was particularly telling in this regard (see above at [132]-[133]), in articulating the serious commercial concerns he had in March 2016, and which no doubt informed his thinking thereafter. True, he was not a director, but there can be little doubt that the concerns he expressed in his evidence were shared by the others who were (Mr Fletcher, Mr Burkey and Mr De Cort), because they were obvious and significant concerns.

485. Mr Hollington criticised the Investors' case on this point, and said that their "*well-choreographed ex post facto rationalisation that the interests of the Minorities were to be equated with that of the majority investors is plainly wrong.*" I cannot agree. I can well see that the Investors and the Minorities had divergent interests when it came to the make-up of the board and constitutional structure of the business, but not when it came to the commercial direction of the business, and to making the tough decisions which had to be made in the Spring of 2016 in the wake of Dr Sachs' departure. Very likely, given the state the business was in, and its dependence on the majority Investors for its ongoing funding, the range of options available to the nominee directors was very narrow, and they had no real choice but to do what they did. It thus seems to me that at that point and in that sense, the interests of the Investors and the Minorities were aligned; or at any rate, I am not persuaded that they were sufficiently different that I can conclude that any particular sectional interests of the Minorities were not sufficiently taken account of, such that in any material sense the nominee directors can be criticised for failing to act in the interests of the members as a whole.

Companies Act section 173 – duty to act independently

486. I have mentioned this above. I do not think the Petitioners' generalised assertion of lack of independence is made out on the facts. The principal players, Mr Fletcher, Mr Burkey and Mr De Cort in particular, are senior and experienced business-people. Mr Fletcher seems to me to be very independently-minded. I see no real evidence that the nominee directors at this or any other point had absolved themselves of their independent decision-making responsibility in favour of doing only what their nominating shareholders told them. They may have helped shape the view of those nominating shareholders, but that is a different thing.

Companies Act section 175/Art 17.2 - duty to avoid conflicts of interest

487. It is convenient to address this head of complaint alongside that based on Art 17.2 of the 2013 Articles, since that raises essentially the same question, namely whether the Vollin and Minden nominee directors were in a position of conflict.

488. In my judgment, this complaint also fails. It proceeds on the basis that, because the nominees were appointed by Vollin and Minden, and had interests which were connected with Vollin and Minden since their remuneration arrangements as advisers were linked to the success of the Vollin and Minden investment portfolios, they were necessarily in a position of conflict vis-à-vis the Company and the Minorities.

489. With respect, I do not think that follows, or at least not as regards the decisions which had to be made as to the commercial future of CPGL. In fact, it seems to me the opposite is true. The personal interest of the nominee directors was in seeing CPGL stabilised and, to the extent possible, made a success. The Company had the same interest, as did the Minorities.

490. That same analysis applies as regards the ongoing negotiations with Kaiam. As I understand the Petitioners' case on this point, it is essentially that the Vollin nominees (Mr Fletcher and Mr Burkey) had a natural preference to favour a deal with Kaiam over other available options, because Kaiam was linked to Dr Frolov/Mr Frolov Junior, and the interests of the Vollin nominees was in doing what Dr Frolov wanted.

491. I do not agree with that basic premise. The personal interest of Mr Fletcher and Mr Burkey, arising from their personal remuneration arrangements, was in making the Vollin investment portfolio a success, and that did not necessarily involve doing what Dr Frolov wanted. As a matter of principle, therefore, there was no conflict. In any event, as I will mention below ([586]), I am unpersuaded that Dr Frolov in fact favoured the Kaiam deal above other options. The sale to Kaiam eventually completed in May 2017, but by that stage it was the only option left.

XII Change of Business

492. It is convenient at this point to deal with the Petitioners' discrete point that the changes in direction announced by Mr Bolger on 18 October 2016 involved a breach by the Shareholders of clause 5.1 of the 2013 SHA.

493. Clause 5.1 of the 2013 SHA provides that:

> *"The Shareholders shall procure that the only business of the Company and each CPG group Company shall, unless otherwise agreed in writing by the Shareholders, be the Business."*

494. "*Business*" is then defined to mean:

> *" … the production and supply of projection products and technologies and all activities reasonably ancillary and necessary in relation to the production and supply of projection products and technologies."*

495. The Petitioners say that the *"New Business Vision*" reflected in Mr Bolger's shareholder update, which according to Dr Sachs focused on "*embedded projection markets of pico, AR and VR*", represented such a shift in the nature of CPGL's operations as to amount to a breach of this provision.

496. The gist of the Petitioners' argument seems to be that the Minorities invested in a business which was to "*produce and supply projectors*" (Written Opening at para. [164]), but that business was abandoned in October 2016.

497. I cannot agree with that proposition. The definition of "*Business*" is obviously wider. It includes "*projection products and technologies*." The "*New Direction*" announced by Mr Bolger had a *"[f]ocus on embedded projection … AR/VR/Mobile/HUD markets.*" All of these seem to me to qualify as "*projection products and technologies*", and plainly so.

498. Dr Sachs himself had had a focus on a form of embedded projector technology – the pico projector, which was to have been embedded in mobile phones. According to Mr Passon, whose evidence was not challenged, AR – or Augmented Reality – products allow computer-generated information to be blended with the real world in front of the user, by superimposing digital images and sounds onto the user's environment via the user's smartphone or sometimes via a headset or glasses. I find it difficult to see why that does not qualify as a projection technology.

499. Likewise according to Mr Passon, HUDs (Head Up Displays) are used in aeroplanes and cars. They are transparent displays which provide pilots and drivers with information about speed, for example, without the pilot or the driver needing to take their eyes off the airspace or road ahead. The required information is projected, but into the user's eye rather than onto a wall or screen. Again, I have difficulty seeing why this does not qualify as a form of projector technology.

500. If the point were not otherwise obvious, the Investors have drawn attention to a number of instances of similar technology being described as part of CPGL's vision during the period of Dr Sachs' tenure. Two examples will suffice:

    i) A CPGL business plan from November 2013 referred to Compound Photonics planning to "*bring a portfolio of projectors and related components to market [including] … Head Up Displays for the automotive market*."

    ii) A copy of CPGL's website as it stood on 16 February 2016, i.e., before Dr Sachs departure, described the Company's products as falling within six categories, including: "*embedded projection device*", "*Heads Up Display*", and "*Head Mounted Display*" (i.e., near-to-eye AR/VR).

501. For those reasons I am entirely unpersuaded by the Petitioner's argument based on an alleged breach of SHA clause 5.1 and I reject it.

XIII Removal of Mr Faulkner

502. I then come to the removal of Mr Faulkner by shareholder vote at the EGM held on 25 October 2016. The Minorities rely on the act of his removal by the Investors as an independent ground of unfair prejudice. Again, it is convenient to address separately

the allegations that Mr Faulkner's removal involved both (1) breaches of the SHA by the Investors, and (2) breaches of the Articles and of their Companies Act duties by the directors (who included, as from 6 September 2016, Ms McDermid, who replaced Mr Burkey).

The Investors

503. Two points arise.

504. The first is essentially the same point already made above regarding the position of Dr Sachs within the agreed constitutional structure (see above at [382], *et seq*.). The same logic applies vis-à-vis Mr Faulkner. His position, too, was critical in terms of the agreed upon balance of power as between the shareholders and the board, and hence in terms of the balance of power between the Investors and the Minorities. He too occupied a special position on the board. The actions taken by the Investors to remove him from his position as a director were on the face of it unfairly prejudicial for just the same reasons as in the case of Dr Sachs. They were unfair because they involved the Investors exercising their voting power to exclude Mr Faulkner in a manner which obviously had the effect of overriding the agreed upon constitutional balance, and they were prejudicial because they deprived the Minorities not only of Mr Faulkner's presence on the board as someone who could look out for their interests, but also of the protections which his presence on the board were designed to achieve.

505. The second point is to consider whether the exclusion of Mr Faulkner, even if otherwise unfair, is rendered fair as a result of his own conduct, which the Investors maintain justified his expulsion. They rely on Mr Faulkner's behaviour generally in the period from late June 2016 onwards, which they criticise as having been erratic and potentially damaging.

506. It is true that aspects of Mr Faulkner's behaviour were strange and unsatisfactory. These included (i) his peremptory demand for a number of categories of information made in his email of 2 August 2016, in which he also proposed to meet at Newton Aycliffe on 11 August, (ii) his decision to circularise the Minorities in order to obtain their individual approvals for the proposed further US$4.5m subscription by Vollin, and (iii) his insistence, when he eventually visited Newton Aycliffe with BDO on 7 September 2016, on demanding access to the visitors' book, about which he gave some odd and less than compelling oral evidence at trial.

507. All of these events, moreover, are consistent with the idea that behind the scenes, and in respects which are still obscure, Mr Faulkner was in communication with Dr Sachs about their own plans and strategies, which seem to have involved trying to resurrect at least some part of Dr Sachs' vision by taking steps to obtain control of Newton Aycliffe for themselves and the Minorities.

508. Nonetheless, looking at matters in the round, I do not feel able to conclude that Mr Faulkner's behaviour justified his expulsion. For one thing, there is no pleaded allegation of breach of duty by Mr Faulkner. For another, Mr Faulkner, like Dr Sachs, was classified on his departure as a "*Good Leaver*", which is inconsistent with the idea that he was in breach of duty at the time and, as Mr Hollington pointed out, should preclude the making of any allegation now that in fact he was.

509. In any event, it seems to me that the examples of what I have called Mr Faulkner's strange behaviour must be put in context. It is relevant in assessing them to identify what one might describe as their root cause. Here, it seems to me the position is plain. The oddities in Mr Faulkner's behaviour can all be traced back to the decision made by the Investors to exclude Dr Sachs, and thereafter to adopt a structure for managing CPGL which left no room for involvement by Mr Faulkner, and ignored the framework of the 2013 constitution. That left Mr Faulkner marginalised and concerned not only about his own position but also that of the Minorities he had introduced to the business. His behaviour in that sense was a reaction to the situation he found himself in, and was a response to the breakdown in the governance structure which came about as a result of the actions taken by Vollin and Minden, and which on the Vollin and Minden side gave rise to examples of dysfunctional behaviour which were equally if not more serious and concerning (by which I mean in particular the decision made by Mr Jackson and Mr Bolger to lie to Mr Faulkner to avoid him visiting Newton Aycliffe on 11 August 2016, and the decision made by Mr Bolger to mislead him about the presentation to the Investors given on 15 August 2016).

510. The high watermark of the Investors' criticism is Mr Faulkner's decision to circularise the Minorities on 17 August 2016, relying on his alternative interpretation of clause 20.1 of the 2013 SHA. It bears emphasis, however, that that interpretation was supported by legal advice, and it seems to me that even if I disagree with it (I think I probably do), I am bound to conclude that it was put forward by Mr Faulkner in good faith. One might perhaps say that Mr Faulkner's actions in this regard were ill-advised, but given the uncertain and febrile atmosphere in which he found himself in August 2016, it seems to me that equally they were understandable. I certainly think that, looked at in context, it would be disproportionate and wrong to say that they were such as to deprive him or the Minorities of the ability to say that his exclusion was unfairly prejudicial.

The Directors

511. The same analysis applies as above, in relation to the removal of Dr Sachs. The removal of Mr Faulkner was brought about by the Investors, not the directors. To the extent they were involved in encouraging or facilitating that removal, that can only have involved breaches of duty under Companies Act s171(a) and s172, but not breach of any other duty: see above at [426]-[430].

XIV Appointments of Further Directors

512. It is useful at this point to look at a further group of complaints raised by the Petitioners. These concern the composition of the CPGL board in the periods after October 2016. At various points after then, new directors were appointed, namely Mr Woo (14 November 2016), Mr Bolger (7 December 2016), Mr Mercer and Mr Tatyanin (31 October 2016), and Valler and Mr Jackson (31 October 2017).

513. It is said by the Petitioners that these appointments infringed Article 14.2, i.e. the provision stipulating that the directors might appoint other persons as directors, but only with the approval of Dr Sachs and Mr Faulkner as the CEO and Founder Director. Relatedly, there is also Article 17.7, which provides that the quorum at any directors' meeting must include "*the Founder Director [Mr Faulkner], the CEO [Dr Sachs] and, if one has been appointed, the director appointed by the Investor*."

514. The Petitioners say that the Investors breached their duties under the SHA in procuring the appointments of their new nominee directors in a manner which ignored the operation of these provisions. They also say that the existing directors who approved the appointments necessarily breached their duties as directors under the Companies Act in doing so.

515. In response, the Investors' basic point was that, properly analysed, no real issue arises at all. In making that submission, they relied on SHA clause 7.8. This too deals with the requisite quorum for directors' meetings, and largely tracks the language of Article 17.7, except that it includes a qualification, underlined in the quotation below:

> *" ... the quorum for the transaction of business of any Board Meeting shall be 3 Directors and shall include (insofar as they each remain a Director) the Founder Director, the CEO and, if one has been appointed, an Investor Director."*

516. Clause 24 of the SHA then provides that in the case of any conflict, ambiguity or discrepancy between their terms, the provisions of the SHA are to prevail over the Articles. Thus, the Investors' argument goes, there is no difficulty in disregarding the quorum requirements in Article 17.7: that is justified because SHA clause 7.8 says one can do so, in the event of Dr Sachs and Mr Faulkner no longer being in post. If that is correct, the argument based on Art 14.2 must fail as well.

517. The underlying issue here is a critically important one: it is about how the constitution of CPGL was intended to work, in the absence of Dr Sachs and/or Mr Faulkner. Yet it received very little attention in the submissions of either side.

518. The Investors' basic submission comes to this, that in the event of Dr Sachs and/or Mr Faulkner being removed from office, the protections afforded to the Minorities are simply swept aside and can safely be ignored. I do not find that persuasive, given the way in which I construe *the parties' bargain* (see above). I certainly do not think it a conclusion which is justified by the words in parentheses in SHA clause 7.8.

519. The Petitioners' counter-argument, set out briefly in their Written Closing and by reference to Article 14.2 rather that Article 17.7 (i.e., the provision dealing specifically with the appointment of directors) was that Article 14.2 reflected *"... an important right, which was plainly intended to enure for the benefit of the minorities. The approval of the minorities was neither sought nor obtained to these appointments.*"

520. This seems to be suggesting that, properly construed, the CPGL constitution required the Minorities at least to be consulted about replacement directors. Yet that submission was also undeveloped, and gives rise to some interesting and difficult questions, for example, how was that consultation to be undertaken; how was any disagreement among the Minorities to be resolved; were they to have a right to appoint a nominee or nominees of their own, or only to veto suggestions made by the Investors and were any nominees identified by the Minorities to have the same special entitlements on the board as Dr Sachs and Mr Faulkner?

521. The fact is that the 2013 constitution does not contain answers to these questions. That fact in itself, it seems to me, supports the view I have taken of the parties'

bargain: the constitution contains no obvious machinery for dealing with the situation in which Dr Sachs and Mr Faulkner are removed from office because it was not seriously expected to happen; or perhaps, it was not seriously expected to happen and for the Minorities to remain as shareholders in a business controlled by the majority *Investors*. Mr Hollington seemed to rely on some implied obligation, or set of obligations, which were said to govern the situation in which Dr Sachs and Mr Faulkner are no longer in office. He may well be right about that, but his point was embryonic only. Be that as it may, I am unpersuaded by the Investors' submission that the protections afforded to the Minorities were swept away and not replaced by anything else.

522. That being so, it seems to me the real value of the Petitioners' argument under this head is that it is another example of the machinery of the 2013 constitution having entirely collapsed, and simply not being workable in any recognisable way, in the periods after the departure of Dr Sachs and Mr Faulkner. As Mr Hollington put it in his Written Closing: "*The breach of Article 14.2 is part-and-parcel of the majority investors driving a coach and horses through the 2013 Constitution by assuming full board control for themselves.*"

523. I agree with the broad thrust of that proposition. I therefore agree that the appointments of the further directors mentioned, in a manner which ignored entirely the possibility that the Minorities might be entitled to a say in how the business was run, necessarily involved further breaches by the Investors of the material provisions of the SHA, and in particular clause 4.2 (good faith), clause 5.2 (good business practice), and clause 5.3(a) (proper and efficient manner).

524. To the extent the appointments were approved by and/or supported by the existing directors, they must also have involved breaches by those directors of their duties under Companies Act 2006, ss171(a) and 172 (though not breaches of the other duties alleged: see above at [426]-[430]).

525. It follows that these various breaches are further examples of ongoing unfair prejudice to the Petitioners arising from the manner in which CPGL was by this time being managed,

526. The Petitioners make one other, minor point which is that the appointments of Mr Valler and Mr Jackson in October 2017 are objectionable for the independent reason that they took the total number of directors of CPGL over 7, whereas by clause 7.1 of the SHA the total number of directors was to be no more than six.

527. On any view of the world, that was a breach of the SHA, but I think Mr Hollington was correct to say in his Written Closing submissions that it does not add materially to the other points already made above. Again, its real significance is as an example of an overall approach which attached little value to the requirements of the 2013 Constitution and in fact was content to ignore it.

XV Failure to Keep Minorities Informed

528. A similar, general complaint is about a failure to keep the Minorities properly informed of the Company's affairs since October 2016. There is a related complaint as to a failure to convene any shareholders' meetings.

529. The Investors in response say it is an exaggeration to say that the Minorities have been provided with no information. They say they have had some at least, in the form of offering circulars for a number of new issues of shares since October 2016, including one in December 2016 which included a memorandum signed by the new CEO Mr Woo giving further information about the direction of the business. The Investors say the Minorities could at any point have asked for more information but have not done so, and likewise could have taken their own steps to convene a shareholders' meeting, or at least could have done so while they held 5% of the company's issued shares: Companies Act s. 303(2)(a). Again they did not do so.

530. In my judgment, these matters add little to the more fundamental complaint I have already dealt with above, namely that the constitutional framework designed to protect the Minorities had collapsed entirely. It is rather difficult for me to say whether the information in fact provided to the Minorities was adequate or not, when measured against the yardstick of clause 5.3(f) of the SHA ("*the Company and each CPG Group Company … shall keep the Shareholders … fully informed as to all their material financial and business affairs*"). The complaint made is again very generalised, and is more in the nature of a complaint that things were simply not being done in the way the Minorities were entitled to expect. Certainly information *has* been provided, but perhaps not at the level one might have expected given the terms of clause 5.3(f). But it is not possible to identify clearly the extent of any material shortfall.

531. I therefore prefer to say that I can detect no sufficiently specific breach of clause 5.3(f) of the SHA as to amount to a self-standing ground of unfair prejudice, but at the same time, the relatively limited information flow to the Minorities seems to me symptomatic of the fundamental shift in the constitutional balance of the Company which I think they are entitled to complain about as constituting an ongoing instance of unfair prejudice.

XVI Newton Aycliffe

532. Having dealt with those issues, I come back to the matter of the sale of the Newton Aycliffe Fab to Kaiam. This is relied on by the Petitioners as a specific and egregious example of the agreed constitutional framework having broken down, but in this instance the various defaults are said to have special potency, because the Petitioners say they resulted in the sale of the Fab to Kaiam at a gross undervalue. The US$10m sale value is contrasted with the value achieved only a few months later on the sale of Kaiam Laser Ltd to II-VI, namely US$80m.

533. Those being the issues, I will proceed by first assessing whether there was in fact a sale at an undervalue, and will then consider after that what breaches arise, either of the SHA by the Investors or of the Articles and Companies Act duties by the directors.

Was there a Sale at an Undervalue?

534. Answering this question turns on an analysis of the expert evidence.

535. I had the benefit of detailed expert valuation evidence from both sides: an expert report of Mr Ian Mackie for the Petitioners and a report of Mr Richard Indge for the

Respondents. Mr Mackie is a managing director at Berkeley Research Group (UK) Limited and Mr Indge a partner at Ernst & Young LLP. The experts produced a Joint Statement dated 3 November 2020.

536. In his Written Opening, Mr Hollington raised what he called a "*fundamental objection*" to Mr Indge's report, which he said was the report of three experts – i.e., Mr Indge and two of his colleagues, Mr Mark Main and Mr Peter Codd. Mr Indge referred to them both at para. 1.6 as individuals whose specialist knowledge he had drawn on in forming his opinion. He went on at para. 1.7 however to say that all opinions expressed in his report were his own. That being so, I reject Mr Hollington's submission, which in any event was not advanced with any great vigour. The report was clearly Mr Indge's report, and it is his opinion on valuation I am concerned with. I note that Mr Mackie also said at para. 1.2 of his report that in preparing it he had been assisted by BRG staff working under his supervision, although he did not identify them by name.

537. The overall difference between the experts was striking. Taking the relevant valuation date as 3 May 2017, Mr Mackie valued the land and buildings at Newton Aycliffe at £40,940,000. To that he added the value of the specialist manufacturing equipment on site which he put at £7,100,000, giving a total value of £48,040,000.

538. Mr Indge's valuation, on the other hand, was in a range between £9,600,000 and £11,200,000 (US$12.69m to US$15.51m).

539. As is often the case, the difference between them was one of methodology.

Mr Indge's Approach

540. Mr Indge's approach involved attributing separate values to what he called different "*asset groupings*", and then adding them together. The different groupings were (i) land and buildings, (ii) plant and machinery, (iii) intangible assets (including the assembled workforce and IP), and (iv) stock and debtors. The critical aspect of this analysis, and the point of material distinction between Mr Indge and Mr Mackie, was Mr Indge's valuation of item (i), the land and buildings. As to that, the important point is that the Newton Aycliffe Fab included specialist buildings constructed at very great expense by the original owner, including in particular a "*cleanroom*". Such a facility would obviously have value to a purchaser looking to acquire such specialist structures and to make ongoing use of them in a business, but no value beyond the land value to anyone else.

541. Mr Indge's conclusion, in summary, was that there was no real market (as matters stood in May 2017) for sale of the Fab on the basis that any prospective buyer would either wish to continue with the existing use of the Fab or turn it to some alternative business use.

542. In stating his conclusion that it was not possible to perform a valuation of the land and buildings of the Fab assuming a continuation of the existing use, Mr Indge was influenced by the history of the Fab including in particular the fact that the Fab had a loss-making track record: CPUK's accounts show an annual loss for each of the 4 accounting periods of its ownership, from 2013 to 2016. In reaching the conclusion that there was no evidence supporting a valuation based on alternative uses, Mr Indge

relied on a report prepared by a firm of chartered surveyors, Colliers International, in September 2014, in which they said:

> *"In our opinion there would be little if any demand for the buildings in the current arrangement and use. Furthermore owing to their specialist design, we consider it highly unlikely that the buildings could be adapted for re-use. As a consequence, we consider that a purchaser in the open market would seek to remove the existing buildings and redevelop the site for a mix of employment uses (warehouse, light industrial, general industrial. offices etc.)"*

543. On that basis, Mr Indge's conclusion was that the Fab's buildings did not generate a value higher than the land value; or to put it another way, the market value of the Fab's buildings assessed outside the context of a profitable ongoing business was nil. Mr Indge assessed the land value at £2,760,000 or US$3.44m. In reaching that figure he relied on the land valuations referred to in the Collier's report, having formed the view there was no evidence of a material change in values in the interim. The other main item of value in Mr Indge's calculation was plant and machinery, which he put in a range between US$8.18m and US$8.3m, thus driving an overall valuation (as already mentioned above) of between US$12.69m to US$15.51m when the other asset groupings were taken into account.

Mr Mackie's Approach

544. Mr Mackie, on the other hand, had a different methodology for valuing the Fab's buildings. He used a combination of a "*market approach*" and what is known as the "*DRC approach*", the latter being a reference to the "*depreciated replacement cost method*" of valuation.

545. In expressing the view that there was a market for the Fab, even if it was a limited and specialist one, Mr Mackie relied on a number of matters, specifically the fact that it had changed hands on a number of occasions previously, the fact that Mr Bolger and Mr Jackson had been involved in discussions with Selex, the fact that ATREG had made a proposal to market the Fab, and of course the fact of the subsequent sale to II-VI in August 2016.

546. As to the DRC valuation method, the experts were at least agreed on its essential nature and characteristics, if not on its applicability in this case. This method is often used to value a specialised asset, which is defined as follows in the relevant RICS Guidance Note (RICS Professional Standards and Guidance, UK – Depreciated Replacement Cost Method of Valuation for Financial Reporting):

> *"A property that is rarely, if ever, sold in the market, except by way of a sale of the business or entity of which it is part, due to the uniqueness arising from its specialised nature and design, its configuration, size, location or otherwise."*

547. As Mr Mackie explained, the DRC approach is a form of the *cost* approach to valuation, which is defined (again in the RICS Guidance Note) as:

> *"The current cost of replacing an asset with its modern equivalent asset less deductions for physical deterioration and all relevant forms of obsolescence and optimisation."*

548. Having regard to his methodology, Mr Mackie valued what he described as "*the Property*" (meaning a combination of the land, buildings, plant and equipment) at a total of £48,040,000. In arriving at this overall figure, Mr Mackie assumed a replacement cost for the buildings on the site of roughly £97.5m, which he then depreciated using a straight-line depreciation method to give a value of approximately £34,131,000. To this he added (i) his estimated current land value, roughly £6.8m at a figure of £155,000 per acre, and also (ii) the value of the specialist plant and machinery at the site, which he put at £7,100,000.

Discussion & Conclusions

549. Having set the scene and described the essential differences between the experts, I should say that overall I prefer Mr Indge's approach. I do not therefore consider there was a sale of the Fab in May 2017 at an undervalue. I say that for a number of reasons, as follows.

550. To begin with, the DRC approach was critical to Mr Mackie's methodology, but as Mr Indge explained, that approach is appropriate only where there is evidence of a demand for the relevant assets. Mr Indge drew attention to this further passage in the RICS Guidance Note, which explains that how value in this sense is linked to use:

> *"The value of a specialised property (or a specialised plant and equipment asset) is intrinsically linked to its use. If there is no demand in the market for the use for which the property is designed, by the current owner or any other market participant, the specialised features will either be of no value or may have a detrimental effect on value as they represent an encumbrance. If the specialised property is not to be retained for delivery of a product or service because there is no longer a demand for it, it follows that the use of DRC would be inappropriate, No hypothetical buyer would consider procuring a modern equivalent asset of this would immediately be redundant."*

551. In his oral evidence, Mr Indge gave the following example:

> *"What the standards allow you to do, and this would typically be – because of the nature of these assets they are typically not – there will be a specialised asset, they will be in use within a broader business. They very rarely change hands as a separate asset. They are usually sold as part of an overall business. Therefore, a particular asset within the context of a broader business may not itself be generating revenue but it might be doing something that enables the business as a whole to generate revenue and profit. Therefore you may not be able to attach a specific revenue stream to it … Within that context, the standards allow you to use a depreciated replacement cost. They allow you to use a cost based estimate of value. That does*

> *not necessarily equate to a market value because it does not reflect what a purchaser may pay for it."*

552. Thus, in the typical case, the DRC method is justified where the asset is part of a revenue generating business, and so if the asset were lost the business would need to replace it. As Mr Indge pithily expressed it, "*The costs approach provides an indication of value based on the principle of substitution*." The corollary, as Mr Indge also explained, is that the DRC approach is predicated on the subject entity having adequate potential profitability. The DRC Guidance Note thus requires DRC valuations in the private sector to be accompanied by a statement that "*the valuation is subject to the adequate profitability of the business paying due regard to the total assets employed.*"

553. In this case, in order for the DRC method to be appropriate, one would therefore need to see evidence (1) of the intended use of the relevant assets in the hands of market participants, and (2) evidence that the assets were able to generate sufficient profitability to justify their value.

554. On these points, I accept and adopt Mr Indge's view that these requirements were simply not met on the evidence as at the valuation date, i.e., 3 May 2017.

555. Taking the relevant points in turn, there is first of all the obvious point that the Fab had been loss making in the hands of the CP Group. That had been the position since acquisition in 2013.

556. Second, I do not find persuasive Mr Mackie's reliance on the fact that Mr Bolger and Mr Jackson had pursued discussions with Selex about a possible MBO. The fact is that those discussions dissolved. The Fab had been loss making even with the benefit of the Selex contract and the MBO idea was pursued only on the basis that Selex might be able to expand its relationship with the MoD and thus generate more business. In the event that did not happen. The MBO idea did not materialise because it could not be made to be profitable. This line of argument therefore does nothing in my view to change the overall position, and if anything counts against the appropriateness of the DRC method.

557. Third, there is the question of marketing through ATREG. I will have to return to this below, but for now I will say that one cannot safely infer from the discussions which Mr Jackson and Mr Bolger had with ATREG that there was a ready market for the Fab in late 2016 or early 2017. On the contrary, it seems to me that the exchanges with ATREG only underscore how difficult and unpredictable the process of trying to market such a specialist facility was anticipated to be (see e.g., above at [285]). It is true that the Fab had changed hands on three occasions previously, as mentioned above at [296], but on each occasion for a reduced value, and on the occasion of the sale to CPGL, at a much reduced value from the previous sale by Filtronics to RFMD. I see little in these facts to support the view that as things stood in late 2016 or early 2017, a buyer was likely to be found for the Fab who would be able to turn it to profitable use.

558. Further as to ATREG, Mr Mackie in his Report referred to ATREG's original proposal for a success fee representing 4% of the transaction value or a minimum of US$1.5m. He said, "*This indicates that ATREG expected to receive a sales value of*

at least £30.3m" – i.e., he inferred that US$1.5m represented 4% of the expected sales value (giving US$37.5m, or £30.3m when converted to Sterling). I do not agree that is an appropriate inference to draw. It is equally if not more plausible to think that the minimum success fee was there to reflect the possibility of a much lower sales value, with the effect that the standard 4% return would not come to much (to use Mr Bolger's expression). It is notable that after the meeting at Newton Aycliffe on 25 October 2016, when Mr Khan wrote to Mr Jackson to give some worked examples of how his revised commission arrangements might work, he included sale values in the US$8m-US$9m range (see above at [299]).

559. Fourth, there is the important matter of the sale to II-VI. Mr Mackie relied on this as a cross-check on his DRC valuation, and as supporting the view that "*there were other players in the market, who without proper marketing would have been unaware of the opportunity to purchase the Property at the time of the sale to Kaiam.*"

560. One can understand that sentiment, but in my judgment, the preponderance of the evidence supports the alternative view that there was a change in the market post-May 2017, or alternatively that II-VI was a special purchaser with its own particular reasons for paying over the market price for the Fab's buildings. In either event I have come to the conclusion that I cannot regard the sale to II-VI in August 2017 as a reliable indicator of market value in May, or as a reliable indicator of demand at that stage such as to justify use of the DRC valuation method.

561. In expressing that conclusion, I must accept that some of the background is vague – Mr Indge himself accepted that the timing was difficult. Yet some points are clear. The proposed acquisition by Kaiam was publicly announced in March 2017 but not completed until May. Had there been real interest in the Fab at that stage from alternative buyers one might have expected them to emerge and try and intervene in the sale: I received evidence of II-VI itself having intervened in a prospective sale on one previous occasion. Yet nothing happened. Instead, the first suggestion of another market participant expressing an interest came only on about 9 June 2016 (see above at [324]). This was a month or so after the sale to Kaiam, and two days after Mr Bolger had attended a Kaiam Board meeting in California at which the focus had been on Kaiam's liquidity difficulties.

562. This first market participant was Finisar, which offered to purchase Newton Aycliffe for US$20m. When Mr Pezeshki reported this, according to Mr Bolger, he linked the interest to intelligence released to the market by Apple at its WDC on 5 June 2017. By 30 June, Lumentum had also appeared as another interested party. Mr Bolger explained in an email to Kew and others on 30 June 2017 that the "*major laser businesses … are scrambling for laser capacity*." He also said "*the sudden interest in NA has arisen because of what is believed to be an Apple plan to put a laser system in the iPhone and iPad to work with AR software tools it is releasing for its IOS mobile platform*." II-VI emerged later and a three-way bidding process developed in which II-VI was the eventual winner, paying a great deal more (US$80m paid for Kaiam Laser Ltd, with approximately US$69m allocated to "*property, plant and equipment*") than what Mr Bolger at any rate understood to be the nearest alternative offer (US$25m).

563. Dr Sachs in his Third Witness Statement took issue with the idea that the Apple WDC was a watershed moment, which signalled a change in the market. He made a number

of points, to the effect that the Apple WDC was aimed principally at software developers of applications for Apple Mobile phones and personal computers, that the possible use by Apple of infrared laser diodes for recognition hardware was known or should have been known before the WDC, and that proper marketing by CPGL would have flushed out the relevant interest at a stage before the sale to Kaiam.

564. I am afraid I cannot accept those points, which were really advanced by way of argument rather than evidence. As already noted, aspects of the background are necessarily opaque, but a key point it seems to me is the emergence of a number of competing bidders at roughly the same time, which very strongly suggests that they were all responding to some new stimulus which was not a feature of the market beforehand.

565. The inescapable inference it seems to me is that *something* new happened to change market perception. The best guess is that that something was associated with the announcements made by Apple in early June 2017. The precise dynamics of it are unclear, but whatever it was, it had particular potency for II-VI because it was willing to pay a great deal more than anyone else in order to acquire Kaiam Laser Limited and its assets.

566. For all those reasons, I do not see the II-VI sale as a reliable indicator of demand or of value in May 2016; and consequently I am not persuaded by Mr Mackie's case as to the appropriateness at that stage of the DRC valuation method for the Fab's buildings, whatever the position may have been in later periods. Overall, therefore, I prefer Mr Indge's approach and overall methodology.

567. As noted above, there was also some disagreement between the experts as to the overall value of the land at the Newton Aycliffe site (see [543] and [548]). On that aspect I again prefer the approach of Mr Indge, since Mr Mackie's approach depended on an assessment of a number of other sale transactions, but on examination only one of them (Wolsingham Steel) was a suitable comparable, and suggested a land value of only £94,600 per acre and not £155,000.

568. In summary, I do not consider Newton Aycliffe to have been sold to Kaiam in May 2017 at an undervalue.

The Investors

569. It follows that the particular potency of the Petitioners' complaint against the Investors under this heading is rather lost. Nonetheless, I am bound to conclude, for all the reasons already explained above, that the circumstances leading down to the sale to Kaiam involved continuing breaches of the SHA by the Investors and continuing unfair prejudice. As before, I would identify in particular breaches of the SHA clauses 4.2, 5.2 and 5.3(a). That is because the relevant decisions were taken not by the board of CPGL, constituted in the manner required by the 2013 SHA and operating in the manner contemplated by the 2013 SHA. Instead, the relevant decisions, including in particular the eventual decision to sell in May 2017, were taken by a board constituted by Vollin and Minden and comprising their nominees and Mr Woo (the CEO) whom they had selected.

570. While dealing with the position of the Investors, it is convenient to mention two further, specific complaints made in relation to Newton Aycliffe.

571. *Clause 5.1 SHA*: A discrete allegation is made that the Investors breached clause 5.1 of the SHA by selling Newton Aycliffe on the basis that the consideration was in the form of shares issued by Kaiam. The point made is that Kaiam's business was in transceivers for data centres, and holding shares in such a company did not fall within the definition of "*Business*" for the purposes of clause 5.1 of the SHA.

572. Little attention was paid to this issue during the trial, and rightly so. I find it a rather artificial point. The consideration was paid on the sale of Newton Aycliffe and selling Newton Aycliffe was a part of the overall strategy for CPGL which became necessary given its financial state after Dr Sachs' departure. To my mind, an acquisition of shares in that manner does not infringe the definition of "*Business*" in the SHA. No decision had been made by the Investors to enter into a new area of commercial investment activity. The holding of shares in Kaiam was only a consequence of the decision to sell Newton Aycliffe, and the inability to find an alternative buyer who would pay cash. That was an entirely defensible decision commercially, as I have already held, and plainly was not part of a new business strategy whose focus was holding investments in other technology companies. For those reasons, I reject this head of complaint.

573. *Clause 14.11 SHA*: A related complaint is also made, although again not pressed very hard. This was that clause 14.11 of the SHA provided that if there was, among other things, an asset sale by a subsidiary (Newton Aycliffe was owned by CPUK), then the proceeds of sale were to be allocated in accordance with clause 4.8 SHA, meaning (say the Petitioners) they should have been distributed to the ordinary shareholders, absent a contrary determination by the board.

574. I do not accept this argument, essentially for the reason given by the Investors. By clause 14.11(a), the obligation to allocate consideration to shareholders was subject to any restrictions imposed by applicable law. There was a relevant restriction here having regard to Companies Act 2006 Part 23. Section 830(1) provides that a company may only make a distribution out of profits available for the purpose. Here, there were no profits available as at May 2017 (the date of the disposal to Kaiam) or, it seems, subsequently. Consequently, the obligation was not engaged.

The Directors

575. The directors of CPGL at the date of the sale to Kaiam in May 2017 were Mr Fletcher, Mr De Cort, Ms McDermid (who had been in post since 6 September 2016), Mr Woo (who had been in post since 14 November 2016), and Mr Bolger (who had been reappointed to the board on 7 December 2016).

576. I think only brief conclusions are now needed under this heading.

Article 17.1 – disclosure of interests

577. See above at [475]. In my judgment, Dr Frolov's connection with Kaiam was disclosable by the Vollin nominated directors, but the point is rather subsumed in the more fundamental complaint that the 2013 Constitution had simply been overridden.

Companies Act 2006 section 171(a) - duty to act in accordance with the constitution

578. There were continuing breaches of the 2013 Constitution and consequently continuing infringements by the directors of the duty under section 171(a).

Companies Act section 171(b) - duty to exercise powers for proper purposes

579. See the reasoning at [478]. Here, as there, it is not clear to me what power is said to have been engaged and what improper purpose was in play in exercising it.

Companies Act section 172 - duty to promote the success of the company

580. Here, the nub of the Petitioners' complaint was that of the alternatives available in the Autumn of 2016 and early 2017, the proposed sale to Kaiam was improperly favoured above the others (i.e., MBO or marketing via ATREG). That was because Dr Frolov's connection with Kaiam via Target Global led to a Kaiam sale being the naturally preferred option, and the other options were not properly evaluated by the directors, in particular instructing ATREG.

581. Again, the potency of this complaint is now rather gone, given my conclusion on the question of sale at an undervalue. Independently of that, however, in my judgment the complaint is not made out on the facts.

582. The mechanics of disposal of Newton Aycliffe were delegated to Mr Bolger and Mr Jackson, who in the Autumn of 2016 were not directors. I do not detect any breach of duty by the directors, however, in deciding to delegate to Mr Bolger and Mr Jackson in that manner. Newton Aycliffe was loss making. It appeared at the time (correctly, in my view) to have limited value. It was a problem to be solved, rather than an asset of substantial value the disposal of which was likely to generate significant revenue for the Group. The problem was really one about trying to avoid the costs and job losses which would inevitably follow if the Selex contract came to an end and no new acquirer had been found in the meantime. Mr Bolger and Mr Jackson, and in particular Mr Jackson who knew the Fab well and had a good relationship with Selex, were well placed to try and solve that problem. The directors were entitled to delegate to them the responsibility of doing so.

583. In any event, I do not see that any breach of duty is disclosed by the decision not to instruct ATREG, whether that is looked at as an omission by the directors in office until 7 December 2016, or as a positive choice made by Mr Bolger following his appointment on that date.

584. I say that essentially for the reasons already developed at [292]-[295] above. The ATREG proposal was an expensive one which would require material expenditure even if one or other of the alternatives (MBO or sale to Kaiam) came off. ATREG's further proposal ([298]-[299] above) did not fully address that point, and indeed expressly contemplated the payment of significant fees to ATREG even in the event of a sale to Kaiam or an MBO. ATREG's projected 12 month timescale, even if realistic, would have extended beyond the date of the Selex contract and therefore into the period when the Fab (if kept open) would be absorbing significant costs but generating no income. There was great uncertainty about price and ATREG would not commit to provide a valuation without signed engagement terms. In the meantime, the other available alternatives appeared equally if not more promising as potential solutions.

585. The choice of whether or not to engage ATREG was effectively a business decision, to be made in light of the many commercial factors in play. It cannot be said that those involved did not honestly think they were doing the right thing, in choosing not to proceed.

586. Finally, and consistently with that, neither does the evidence show the Kaiam option being improperly favoured above the others. I think one must accept that at least Mr

Frolov Junior had an interest in a sale to Kaiam coming about (see at [304]), but the other evidence is equivocal, and in fact shows the Investors wavering between the MBO option (which was cost neutral), and the Kaiam option (which would involve them having to make a further investment in Kaiam as a "*sweetener*"). Here I have in mind in particular Ms McDermid's email mentioned at [291] above (*"the principals…are happy to invest in Kaiam to get rid of NA, but I get the feeling that they would be even happier to not invest."*). I also have in mind Mr Bolger's email to Mr de Cort and Mr Tenenbaum on 27 February 2017, showing that even at that stage the MBO, although unlikely, appeared the better option ("*while there is still a possibility that [the MBO] might be happen [sic] (and would generally be a better outcome for CP/NA), it does not seem likely at this point*.") By April 2017, the MBO had fallen away and only Kaiam was left (see above at [314]), which made Mr Bolger nervous about what would happen if the Kaiam sale fell through. This overall fact pattern is not consistent, in my view, with Dr Frolov pushing the Kaiam deal and the directors of CPGL therefore favouring it above the other available options.

Companies Act section 173 – duty to act independently

587. See [430(iii)] above. In my judgment, for the reasons there given, this is not made out on the facts.

Companies Act section 175/Article 17.2

588. The Petitioners' case on conflicts was based on the personal association between the Vollin nominee directors (in particular Mr Fetcher) and Dr Frolov, and more particularly on the remuneration provisions under which the members of Kew were rewarded for the success of the Vollin investment portfolio.

589. I have already dealt above with the position as a matter of principle (see at [490]-[491]), both as regards section 175 and Article 17.2.

590. I should also say that, on the evidence of the negotiations as they progressed, I do not see that any valid ground of complaint is made out. I repeat the points made above at [586]. The evidence does not show the directors of CPGL improperly favouring the Kaiam transaction above the other available alternatives, because of Dr Frolov's connection with Target Global.

591. That being so, I simply do not think that the situation which arose was one which could reasonably be regarded as actually likely to give rise to a conflict of interest (Companies Act section 175(4)(a)), or was one in which a director acting reasonably should have formed the view that there was a conflict between his fiduciary duties to the company and his role as the appointed director of a shareholder (Article 17.2).

XVII Conclusion

592. For all the reasons given, I conclude that the Petitioners have successfully made out their case that they were unfairly prejudiced at the hands of the Investors. I will need to hear further from the parties on matters arising from this Judgment, and in particular on the question of remedies, which remains to be addressed.