



Neutral Citation Number: [2024] EWHC 1612 (KB)

Case No: QB-2020-004616

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
KINGS BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2024

Before :

MR JUSTICE SWEETING

Between :

| | |
|---|-------------------------|
| DANIEL WAGNER | <u>Claimant</u> |
| - and - | |
| BRIGHT STATION VENTURES MANAGEMENT LIMITED | <u>Defendant</u> |

FRASER CAMPBELL (instructed by **MISHCON DE REYA LLP**) for the **CLAIMANT**
THOMAS PLEWMAN KC & WILLIAM HOOPER (instructed by **SQUIRE PATTON BOGGS LLP**) for the **DEFENDANT**

Hearing dates: 2nd - 12th May 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SWEETING

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Introduction

1. The Claimant (“Mr Wagner” or “the Claimant”) claims in debt, alternatively in restitution, sums that he contends were advanced, by or on his direction, to or for the benefit of the Defendant company, on the understanding that they would give rise to a debt in his favour.
2. The Defendant (“BSVM” or “the Defendant”) counterclaims: (a) in debt, and/or damages for breach of duty, sums that it is said Mr Wagner allegedly improperly caused BSVM to advance to him or third parties; and (b) damages for breach of duty in respect of losses allegedly suffered by BSVM as a result of Mr Wagner’s failure to ensure that BSVM maintained proper books, records and accounts.

The Disputes in Summary

3. There are four areas of dispute. First, the claim for cash advances into BSVM’s bank account or payments to third parties to meet legal bills (allegedly on behalf of BSVM), in circumstances where Mr Wagner as the sole director agreed that each of the payments would give rise to a debt or where, it is argued, the sums advanced, or the benefit of the payments made, were freely accepted so that there was an obligation to make restitution, subject to the defence of change of position. It is common ground that:
 - a. the sums claimed were advanced or paid;
 - b. Mr Wagner was under no personal obligation to make the payments or advances; and
 - c. they were not made as a gift.
4. There was no formal documentation in relation to any of the loans or advances. Mr Wagner's contention that the payments made to or for BSVM gave rise to an obligation from that company to him, turn upon his argument that BSVM acted as a service company so that monies could properly be channelled through it for the benefit of other operating companies in the group to which it belonged.
5. BSVM contends that there was a breach of duty in relation to any alleged loan agreement as the Claimant had an interest that was not properly declared and there was no shareholder approval. Mr Wagner argues that even if that is right it does not lead to the transactions being void ab initio, but voidable, so that they can be rescinded only if restitution is possible.
6. Secondly, there is a counterclaim for the amounts that Mr Wagner accepts were not strictly in the interests of BSVM and which he has already set off in quantifying his claim. Mr Wagner’s concession that these sums were appropriately set off evolved during the course of the trial into a contingent acceptance depending on the outcome of his claim.
7. Thirdly, there is the counterclaim for sums paid by BSVM for which Mr Wagner does not give credit because, he says, they were legitimate expenses. The Defendant says they were improper. The individual advances and payments are set out in annexures to

the pleadings. This also bears on the question of whether BSVM was a service company supplying management services to other group companies, including its parent company Bright Station Ventures Limited (“BSVL” also sometimes abbreviated in the documents to “BSV”). The Defendant’s primary position is that expenses could only properly be met by BSVM where it was defraying a sum due under a legal obligation, otherwise such payments were not in its interests and involved a breach of duty on the part of Mr Wagner in causing a payment to be made. He, in turn, argues that this position is too extreme; payments could legitimately be made if they were in the interests of the company; there did not need to be a legal obligation to make the payment in every instance. The contention that there was a legal obligation to pay has largely given way in the course of the litigation and the trial to the argument that there was an established practice of making such payments.

8. Fourthly, there is the claim for accountancy fees. The Defendant says that Mr Wagner took such little care in maintaining records that it was necessary to incur expenses with the accountancy firm BDO to put things right. This claim initially stood at some £100,000 but reduced as the Defendant reformulated its approach to whether these sums sounded in damages or were more properly to be regarded as costs. The fees charged by BDO fall into three categories:
 - a. work to put the records in order,
 - b. work to ensure tax compliance, and
 - c. forensic investigation into the payments made by Mr Wagner.
9. The Claimant says there was no breach of duty. He attributes any gaps in the records and any shortcomings in his ability to answer queries, to the fact that the accountancy firm Deloitte seized records, so depriving him of access. There was no fault on his part. Mr Wagner suggests that the exercise then carried out by BDO was not properly required to correct records or rebuild corporate knowledge but was an attempt to construct a case against him.
10. The disputes which have arisen from the same background facts have been wide ranging, involving more than one set of proceedings.

The Principal Individuals

11. There are two central individuals in the case, Mr Wagner and Mr Dunbar (now a director of the Defendant and BSVL). Both are experienced businessmen although their career backgrounds differ.
12. Mr Wagner has a track record of founding technology businesses. His first company was formed in 1984. It floated on the London Stock exchange in 1994 and was sold in early 2000 for \$500 million. It was by no means the only company he has established and built into a successful business. It would be accurate to describe him as a successful businessman and serial entrepreneur.
13. Mr Dunbar is a retired investment banker who ran Global Capital Markets for Deutsche Bank until 2013. He then became an angel investor and a non-executive director of several companies.

14. The two men were introduced to each other by a mutual acquaintance, Mr Colin Grassie, a colleague of Mr Dunbar's from his days at Deutsche Bank. Both Mr Wagner and Mr Dunbar gave evidence. They have each been high achievers in their respective fields. They appear to have been on good terms until they found themselves on opposite sides of a fractious boardroom battle which has spilled over into the courtroom. There was plainly a degree of animosity between them as a result. What began as a commercial dispute has become personal, although not discourteous.
15. I found Mr Dunbar to be a straightforward witness whose evidence matched what was to be seen in the documentary material. He seemed to me to be a pragmatist in matters of business and not unduly rigid in his approach to formalities at a time of crisis. He was accused of applying double standards, but I think it would be more accurate to say that the degree of latitude he was prepared to allow Mr Wagner decreased as his concerns grew and as matters of which he had been unaware came to light.
16. Mr Wagner appeared to me to have regarded the boundaries between the distinct legal personalities of the companies he ran as permeable to the detriment, at least, of good business practice. Any case that he had fabricated documents had evaporated by the time of the trial but the inevitable consequence of this was that he had failed to disclose important matters to others who should have been made aware of them. He was, at times, unembarrassed by the casual way in which he had approached his duties as a director and not prepared to accept any significant criticism.
17. As far as his oral evidence was concerned Mr Wagner appeared to me, on occasions, to be seeking to avoid answering questions. I do not think his responses could be regarded, as Mr Campbell suggested on his behalf, as merely born of an anxiety to give complete answers or simply from thinking ahead to the questions which might follow. I found some of his explanations unconvincing and at times self-serving, but I did not conclude that he was dishonest. I did conclude that he had resorted to a degree of post-rationalisation in justifying his actions, in particular his contention that he had been acting pursuant to agreements, in effect, reached with himself. He had constructed his own narrative of events as a result.
18. Against these observations Mr Wagner had, in my view, genuinely sought to support and promote the companies in the group. Moreover, in some of the period which is central to this litigation he was doing so in the midst of a crisis, and this explained, if not excused, the approach that he took. Whilst business was flourishing, or appeared to be so, those around him had been content for him to run things in his own idiosyncratic style. His approach, dismissive of formalities and information sharing, told against him when the affairs of the companies which feature in this litigation came under scrutiny.
19. Mr Henry Agoh was the bookkeeper for the Defendant and other group companies. He had arrived in this country in his late twenties when he emigrated from Ghana. He had not received a university education and took a number of low paid jobs. He got to know Mr Wagner whilst working in a car park. In an act of personal kindness, and no doubt recognising potential, Mr Wagner had been instrumental in Mr Agoh securing employment as an account assistant (with Mr Wagner's original start up business). Mr Agoh made the best of the opportunity and in due course obtained professional accountancy qualifications. He moved away to work for a number of American companies, but in 2010 returned to employment in Mr Wagner's businesses. Thus, Mr

Wagner had been responsible for launching Mr Agoh's career and the two men had known each other for many years.

20. It was agreed on both sides that Mr Agoh was a patently honest witness who gave careful and truthful evidence. That was also my assessment. His working arrangements with Mr Wagner were based upon trust and their longstanding association. Notwithstanding his undisguised loyalty to Mr Wagner, I did not conclude that his evidence was in any way partisan. His obvious honesty did not however render him immune from the criticism that some of his evidence was quite general in nature. It might also be observed that he was working under the direction of others, in particular Mr Wagner and Mr Stirling, the CFO of BSVL and the Company Secretary of the Defendant, and so heavily dependent upon his instructions. It was evident that he saw no reason to question what he was told by Mr Wagner. Mr Agoh's evidence was nevertheless central in resolving a number of the issues which arose, and I was confident that he was candid throughout and that his evidence could be relied on. But for his evidence I might well have reached different conclusions, particularly in areas where there was little available, contemporaneous documentation. As to this there were very different accounts as to why material was not available, why some accountancy records no longer existed and why material in storage had not been recovered or its existence revealed at an earlier stage. I doubt however that I am in a position to resolve what were essentially satellite issues on the evidence before me. Mr Agoh gave evidence about the difficulties he faced in relation to the recovery of documents and records and there were undoubtedly genuine problems. He also explained why he had deleted records on his laptop. There was nothing to suggest that he had not cooperated with Mr Dunbar in answering questions and providing information.
21. Mr Sharp was a director of Powa until February of 2016 and then of BSVL, between April and November 2017. He is a friend of Mr Wagner's. He was not seeking to be unhelpful in his evidence, but he was reluctant to make any concessions which he thought might damage Mr Wagner's case.
22. BSVL had two professional Manx directors, Mr Derbyshire and Mr Charmer, from the professional services firm SMP Partners ("SMP"), later renamed "Suntera", who were in post from 2010 until 2017. I set out the circumstances in which they resigned and were replaced in summarising the factual background (below). Both struck me as neutral and measured in the way in which they gave their evidence. Mr Derbyshire appeared to have a better recollection of matters and gave more detailed answers.
23. Mr Glavanis was an investor in BSVL and a qualified accountant. At Mr Dunbar's invitation he became involved in preparing accounts for BSVL and BSVM after Mr Wagner had ceased to be involved in their management. He was not called to give evidence so he went unchallenged, although his evidence ultimately contributed little.

BSVL & Powa – The Powa Services Agreement

24. BSVL was incorporated in the Isle of Man by Mr Wagner in January 2010. Mr Wagner was the CEO, and a director of BSVL, until 2017. He was also the largest minority shareholder, holding 43.39% through DBLP Sea Cow Limited ("Sea Cow"), his family investment vehicle, and 4.13% directly. BSVL was a vehicle for obtaining external investment for the technology related businesses of its subsidiaries such as BuyaPowa

Limited (“BuyaPowa”), a digital referral network business and Attraqt Group plc (“Attraqt”), a cloud software platform.

25. The company at the centre of the present proceedings, Powa Technologies Ltd (“Powa”), became a wholly owned subsidiary of BSVL by way of a share transfer following BSVL’s incorporation. Powa was a “start-up” business with innovative technology, offering a point-of-sale system based upon “PowaTags” which worked with mobile phones. Powa was described in the evidence as BSVL’s “jewel in the crown”. It was provided with a substantial credit facility by BSVL such that by July of 2013 the facility stood at £7.5 million.
26. Mr Wagner was the Chairman and CEO of Powa pursuant to a services contract dated 1 January 2010 (“the Powa Services Agreement”). Under the terms of that agreement he was entitled to an annual salary of \$1m per annum and required to work full time.

The Bothy Power of Attorney

27. The investors and shareholders in BSVL included Mr Dunbar and Mr Grassie, the latter via his offshore company, Bothy Investments Limited (“Bothy”), which held 9.77% of the equity.
28. On 30 November 2011 Bothy executed a one-year power of attorney in favour of Mr Wagner granting him voting rights over Bothy’s shares in BSVL to:

“Attend and vote on behalf of the Company at any general meeting and at any separate meeting or any adjournment thereof relating to the Company’s shareholding in Bright Station Ventures Limited (the “Investment”).

29. The power of attorney was subject to a, subsequently disputed, right to call for it to be renewed as set out in a “Voting Undertaking” letter. The addition of the Bothy shares to Mr Wagner’s personal and family shareholding gave him overall voting control so that he owned 58% of the voting rights and 48% of the equity. However, the basis on which a power of attorney could be renewed and exercised led to a substantial dispute. The issue which arose was ultimately whether Mr Wagner had autonomy in relation to how the votes were exercised or whether he had to vote at the direction of Bothy.
30. Mr Wagner's case was that the shares had been given to Mr Grassie in exchange for the work that he (Mr Grassie) had carried out in identifying and encouraging others to invest in BSVL, but that the crucial voting rights (less 10%) attached to those shares were always intended to remain with Mr Wagner. The dispute over the exercise of the Bothy power of attorney was, at least in part, responsible for a paralysis of decision making within the BSVL board during 2016. Whether it should in fact have been allowed to impede boardroom business was a topic on which the parties took opposing positions both at the time and in this litigation.

BSVM and the nature of its role

31. Mr Wagner was, until 2018, the sole director of BSVM, thereafter Mr Dunbar took over. The company secretary at relevant times was Mr Stirling. The company’s unaudited financial statements identify its principal activity as *“the provision of management services”*. Whether its role was in fact to provide such services to other

companies under the BSVL umbrella was contested as was the scope of any practice whereby it did provide such services.

32. BSVM's role was described in different ways at different times. In a BSVL resolution passed on 27 September 2016 the directors, including Mr Wagner, recorded that: "*The Company owns 100% of Bright Station Ventures Management Limited, a technology company focused on innovating in web based technologies and services*". Mr Wagner accepted in his evidence that this was inaccurate though the point was made in submissions that the resolution had been drafted by SMP. Whilst that may be the source of the inaccuracy, it suggests that the two professional directors of BSVL were unaware, at that stage at least, of the role which Mr Wagner ascribes to BSVM and that he did not check the draft. None of this is surprising perhaps given the way in which the companies were run. No one has suggested that BSVM was at any point a company which had any direct involvement in web-based technologies, so I am inclined to treat this statement simply as an error.
33. Mr Glavanis was clearly aware, as a shareholder in BSVL, that BSVM was supporting "*group entities of BSV*" although he confined this to the UK and UK operations with the aim of protecting BSVL from becoming liable to tax in the UK.
34. In an email to Mr Dunbar of 24 October 2018, as he was about to step down as a director, Mr Wagner said: "*BSVM was set up to get VAT on UK service costs and all the internet, phone systems, rent at Percy Street etc went through it. I really didn't get involved in the admin.*" This description of the original rationale for the incorporation of BSVM is borne out by Mr Agoh's evidence.
35. In a letter of 24 July 2020 in response to a request for information from BSVM's solicitors Mr Wagner said:
- "Bright Station Ventures (and its subsidiary, Bright Station Ventures Management Limited) (together "BSV") operated as a holding company with its primary asset being Powa Technologies[...] BSV operated as a service provider to Powa and other BSV investee companies (BuyaPowa, Attraqt, Aigua Media etc) whereby it contracted with utility providers (property, power, telecoms etc) and re-charged these services to the investee companies [...]. BSVM was set up as the trading entity and BSV was the holding company."*
36. In this context the term "trading entity" was, it seems, a loose reference to the service contracts BSVM entered into rather than any activity which generated profit. The intention was to contrast the operation of BSVM with that of BSVL which was a passive investment and holding company.
37. Mr Agoh also gave an explanation, in his witness statement, as to why BSVM had been set up, saying that he had suggested that it should be used to hold the lease of the Powa group offices and to pay for administrative and bookkeeping services to the group. In addition, it met overheads such as telephony services. Mr Agoh described how costs incurred would be dealt with:

"As and when those costs were incurred by BSVM, they would be later appropriately apportioned by me in the ledgers for the other group companies where they were also benefiting from those services. I recall that, on occasion,

I would raise invoices between the group companies as part of that apportionment and ensure that the relevant VAT payments were also apportioned.”

38. Mr Agoh explained that these ledgers would then be sent to the group accountants, BDO, who would prepare end of year accounts, save for the BSVL ledgers which would be sent to the nominee directors, for the same exercise to be carried in the Isle of Mann.
39. Intercompany invoices have never been produced even though Mr Agoh said they were raised. He was nevertheless able to point to ledger entries which appeared to support his explanation as to how costs were accounted for. The pleaded case was that it was unnecessary for BSVM to formally recharge. It is common ground that there is in fact little evidence of formal recharging of BSVL or investee companies by BSVM and that there is no documented management services agreement between BSVM and any other group company.
40. There was an issue as to precisely how the case had been pleaded but Mr Wagner's evidence and the case advanced at trial, was that “in practice” BSVM was established and operated as a service company irrespective of whether it had a legal obligation to other group companies to act as such or to make payments. This represented, to some extent, an evolution of Mr Wagner's case which had asserted that invoices were issued and that BSVM had a range of spending “commitments” to third parties which it was obliged to meet on behalf of other companies in the group. This was certainly partially true in relation to the sort of expenses which it was originally envisaged that BSVM would meet. Mr Wagner accepted in evidence that he had not been precise in his description of what the company did and agreed that it had no extraneous source of funding so that it either had to be put in funds or to recharge any expenses it incurred. Absent recharging it was not in issue that its only source of funds was Mr Wagner, other group companies or its parent company, BSVL.
41. Mr Derbyshire agreed in his oral evidence that “*BSVM was a service company that paid all sorts of overheads for the group*”. There was evidence that his own firm had invoiced BSVM for its services. He saw nothing irregular in BSVM paying rent for offices that were occupied by personnel from different companies associated with BSVL because “*it was a service company to the group*”.
42. Mr Charmer's evidence in relation to payments made in relation to BSVL and BSVM is that any queries which were raised were answered; there were no “red flags”. He said “*At the time I did not think it was strange that there was no formal relationship between BSV and BSVM. It was and remains common practice to make payments to subsidiaries on an interest free basis.*” He thought it would be normal for BSVM to support the Powa companies as a service company in the same way as it supported the English group companies.
43. In his oral evidence he replied to questions on the topic as follows:
 - Q...I think you agree with Mr Derbyshire -- and your statement, I think, is perhaps even less equivocal than his on this -- that BSVM was the group service company?*
 - A. Agreed.*
 - Q. You say rightly in your statement that there was no formal documentation recording the role of BSVM as the group service company?*

A. Yes.

Q. You didn't ever at the time consider there had to be such documentation, did you?

A. No.

Q. And nobody else, as far as you are aware, at the time, ever suggested that there ought to be some sort of formal documentation?

A. Not at the time, no.

Q. And you were content, as was Mr Derbyshire, for Mr Wagner to be responsible for the running of that service company in terms of its expenditure on rent?

A. I was, yes.

Q. On telephones?

A. Yes.

Q. On employee expenses claims?

A. Yes.

44. As Mr Campbell submitted, it was also clear from the statutory directors' evidence that the role of BSVM extended beyond administrative overheads. It included paying third-party debt liabilities of investee companies, even when BSVM/BSVL had no legal obligation to do so. That created an inter-company liability from the investee company to BSVM/BSVL. BSVM and BSVL were nevertheless not required to demand or collect 'recharges' or other inter-company liabilities within any specific timeframe. Both Mr Derbyshire and Mr Charmer agreed that promoting the success of investee companies was crucial for the group's overall value, even if it involved lending them money since promoting the success of the investee companies was the only route to value for the group as a whole.
45. In his witness statement when dealing with the relationship between BSVL and BSVM Mr Derbyshire said:
- "I do not remember anything formal or any specific documents between any of the companies reflecting their relationship and my view is that at the outset there was probably not a fixed idea as to how the relationship would work it was something that developed over time."*
46. I consider that to be a fair summary of the way in which the role of BSVM evolved. It operated as a services company from the outset, meeting expenses on behalf of group companies and initially providing limited services. It was however the obvious and available vehicle when it became necessary to carry out a wider range of activities for the group including receiving and advancing monies.
47. BSVL itself repaid a loan, made to BuyaPowa (a subsidiary of BSVL) by Mr Dunbar, in July 2016 and repaid a loan made to Powa by Continental Mining so that the practice of meeting the liabilities of subsidiary companies within the group was evidenced in practice.
48. Mr Plewman accepted in argument that if a company is in practice doing things for other companies in a group that may be sufficient in appropriate circumstances to mean that there is no breach of a director's duty in authorising transactions that fall within the practice irrespective of whether there is a legal obligation to perform or pay. I conclude that there was such a practice.

VC247, BSL & Rezolve

49. Three other companies feature directly in the litigation because they made advances to BSVM which Mr Wagner contends give rise to a claim by him for repayment or restitution.
50. Vertical Commerce 247 (“VC247”) was a subsidiary of Powa. Mr Wagner was not a shareholder. His case was that he used it to make transfers, in difficult circumstances during 2016, because it had a bank account. In 2018, prior to its dissolution, he took an assignment of its rights against BSVM. Whilst the Defendant's position at the outset of the trial was that there was “material doubt” about the authenticity of the assignment it was eventually accepted that the assignment was effective to transfer such debt claims as VC247 had against BSVM. The assignment recites:

“...the Assignor hereby assigns and transfers all of his right, title and interest in and to all the debts owed to the Assignor by Bright Station Ventures Management Limited, a company registered in England under Company number 07710419. As at today's date, the amount owing to the Assignor amounts to GBP Sterling £733,222.24 and US Dollars \$166,896”.

51. The two other companies are Bright Station Limited (“BSL”), which despite its name was not part of the Group, and Rezolve Limited (“Rezolve”). I set out below Mr Wagner’s explanation for the formation of Rezolve.

Powa PLC

52. In 2013, Powa Technologies Group PLC (“Powa PLC”) was incorporated to hold the shares in Powa Ltd. At inception, Powa PLC was wholly owned by BSVL. Some of BSVL’s shares in Powa PLC were then sold to third parties including Wellington Asset Management (“Wellington”), an institutional investor based in the USA (managing the interests of various secured lenders), and the “Series A investors”; principally Aquila Investments Ltd (“Aquila”) and Rovio Ltd (“Rovio”). Following these share sales, BSVL was left with just under 60% of the shares. In due course Wellington advanced over \$60m to Powa PLC by way of secured lending.
53. High valuations and bright prospects were attributed to the business in its promotional material. In 2015 Goldman Sachs “valued” the Powa business before it started trading at between \$2Bn and \$50Bn. However, by late 2015 Powa/Powa PLC was facing a liquidity crisis as it ran short of cash and repayment dates approached for existing borrowing (by way of loan notes falling due in December 2015). There was a desperate need for funding until the anticipated major deals could be secured. There were discussions with Wellington about its lending which included a proposed extension of the loan maturity date. Those discussions continued into early 2016 but came to nothing and were then overtaken by events.
54. In order to bridge the shortfall in funds:
- a. On 29 October 2015, Mr Wagner lent Powa PLC \$1m;
 - b. On the same day Mr Wagner gave a personal guarantee for a loan of £600,000 from a Mr Nic de Boinville to Powa PLC. There is a back-to-back indemnity,

also dated 29 October, from BSVL agreeing to underwrite that guarantee addressed to Mr Wagner and signed by him as Chairman of BSVL;

- c. On 2 December 2015 BSVL lent Powa PLC \$1m;
- d. On 11 December 2015, Mr Wagner gave a personal guarantee for a loan of \$2m from Mr Ben White to Powa PLC. Having advanced the sum agreed, Mr White joined the board of Powa PLC, his appointment being approved at a Board Meeting on 13 January 2016, and;
- e. On 17 December 2015, Mr Wagner gave a personal guarantee for a loan of \$2m from Mr Stuart Roden to Powa PLC.

55. Mr Wagner appears to have been the only individual prepared to give personal guarantees at this difficult time and there can be little doubt that he was seeking to inject funds (including his own) into Powa PLC to keep it afloat. It was evident that both he and other BSVL shareholders and investors considered Powa to be the most important and potentially lucrative of BSVL's portfolio of investments.

The Powa Administration and its aftermath

56. These efforts to shore up Powa/Powa PLC were frustrated when on 19 February 2016 Wellington appointed Mr Edwards and Mr Harding of Deloitte as joint administrators of Powa PLC and Powa. Mr Wagner resigned as a director on the same day. On 3 March 2016 the assets of the companies were purchased out of administration by Bidco 964 Ltd, a special purpose vehicle owned by Mr White and Wellington. The readiness of Mr White and Wellington to acquire the assets, principally intellectual property, suggests, as Mr Wagner contended, that they were seen as having significant value as part of a "tech unicorn" business.

57. Although there were many Powa subsidiaries, it appears that Deloitte did not engage with them or include them in the administration. In his witness statement Mr Wagner said he was faced with:

"... having to close down 18 worldwide subsidiary offices of Powa as I was still a serving director, and the company directors all faced threats of potential criminal liability in some countries."

58. In a later email of 31 July 2016 to Mr Dunbar (sent in similar terms to other shareholders), Mr Wagner explained:

"After the sale of IP, Deloitte informed me that I was the director of these subsidiaries and it was my responsibility to close them down. In order to do so, I had to engage with lawyers all over the world to close down the entities in an orderly manner. This was expensive in places like Asia and some countries in Europe as liabilities needed to be settled as well as lawyers' fees.

Whilst BSV had no liquidity, I advanced the money on BSVs behalf to make sure these entities were closed and liabilities - both criminal and commercial - were lifted from me (as director)".

59. In his oral evidence he said:

“So, Deloitte, when they took control of Powa, they basically -- there was subsidiaries, and they deliberately left all of those subsidiaries as, like, “zombie” companies, and the decision they took, it was kind of cynical, but the decision they took was because all -- they had obviously carefully evaluated those 18 companies before determining not to touch them. They realised that I was a director on all of them, in Taiwan, Singapore, Germany, everywhere, all over the world. None of them had any money. Most of them had liabilities to the topco. And so, by not putting them into -- there was no value of them taking the administration of them because it would have been a cost to them. By leaving them to me as a director, I had all the responsibility to close them down, finance any liabilities in countries where I would have had a criminal -- in some countries you have a criminal liability if you do not solvently close down a company, like Italy, from the top of my head Singapore, I think Germany there is an element of it, and other countries. So in the aftermath of Powa going down, amongst all this other stuff that was going on, my Lord, there was a huge amount of intense activity all over the world, which I didn’t have really the money for, to close these companies down, where I had to take on counsel. A lot of those things were never charged to BSV and still aren’t part of this -- I’m not even sure if any of them made it into our claim here. But I had to pay lawyers all over the world to close them down.”

60. Mr Wagner’s supplemental disclosure includes email correspondence in which he had sought professional advice as to how companies could be wound up in the jurisdictions in which Powa had subsidiaries and there can be no doubt that much of his time and attention was devoted to doing so in 2016 although this was not the only pressing matter he had to deal with.
61. Mr Charmer’s evidence was that he thought it would be Mr Wagner’s role to close down the Powa subsidiaries and he did not see anything unusual in him doing so. Mr Dunbar agreed that he was aware that Mr Wagner considered that he was obliged to carry out work in closing down the Powa subsidiaries and would expect reimbursement of funds that he had supplied personally. He agreed that he had not voiced any objection to this.
62. In his June 2016 update to shareholders Mr Wagner set out a list of activities that had taken place since March 2016 and which had led him to make personal payments. They included:

“Legal fees:

a. £3,500 and €17,000 to Taylor Wessing for Powa Office closures

b. Payment of USD\$7,247.00 to Lee & Li Attorney-at-Law - Taiwan for old debt owed to this company for services provided for Powa Taiwan so that they will release documents to enable preparation of dissolution of Powa Taiwan

c. Payment of USD\$7,000.00 to Baker & McKenzie - Taiwan against dissolution of Powa Taiwan

d. Payment of USD\$15,000.00 to Lex Compass Singapore against closure of Powa Singapore

e. Payment of SGD\$2,000.00 to Lex Compass Singapore against closure of Powa Singapore f. £55,000 to Mishcon de Reya for work carried out in 2015”

63. The accumulation of these fees and other payments were described as *liabilities “for BSV not accounted for in the Balance Sheet”*.

64. In his circulated e-mail of 31 July 2016 Mr Wagner also provided more details of the background to the administration and his attempts to shore the company up and pursue remedies. This prompted an e-mail from Mr Stirling to Mr Wagner in the following terms:

“This is the first I have heard of all these contracts between BSV and the Powa subsidiaries and the investment in BuyaPowa.

During the last four years I have done my best to make sure that all the procedural requirements of running a company with Isle of Man domicile have been complied with. This has not always been easy as I have often not been advised of planned developments until very late in the process.

Recently this "late in the process" has become "after the event has happened". In this scenario it is not possible for me to go on as the Chief Financial Officer of BSV. Therefore I am resigning with immediate effect from all my involvements with BSV companies.”

65. The reference to “contracts” was to agreements put in place between BSVL and the subsidiary companies which, Mr Wagner said, had frustrated any attempt to buy Powa/Powa Plc out of administration with the subsidiary structure in place. The “investment in BuyaPowa” was in fact the repayment of Mr Dunbar’s loan (see earlier). Mr Wagner’s response, in an unsuccessful effort to dissuade Mr Stirling from resigning, was:

“Please find a sample of the contract I was referring to attached. It was signed by Polina Atherton in the IOM in September 2015 and is one of 18 similar agreements. Were you around at that time? I am surprised you were not involved in some way.

Regarding the urgent investment last week into BuyaPowa. I apologise for not reaching out. Ivor Dunbar had advanced the monies and we repaid him. I had our previous £150k loan wrapped up into an 'at call' loan agreement for the £150k and the new £120k (also attached). This is much better for BSV as it happens.

Both Henry and I have been dealing with a lot of challenging and time sensitive issues and although not an excuse for breaching protocol, I would ask you to reconsider your resignation with the commitment from me to ensure this doesn't happen again. Will you do that?”

66. Mr Wagner described the period following the administration as turbulent and chaotic. He said:

“All my access to emails (including BSV) was taken away by Deloitte, and all the company bank accounts were frozen. This meant that I had to be extremely

focused and prioritise all my available time such that many day-to-day tasks had to be deferred or could not be completed until matters had calmed down at some time in the future. In retrospect, I accept that these circumstances meant that I did not always fully and formally record matters in writing or hold formal meetings. This was simply not possible. ... I was at all times fully transparent with the other directors of BSV and with its shareholders. I considered that all my actions were not only objectively in the best interests of the BSV group but also that they were understood and approved by those other directors and shareholders.”

67. Mr Agoh’s oral evidence painted a similar picture of work having to be done under great pressure of time and of battles fought on a number of fronts. It is evident that steps were being taken to mitigate the effect of the administration and explore options. The orderly run down of the Powa subsidiaries was carried out in this context.

68. In the June 2016 shareholder update Mr Wagner said:

“In the meantime, I have incorporated Rezolve Limited within which I have granted BSV shares representing just over 10%. This new business is quickly building momentum around an improved 'PowaTag' proposition. I have been very careful not to breach any IP or other rights owned by 964 Bidco.”

69. The BSVL shareholders considered that Wellington and Mr White might have acted unlawfully in precipitating the administration and decided to explore whether BSVL could bring claims against them. In part at least, this arose from a suspicion that, in breach of his fiduciary duty, Mr White had been acting behind the scenes, after he had joined the board, in order to sabotage attempts to raise bridging finance and had conspired to bring down Powa/Powa PLC. Mr Dunbar appeared to share that view when he later provided a witness statement in support of the Series A Investors’ application to appoint a new administrator.

70. I should make it clear that I am not required to determine any issue in this litigation in relation to Mr White’s or Wellington’s conduct, nor as to the alleged unlawful means conspiracy. It was suggested to Mr Dunbar that he had changed his tune in the present proceedings to place blame on Mr Wagner for mismanaging the Wellington relationship. Whilst Mr Dunbar was certainly critical in this respect, this was, I think, simply another example of him becoming disenchanted with Mr Wagner’s leadership as he became better informed.

71. In November 2016 BSVL and the lead shareholders (Aquila and Rovio - the Series A Investors) jointly engaged solicitors, Hewlett Swanson. The solicitors’ terms of engagement were approved at a board meeting on the 2nd of November 2016.

72. The positive legal opinion provided subsequently included advice that there should be an application for the appointment of a new administrator in place of Deloitte and placed a value on the claim of \$2 billion. In relation to any potential defences asserting that Powa was bound to fail as a result of underlying financial problems or the negligence/breach of duty of its board, the advice records:

“We have discussed this issue with Mr Wagner, Mr Dunbar and other representatives of the Powa Lead Shareholders, who are confident that any such arguments can be strongly and effectively refuted.”

73. BSVL then turned its attention to the question of how litigation should be funded and pursued, instructing Hewlett Swanson to carry out *“supplemental work”* to assist. Although not a director, Mr Dunbar was identified as *“the primary point of contact”* in Hewlett Swanson’s terms of engagement of 14 November 2016.
74. By the spring of 2017 the initial unity of approach amongst the BSVL investors had given way to disagreements about litigation funding, the distribution of any proceeds and the identity of an alternative administrator.
75. At a board meeting of BSVL on the 24th of March 2017 the board resolved to create a special purpose vehicle (*“SPV”*) to be funded by previous shareholders of Powa and third-party finance. It approved *“a motion to assign the case to Dan Wagner to advance the case and secure the funding.”*
76. It then reconvened to consider the structure of the *“waterfall”* arrangements under which it was proposed that the proceeds received by the company should be distributed. The minute records that *“It was noted that Ivor Dunbar (a 12.064% shareholder of the Company) had written to Martin Derbyshire and Michael Charmer via e-mail to advise that an alternative fully underwritten rights issue is being prepared and would be submitted for approval.”* On the 30th of March, by e-mail, Mr Dunbar indicated his dissatisfaction with the arrangement proposed and reiterated his intention to offer an alternative.
77. Mr Dunbar's proposal was set out in an email of 31 March 2017 and was supported by the Series A investors. Both Mr Wagner and Mr Dunbar maintained that their funding and distribution schemes were fairer to all. Mr Wagner’s initial scheme incorporated a percentage carry over to himself whereas Mr Dunbar proposed a correlation between the amount invested in the litigation and the percentage share of the proceeds. Mr Dunbar’s position was that Mr Wagner’s proposal conferred a substantial personal advantage on him (Mr Wagner), in preference to the other BSVL shareholders, whilst a further revised proposal was so opaque as to be impossible to assess objectively. Mr Wagner’s evidence in cross-examination did not shy away from suggesting that the scheme backed by Mr Dunbar and others was tainted by self-interest, not least because it restricted a return to those prepared to fund an SPV. Each accused the other of proposing dilutive rights issues to gain control. Mr Dunbar’s proposal in fact contained two options the second of which addressed the issue of dilution for non-participating investors.
78. On 10 April 2017 Mr Dunbar requested the convening of an Extraordinary General Meeting (*“EGM”*) of BSVL, for the purposes of considering resolutions to appoint him and Mr Press as directors with immediate effect. As a result of the initial impasse to which this led, Mr Derbyshire and Mr Charmer resigned as directors on the 11th of April 2017. They were replaced by Mr Sharp and Mr Caplin who were appointed as interim directors by Mr Wagner.
79. Mr Derbyshire’s email of 11 April to Mr Wagner explained the position of the professional directors:

“Having thought about matters overnight and considered the content of our call of yesterday it is with regret that I confirm my decision to resign from the board of BSV with immediate effect. I also had a conversation with Michael yesterday and he is of the same view in respect to his position. The reasons are as outlined in my emails of Tuesday the 4th April and Monday the 10th April in addition to the realisation that despite best endeavours I am not able to secure that a dialogue takes place between the various parties with a view to resolving the issues, I am simply not able to continue in the role on a Company where there is not majority shareholder support for the board as currently constituted. Whilst that support may actually be achievable currently there is no clear visibility on the matter absent a formal vote on the various issues As indicated our resignation means that the Company is not capable absent new appointments to undertake any activity other than to secure alternate appointments, the responsibility for new appointments is vested in the remaining Director and / or the shareholders. The resignation does create the opportunity for the board to be reconstituted with nominations from potentially both disparate shareholder groups in line with a resolution you make to appoint additional board members and in line with the EGM request for shareholder representation inbound yesterday.”

80. The new directors held a board meeting on the 28th of April 2017 to consider how the proposed litigation could be pursued. It was noted that, on advice from counsel, the proposed assignment of any BSVL claim to Mr Wagner would be in breach of the terms of the loan notes and debenture granted by the company to various of its shareholders. In addition, there was simply no money available to fund a claim. The minutes record:

“It was noted that Dan Wagner had been funding a claim ("DW's Claim") on his own account for the last year which is similar to BSV's Claim and, in consequence, his interest could potentially be seen as conflicting with that of the Company in respect of the need to ensure that DW's Claim was supported by the Company's....

It was noted that the Company would benefit from any claim brought against Wellington, Ben White et al in any event due to its ownership of Powa (c. 70%) and its debt with Powa (c. \$10m) but:

...Funding the Claim would be highly speculative;

...The Claim could go on for many years and would therefore need considerable management time and input; and

...The costs of pursuing the Claim in the courts could be materially in excess of £10 million.

It was also noted that Dan Wagner has been funding DW's Claim for the last year and is willing to continue to pursue it. It was further noted that if DW's Claim is successful, the Company would benefit as a creditor insofar as any settlement or compensation received by Powa would, in the majority, be paid out to the Company due to its large debt and equity position. If DW's Claim is unsuccessful however, the Company would not have diverted valuable cash and management resources that currently it doesn't have.

It was noted that the timing of any action either on BSV's Claim or on DW's Claim was pressing and that, absent any available funds, it could be in the Company's best interests not to pursue BSV's Claim at this point...

The directors then considered the Company's financial position, its ability to pay its debts as they fell due and the current state of its balance sheet. It was noted that there was no cash available to pursue BSV's Claim. It was also noted that whilst DW is going ahead with DW's Claim this does not prevent the Company from going ahead with BSV's Claim if it wanted to or had the means to do so at some point in the future.

Consequently, IT WAS RESOLVED THAT the Company not pursue BSV's or any Claim at this point but would seek to benefit from the success of DW's Claim."

81. Mr Wagner was asked about this in cross examination:

Q. You will accept this is a formal decision by BSV not to pursue a claim itself and, instead, to leave you to continue a claim that you were funding on your own account?

A. Correct.

[...] Q. And I will simply put to you that in that context, for you to suggest that now the costs of you doing so should be borne by BSV, or indeed in this case by BSVM, is plainly at variance with what was factually agreed at the time.

A. I think that that is a fair point, yes.

82. On 2 May 2017 Mr Dunbar sought an EGM to remove Mr Sharp and Mr Caplin. This began a boardroom battle, in effect, to wrest control of BSVL from Mr Wagner in circumstances where, absent the ability to vote the Bothy shares in Mr Wagner's favour, some 52% of the shareholders supported the resolutions proposed by Mr Dunbar. The basis on which Mr Wagner could call for an exercise of voting rights was therefore key to the contest for control of the board which took place in the summer of 2017.

83. After an initial delay the EGM was convened on the 12th of June 2017 when resolutions were tabled. In fairly short order Mr Sharp, who was chairing the meeting, refused to take into account the Bothy votes (and the exercise of a proxy which had not been received by the time of the meeting) and rejected the resolutions.

84. There was a further EGM on the 18th of July 2017 when Mr Sharp declined to conduct a poll on the resolutions, decided to hold the count over until the 15th of August 2017, and gave as an explanation that proceedings had been issued against Bothy in relation to Mr Wagner's, asserted, entitlement to cast its votes. He said:

"There is a dispute in the Courts of the voting rights of a block of shares known as Bothy. In view of this, to be determined in the Courts and to give the parties a chance to determine the outcome, the poll will be conducted on Tuesday 15 August at noon by the Company Secretary. The business of this meeting being formally concluded, I declare the meeting closed."

85. In fact, no proceedings in relation to that dispute had been issued at that stage (see further below). Mr Sharp refused to allow any discussion on his decision or to elaborate on the court proceedings he was referring to. He was to some extent on the horns of a dilemma having resisted pressure, in effect, to determine the dispute himself. Given the significance of the voting rights attached to the Bothy shares his decision to delay calling a poll might be explained as a pragmatic one but it was certainly seen by Mr Dunbar and others as supporting Mr Wagner's objectives. I conclude that it was intended to do so.
86. Mr Sharp's decision led to tetchy exchanges and an attempt to carry on the meeting under new chairmanship with the result that the resolutions were passed. However, the company providing secretarial services to the Board of BSVL refused to recognise the resolutions, on the instructions of the directors, so they went unacknowledged and unimplemented. A further EGM took place on the 15th of August 2017 with Mr Caplin in the chair. He announced that the Bothy shares were unfit to vote because of the, now, pending litigation with the effect that the resolutions were not carried.
87. In cross examination it was suggested to Mr Wagner that he was not prepared to submit the competing funding proposals to a shareholder vote, which was the underlying reason for the battle over control. His response was that this was a case of obstruction and delay on the part of Mr Dunbar. On balance I conclude that both Mr Sharp and Mr Caplin were, during this period, acting in a partisan way, by deferring and delaying a shareholder vote, so supporting Mr Wagner's interests. The litigation which arose from this was not intended simply to resolve an impasse but to advance very different, and by 2017, irreconcilable approaches to the strategic direction of BSVL.

Litigation

88. By this stage both the Series A investors and Mr Wagner had brought separate applications (on the 12 and 15 May 2017 respectively) in the Chancery Division (Manchester District Registry) for the appointment of new administrators; Mr Wagner on the basis that he was a creditor of Powa because of "undrawn salary" of £3.3M and as a creditor of Powa PLC in respect of a loan. The dissolution of the Powa companies had been suspended pending the resolution of these competing applications.
89. On the 11th of September 2017 His Honour Judge Bird handed down a judgment in which he rejected Mr Wagner's application to appoint KPMG and acceded to the application of Aquila and Rovio to appoint Grant Thornton. He concluded that "*Mr Wagner has interests which might be regarded by the creditors as being in conflict with the duties of the administrators*" because, he said, the administrators might wish to investigate his role as a director and as the person who appeared to have been in charge. These proceedings were referred to in the course of the hearing as "The Administration Proceedings". For the reasons set out earlier the appointment of new administrators was regarded on all sides as the first, necessary, step in seeking to pursue a claim against Mr White or Wellington.
90. The order made following the judgment provided that Mr Wagner personally should:

"a. bear his own costs of the Wagner Application and of the Aquila Application and shall not be entitled to claim them as either an expense or as a creditor in the Administration; and

b. contribute to the costs of Aquila of and occasioned by the Wagner Application and his opposition to the Aquila Application in the total sum of £187,000,”

91. On 26 July 2017 Mr Dunbar had issued proceedings in the High Court of Justice in the Isle of Man (“the IOM Proceedings”) against Mr Wagner, Mr Caplin and Mr Sharp. He sought to challenge the conduct of the EGMs. He subsequently obtained an interim injunction to prevent a rights issue and an order for a preliminary issue to be determined in relation to the exclusion of the Bothy votes (at the 15 August meeting). BSVL was a necessary party to these proceedings although it did not play an active role.
92. On 27 July 2017 Mr Wagner issued proceedings against Bothy in the Chancery Division (“the Bothy Proceedings”) seeking specific performance of the alleged undertaking by Bothy to issue a renewed power of attorney, together with declarations that the undertaking was contractually binding and permitted him to exercise the voting rights attached to Bothy’s BSVL shares as he saw fit; this being the putative litigation referred to by Mr Caplin, first at the July meeting and then at the August meeting at which the Bothy votes were excluded.
93. The Bothy Proceedings and the IOM Proceedings were compromised on 30 November 2017 by a deed of settlement (“the Settlement Agreement”). Mr Wagner said that he had settled only because he had run out of energy and patience and wished to bring all disputes to an end (notwithstanding that he had been given advice to appeal the Administration Proceedings). On the central issues in the litigation however his position was more one of capitulation than compromise.
94. In relation to the Bothy shares the Settlement Agreement provided:
- “4.2 DW irrevocably agrees that he has no rights whatsoever, whether in law, in equity or otherwise over Bothy's shares in BSVL whether (without prejudice to the generality of the foregoing) under the Bothy Undertaking, by a power of attorney, or otherwise.*
- 4.3 DW irrevocably agrees that he has no right in law or in equity to require Bothy to execute any power of attorney pursuant to the Bothy Undertaking or otherwise.*
- 4.4 DW and Bothy irrevocably agree and acknowledge that, in so far as they may exist, any and all powers or rights granted to DW by Bothy pursuant to the Bothy Undertaking, any power of attorney or otherwise are hereby terminated with immediate effect.”*
95. Subject to provisions for the allocation of reserves to costs, the Settlement Agreement also provided that “*each Party shall bear their own costs in relation to the Proceedings and this Deed*” and included indemnities in relation to costs and damages recovered against the parties in any future claims in relation to the matters which were the subject of the settlement.
96. Mr Dunbar and Mr Press then became directors of BSVL and on 24 October 2018 Mr Dunbar became a director of BSVM.

97. There were further proceedings, referred to as “the White Proceedings”, relating to the \$2,000,000 of funds introduced by Mr White (and a Mr Roden) in respect of which Mr Wagner had given a personal guarantee. The guarantee was called upon by reason of Powa PLC’s administration (a default event) followed by statutory demands when it was not honoured. Mr Wagner's argument that Mr White could not call on the guarantee because he had caused the administration and that the statutory demands should be set aside was rejected by the Registrar and on appeal (see *Wagner v White* [2018] EWHC 2882 (Ch)).
98. Mr Wagner does not seek to recover any of the costs of the White Proceedings but does claim reimbursement of sums paid to various law firms and Manx advocates in respect of the other litigation.

Legal Expenses and Costs

99. Mr Wagner’s primary case is in debt, because he met legal expenses and costs “*on the basis of an agreement – between him in his personal capacity, and him as sole director of BSVM – that they would be reimbursed by BSVM as the service company of BSVL, or by BSVL as ultimate beneficiary.*” The obvious way in which such a debt might arise was if BSVL had resolved to pursue a claim and Mr Wagner had agreed, subject to reimbursement, to fund its legal expenses and meet adverse costs; but that is not the position in relation to any part of Mr Wagner’s claim. He does not assert that he reached any express agreement with BSVL that it would reimburse his legal expenses and underwrite any costs liability. He could easily have done so if, as he contends, he was incurring legal expenses in its interests.
100. BSVM had no legal liability to pay any of the bills which make up the legal expenses claim. It could not have been sued for payment by those who had provided legal services. It was not the client and did not itself have any express agreement with BSVL to meet its obligations to legal providers, assuming such obligations existed. If they did it was for BSVL to enforce them rather than Mr Wagner. There is nothing to indicate that BSVL could be regarded as receiving any benefit on behalf of BSVM. I consider that Mr Wagner's case as to an agreement is at best a post-rationalisation in the absence of any express and memorialised arrangement in relation to legal expenses. I am not persuaded that there was any such agreement.
101. The alternative claim in restitution is predicated on the assertion that had Mr Wagner not met legal expenses they would have been paid by BSVM as a group service company (pursuant to a general practice) and that it was sufficient for the purposes of restitution that BSVM/BSVL had freely accepted a benefit because they had been spared expenditure that in practice they would have incurred. This argument therefore turns on the proposition that BSVM was acting as a service company for BSVL and would do so in relation to litigation which was being brought for the benefit of BSVL or which BSVL would, itself, otherwise have brought. I have accepted that BSVM acted as a services company for the group and that its role had changed over time. It may have included discharging legal bills which related to advice being given to BSVL or the run down of Powa subsidiaries but I do not conclude that its expanded remit included the conduct or funding of contentious litigation on behalf of BSVL without clear authority to do so; there was no “practice” which justified such an approach and it would have been entirely inconsistent with the stance in relation to litigation that the Board of BSVL took.

The Administration Proceedings

102. These proceedings account for the larger part of the overall fees and costs claimed. The applications made in the Administration Proceedings were, for the reasons set out earlier, part of an initial strategy by which substantive claims would be brought by newly appointed administrators of Powa. After the abortive resolution to assign any claim BSVL might have to Mr Wagner, the Board of BSVL disavowed any intention of pursuing such a claim itself at the board meeting of 28th April and resolved in terms not to do so. This was before any application had been made in relation to the appointment of new administrators. As Mr Wagner accepted, the Board expressly recorded that he had been pursuing and funding his own litigation from which, if successful, BSVL stood to gain; as indeed would all of Powa's shareholders.
103. The central point made by Mr Campbell, on Mr Wagner's behalf, was that the board of BSVL supported his proposals both before and after the meeting of 28 April. Thus at the meeting of 14 May 2017 the minutes record that "*the Company continued to be supportive of Mr Wagner and the SPV continuing the action in respect of the Powa companies.*" However, this stopped well short of any indication or promise of financial support or any acknowledgment that the company's claim was being pursued on its behalf. The Chair reminded those present (as he had done in similar terms on 28 April) "*that nothing was stopping the Company from pursuing its own claim at any time now or into the future but unless and until a sensible financing option was open to the Company, it was unable to do so at this time.*"
104. The fact that the Board had taken its decision on the 28 April to avoid any costs exposure from litigation lies uneasily with the contention that there was any agreement or expression of support that left it liable to meet legal costs.
105. Mr Campbell sought to address this in his closing submissions by suggesting that the resolution passed on the 28th of April was confined to BSVL deciding not to support the *substantive* action but was not inconsistent with there *being* "*a continuing agreement for BSVM to support Mr Wagner's preliminary, procedural application to get his preferred administrator appointed.*" However, the meeting of 14 May was concerned expressly with the proposed appointment of KPMG and made no distinction between the application which was to be made by Mr Wagner in that respect and the litigation in which it was regarded as an essential preliminary. The company's position appears to have been a blanket one in relation to any exposure to costs and, contrary to Mr Campbell's submission, it does not appear to me to be a fair reading of the April minutes, or of the subsequent meeting in May that BSVL had accepted any prospective liability in respect of legal costs.
106. The application to appoint KPMG was made in Mr Wagner's name as a creditor of the company. His standing to pursue the application did not derive from BSVL. Following the judgment he was advised to appeal because, it was said, Aquila and Rovio should not have been regarded as creditors. As far as the shareholders were concerned, the majority of them (by number) in fact supported the application made by the Series A investors. It is difficult to see how Mr Wagner, as he suggested in his evidence, could have been acting in the interests of shareholders generally by bringing his applications rather than on behalf the factional interests represented by his and his family's shareholding. It would be a very strange result if BSVL/BSVM were responsible for meeting an adverse costs order against Mr Wagner or his legal costs in

these circumstances. In truth the rival applications were part of the dispute which had arisen as to voting control and as to the basis on which litigation should be pursued and the spoils divided.

107. Mr Campbell adopted the fallback position that in any event work done up to the board decision on 28 April should be regarded as being carried out for the benefit of BSVL. The only relevant invoice from Winckworth Sherwood, the solicitors instructed in relation to the Administration and Bothy Proceedings, is dated 22 May 2017 in the sum of £198,104.16. Whilst that firm had initially been instructed on behalf of BSVL in the administration application, as acknowledged in their terms of business letter of the 26th of April 2017, that was prior to the board meeting of the 28th of April. By e-mail of the 15th of May 2017 Winckworth Sherwood confirmed that they no longer acted for BSVL. As Mr Plewman observed the invoice of 22 May does not, on examination, support Mr Wagner's case. The fee narrative includes a number of entries which were moved from the BSVL matter number to Mr Wagner's personal matter number.

108. I reject Mr Wagner's claim for reimbursement of his own and adverse costs in relation to the Administration Proceedings. I should add that one Winckworth Sherwood invoice of 30 June 2017 does appear to relate to corporate advice and is the only one addressed to BSVL. BSVM concedes that this was for work properly chargeable to BSVL and which I conclude could have been met by BSVM acting as a service company.

The IOM Proceedings and the Bothy Proceedings - Settlement

109. In the circumstances I have summarised, both sets of litigation arose out of disputes amongst shareholders and at Board level as to how claims arising from the demise of Powa should be pursued and funded. Their interrelationship is reflected in the fact that they were compromised in a single settlement agreement to which all shareholders in BSVL were parties. Clause 11 of the Deed of Settlement provided:

“subject to clause 10 above, each party shall bear their own costs in relation to the Proceedings and this Deed”.

110. Clause 10 did allow for BSVL's reserves to be allocated to the payment of Mr Wagner's legal costs, fixed at £125,000, but only after the discharge of shareholder loans and the repayment of Mr Dunbar's and Bothy's costs. Mr Wagner was therefore last in the queue and in any event there were no available reserves. More to the point any liability of BSVL to meet his costs was specifically compromised on the terms set out in clauses 11 and 10. It is not open to him, in my view, to seek to avoid the clear terms of the settlement in relation to costs which related to the “Proceedings”. I also reject this part of his claim.

The IOM Proceedings - Invoices

111. Two invoices from the Isle of Man firm, Cains, were issued to BSVL. The first relates to advice given in relation to the holding of an EGM and, what are described as, “related issues”. The second indicates that the solicitors were asked to consider whether they could continue to take instructions in view of the “uncertain board composition”. The dates suggest that the work was done at a time when BSVL was the client but

against the background of the boardroom dispute having been brought to a head by Mr Dunbar's application for an injunction (against Mr Wagner in person as well as the directors appointed by him). It was accepted in argument by the defendant that the invoices might be regarded as relating to work properly done for BSVL. That appears to me to be a sensible concession given that the invoices were for the account of BSVL. I also conclude that this was the sort of legal work the costs of which BSVM might have been expected to discharge in its capacity as a group services company.

112. There are a further two invoices issued to Mr Wagner by Long and Humphrey. Both invoices, by reference to their title, relate to the shareholder dispute. Mr Campbell accepted that Long & Humphrey's work related to Mr Dunbar's Isle of Man proceedings, which did not progress beyond the early case management stages. Their advice was directed at the directors of BSVL rather than BSVL itself (which was a passive party). Whilst Mr Campbell accepted the principle that companies should not fund one side against another in a shareholder dispute, he submitted that there was no prohibition on directors seeking advice related to case management and undertakings. He argued that if Mr. Wagner had not paid for this advice, BSVM would have met the bill.
113. The Defendant drew attention to an e-mail of the 27th of November 2017 from Mr Helfrich of Long and Humphrey which indicated that that firm was acting for Mr Wagner, Mr Sharp and Mr Caplin in their personal capacities and not for BSVL. In the circumstance which had given rise to the need to seek advice this was not, in my view, work which BSVM could properly have been asked to meet on behalf BSVL. Whilst BSVL was a necessary party so that it would be bound by the result, the litigation was essentially against the individuals.

The Bothy Proceedings -Invoices

114. As Mr Plewman submitted, the costs in the Bothy Proceedings were incurred solely for Mr Wagner's benefit. The central issue revolved around whether he could compel Bothy to grant him a new power of attorney and give him unfettered voting rights. His aim was to exercise majority voting rights for himself, advancing his funding approach for Powa's hypothetical claim, despite opposition from other shareholders (including Bothy). Winckworth Sherwood represented Mr Wagner in the Bothy Claim, as reflected in their invoices, which also included a substantial amount of work carried out on the concurrent Administration Proceedings. However, at least one invoice relates exclusively to work done on the Bothy Proceedings, in settling the particulars of the claim.
115. Mr Campbell's argument turned on the contention that during the summer of 2017, the dispute around the voting entitlement paralysed shareholder decision-making so that resolving it was in BSVL's best interest and, further, that Mr Grassie's actions aimed to undermine Mr. Wagner's position in the Administration Proceedings, which the BSVL Board had resolved to support. As I have indicated earlier, that is not my conclusion as to how and why the shareholder dispute had arisen nor why it remained unresolved.
116. I conclude that none of the work carried out in relation to these proceedings can be characterised as being for the benefit of BSVL and the legal costs arising could not properly have been met by BSVM.

117. Accordingly, I reject Mr Wagner's claim for reimbursement of the costs met by him in relation to the IOM and Bothy Proceedings.

Personal Cash Advances

118. The Defendant's position (in relation to both personal and corporate advances) was that Mr Wagner was using BSVM as a conduit and investing it with a liability to repay him which could not possibly be in BSVM's interests. The Defendant questioned why BSVM was being made to carry a liability which could not be repaid by the underlying companies rather than the payment just being made directly to meet the liability. Mr Plewman nevertheless accepted that where personal advances were made by Mr Wagner there was, if nothing else, a "moral claim".

119. Mr Campbell argued that the advances were clearly to be regarded as loans citing *Chitty on Contracts* (35th Edition at 42-277):

"If money is proved, or admitted, to have been paid by A to B, then in the absence of any circumstances suggesting a presumption of advancement, there is prima facie an obligation to repay the money; accordingly if B claims that the money was intended as a gift, the onus is on him to prove this fact."

120. Once the existence of a debt has been proved the obligation to repay is then presumed to continue unless the borrower proves that the loan has been repaid or otherwise discharged.

121. In the alternative the claim was advanced on the basis of restitution since the sums had been freely accepted and there was no defence of change of position raised by BSVM.

122. The Defendant's response was that this analysis overlooked the additional nuance arising from the duty of a director to ensure that the discharge of liabilities was in the best interests of the company; a company should not take on loans to meet liabilities unless it was legally required to do so, otherwise, it was merely acting as an intermediary and creating unnecessary debt. If the personal advances in fact resulted in a debt liability for BSVM, it was not in its interests for the company to borrow funds from Mr Wagner and use them to meet third-party liabilities. BSVM could therefore claim damages equal to the liability amount from Mr Wagner and his claim would fail for circuity of action.

123. This dispute was essentially a further iteration of the argument around the status of BSVM as a service company performing functions within and for the group. As I have indicated there was a precedent for BSVM itself meeting group liabilities by repaying lending. Using BSVM to borrow and channel funds in 2016 and 2017 to deal with the urgent issues facing the group companies was by that stage within the role that, as a matter of practice, it was carrying out.

124. In 2018 Mr Agoh explained to Mr Dunbar that Mr Wagner had:

"...advanced money to BSVM to meet some obligations after the Powa bankruptcy and because all the other accounts were frozen. Many payments had

to be made to close down Powa offices around the world, pay legal fees and other costs that were left after Powa went out of business.”

125. The relevant advances, which were not disputed, were set out in Annex 1 to the particulars of claim and were made between March of 2016 and October of 2017 (most in the Autumn of 2016), thus during the period when Mr Wagner was seeking to deal with the winding up of subsidiaries and the aftermath of the Administration. Whilst it may have been the case that the initial and most intense phase was over by June of 2016 the amounts and distribution of the advances are consistent with the work that he described himself as carrying out in this period in relation to the Powa subsidiaries and accords with Mr Agoh’s evidence on the point. I conclude that the personal cash advances are recoverable.

The Corporate Advances by BSL and Rezone

126. Mr. Wagner contends that he facilitated the funds advanced by these entities. He asserts that the funds were available to him personally, and gave rise to a personal right to repayment.

127. Mr Wagner accepted in evidence that there were no express agreements and the case really became one, in argument, of implied corporate loans. Even if that is correct, as the Defendant observed, claims for repayment belong to the companies making the advances and not to Mr Wagner personally. The suggestion that he had caused the loans to be made and was entitled to repayment because he was substantially invested in the companies advancing the monies was not a basis for ignoring their separate corporate identity. Rezone at least has other shareholders and has been acquired by another company.

128. If there are claims by way of implied loan then they belong to the companies themselves and not to Mr Wagner. I reject these claims.

The VC247 Advances

135. Mr. Wagner described VC247 as a convenient shell entity with a bank account which was used to channel his personal consultancy earnings to BSVM. He appears to have treated VC247 as his own. He made a filing at Companies House suggesting that he was a 75% shareholder when that was not the case. The Defendant characterised this as dishonest whilst Mr Wagner said it was a misfiling. In fact, BSVM ultimately controlled VC247 as a 60% shareholder in Powa. In these circumstances I do not accept Mr Campbell’s submission that the position was analogous to that *in Investment Trust Companies* [2017] UKSC 29.

136. Mr Wagner explained that VC247 was used as something of a last resort:

“One of those companies was VC247. It was the only company –– it had about £100 in the bank, or maybe less. I don’t know exactly. It was one company that I had a credit card and access online to the bank account. At that point, Deloitte had taken all the bank account management, all our cards to access Barclays for Bright Station, Bright Station Limited, Bright Station Ventures. All of them were taken –– were closed down. So the only bank account I had –– I didn’t

have online banking, sorry. I had a chequebook and a credit card, or a debit card.”

137. He said that he:

“... funnelled consultancy revenue and other elements of my activity to generate cash into that vehicle and then I passed that money into Bright Station Ventures to settle debts.”

138. Mr Wagner’s evidence about the basis of the advances made by VC247 (or the services that he had supplied through it) was somewhat opaque. When he was asked about the pleaded case that the monies advanced were, by agreement, owed to him personally he demurred, saying that there was no formal structure or agreement in place. The suggestion that there was an implied loan repayable to him by BSVM is equally difficult to reconcile with the facts. He had not engaged with a request for further information about the revenue generating activities which allowed him to pass cash into VC247.

139. On his case, VC247 was, as far as the advances were concerned, in no different position from BSL and Rezolve, so it might appear curious that he took an assignment of VC247’s debt claims against BSVM. If BSVM owed the money to Mr Wagner personally then the assignment would have been unnecessary and in any event a hollow one since it encompassed debts due from BSVM to VC247 (not debts due from BSVM to Mr Wagner which would have been nothing to do with VC247 save that it was used as a convenient conduit for the advance). It may be that Mr Wagner’s retreat from the suggestion that there was any agreement to repay him personally is to be seen in that context and as part of a concentration on the assignment. Mr Agoh’s evidence was once again helpful in determining the questions to which the advances and assignment gave rise. He explained the circumstances in which the assignment of the VC247 loan had come about:

“I am aware that there was an assignment of the loans of VC247 to Mr Wagner on 10 of December 2018. I was told by Mr Wagner that he wished to close this company but, before doing so, I knew that it was necessary to deal with the fact that VC247 had made substantial transfers of money into BSVM, and that the money was still owed by BSVM to VC247. I discussed this with Mr Wagner, and it was decided that the best way to solve this problem was for there to be a legal assignment of that debt to Mr Wagner personally. I drafted an assignment document and sent it to Mr Wagner for his approval. I recall that I later witnessed Mr Wagner's signature on this document, at the offices at 80 New Bond Street. Following the assignment, VC247 was closed.”

140. It was implicit in his evidence that there was therefore a commercial rationale for the assignment (suggested by Mr Agoh) and that he viewed the advances made by VC247 to BSVM as inter-company loans and, ultimately, as monies due to Mr Wagner.

141. In his oral evidence Mr Wagner said:

“Because in dissolving the business, that would have gone forever, if I hadn’t have done that. So it was suggested that I do it formally and I said that’s a great idea, and we drafted a letter, held a virtual board meeting and that was it.”

142. Although the assignment was initially viewed with some scepticism, its authenticity was not challenged and it was accepted that it was effective to transfer VC247's debt claims against BSVM to Mr Wagner. I conclude that the VC247 advances were part of the funding introduced by Mr Wagner (albeit via VC247) and were received by BSVM in its role as a services company for the group. The advances fall largely in the most turbulent post-administration period when he was involved in the closure of the Powa subsidiaries. But for the assignment and VC247's dissolution they would be sums which it would fall to VC247 to seek to recover.
143. Mr Wagner is responsible for proving the debt owed by BSVM. However, he has not provided VC247's full financial records, and those available contain minimal details, making it unclear if VC247 recorded any debts from BSVM. BSVM's accounts as at 30 June 2016 showed an outstanding balance owed to VC247, of £455,643. Mr Wagner confirmed the accuracy of this account balance during his evidence. The Defendant's case was that sums advanced after the 30th of June 2016, less any repayments, should be added to the figure given in BSVM's accounts to produce the total indebtedness to which the assignment related. However, both parties had conducted an exercise to establish the movements of monies by reference to the bank accounts and the accuracy or otherwise of the annexes to the particulars of claim were dealt with in the pleadings. I conclude therefore that Mr Wagner has established that the advances to VC247 are as set out in the pleadings at annex 1 and that credit has been given for any repayment in annex 2.

The Counterclaim

144. The counterclaim seeks the repayment of damages for payments made by BSVM at Mr Wagner's direction which the Defendant says were not properly expenses of the company. As a result, it said, Mr Wagner's conduct involved a breach of his fiduciary duty to BSVM to act in the company's interests as well as his general duty under section 172 of the Companies Act 2006 to promote its success. There is no issue as to the fact and amount of the payments. There is the additional but much reduced claim in relation to the mismanagement and keeping of records which have resulted in additional cost in rectifying and reconstituting the books of the company. Apart from the latter claim in relation to records, the individual items which were challenged were set out in two annexes to the counterclaim. It is convenient to consider them in the order in which they appear in those annexes save that I deal with issues relating to credit cards compendiously and as the first item.

Credit cards

145. The payments which were made to credit card companies were set out by way of schedule. It was apparent from an early stage in the litigation that it was accepted that there was a mixture of personal and business expenditure. It might plainly have been preferable for spending to be separated at the point at which it was incurred by the use of separate credit cards or accounts. However, that was not the way in which Mr Wagner used his credit cards and it is conceivable that with a large number of companies to which spending might relate it would not have been feasible. Equally where spending related to a variety of different matters and different companies it would seem logical to centralise payments or reimbursement through a services company and I conclude that this was part of the role assumed by BSVM as a matter of general practice.

146. Mr Agoh's witness statement contained a section which was headed "corporate credit cards" but limited to evidence about an Amex card which was in Mr Wagner's own name. His oral evidence was wider in scope. The system described by Mr Agoh was that Mr Wagner would indicate which lines on his credit card statement were incurred on behalf of which group company and these would then be entered as company expenses in the appropriate company ledger. Mr Agoh elaborated in his oral evidence on the particular methodology used by Mr Wagner (although Mr Wagner had not mentioned it in his own evidence). This was therefore a description of a line by line analysis of individual credit card statements and I take Mr Agoh at his word in concluding that it was indeed carried out. That analysis would result in a payment by the relevant company into Mr Wagner's personal bank account. Mr Wagner's oral evidence was "*I had total confidence in his ability to trawl through the expenses and, you know, he had full record from me so he would identify those that were not business and clarify with me and accordingly allocate them as appropriate.*" Mr Agoh in turn said that he would not just post expenses when asked but would query whether or not they were properly incurred on behalf of group companies.
147. The Defendant drew attention to clause 8 of the BSVL Service Agreement which provides:
- "8.1 The Company shall reimburse (or procure the reimbursement of) all reasonable expenses wholly, properly and necessarily incurred by the Employee in the course of the Appointment, subject to production of VAT receipts or other appropriate evidence of payment.*
- 8.2 The Employee shall abide by the Company's policies on expenses as set out in the Staff Handbook from time to time.*
- 8.3 Any credit card supplied to the Employee by the Company shall be used only for expenses incurred by him in the course of the Appointment."*
148. The staff handbook, which was referred to and incorporated, required the provision of an expenses claim form and, it was argued, that since no evidence of such forms, receipts or any other evidence to support transactions in both Amex and Barclaycards had been provided reimbursement could not have been justified. However, the operation of the system explained in the evidence was in my view sufficient to satisfy in substance the contractual and handbook requirements.
149. Where the entire bill was paid so that the payment to Mr Wagner included personal expenditure Mr Agoh said, in his witness statement, that it would be recorded as a salary payment to Mr Wagner. This was at odds with the fact that no salary payments were recorded or carried in the company's accruals. Mr Agoh explained that it could also be treated as an addition to a director's loan account adding: "*So as I'm standing here today, I don't know how I treated it at the end*". Mr Wagner's evidence was that any payments by BSVM which related to personal expenditure on either the Amex or Barclaycard accounts would have been treated as a drawdown of salary albeit that he left the accounting exercise to Mr Agoh (I consider the question of salary further below).
150. Mr Wagner was cross examined about some of the individual credit card statement entries and it was suggested to him that a number of them, at least, are unlikely to relate

to any business expenses which could properly have been incurred by him for the business of BSVL/BSVM. He gave reasons why some, at least, would have been business expenses. I asked at the outset of the trial whether it would have been possible to deal with these by way of a Scott schedule.

151. In the course of his closing argument Mr Plewman produced a schedule with a number of columns indicating what the Defendant contended fell into the category of personal spending and what might be attributable to business expenses. Notwithstanding the amount of work which must have gone into the production of this document, as Mr Campbell observed, it came far too late, was not a joint exercise and could not sensibly be used to identify or resolve the potential issues between the parties which might arise in relation to a granular examination of the credit card statements. Whilst a number of the entries do, on their face, suggest that they might be difficult to justify as business expenditure this aspect of the case was dealt with at a much higher level of generality both in the pleadings and in the course of the evidence.

152. Mr Campbell submitted that it was not appropriate to take a “jackpot” approach and conclude that all expenses were personal and not properly incurred as reasonable business expenses for which BSVM made payment as a group service company. Whilst the admixture of business and personal spending together with scant documentation gives rise to unanswered questions I am satisfied that a filter was being applied by Mr Agoh and Mr Wagner to separate out personal expenditure. I conclude that it was appropriate for BSVM to pay or reimburse business related expenditure in its service company role. I am not persuaded that the counterclaim is made out.

Jeff Max

153. Mr Max was appointed as a director of BSV in August 2017. He had previously worked for other companies founded by Mr Wagner. There was a counterclaim for \$75,000 in respect of a payment made by BSVM to Mr Max on the 13th of January 2014. This was not the subject of any cross examination of Mr Wagner and was abandoned in closing submissions.

Anthony Caplin

154. Mr Caplin was a director of BSVL between April and November 2017. A payment was made to Mr Caplin in the sum of £2,000. Mr Caplin’s co-director during that period, Anthony Sharp, confirmed in his evidence that he was not paid any remuneration as a director. Mr Wagner’s pleaded case is that the payment to Mr Caplin was made to him in his capacity as a director of BSVL. There is no ordinary resolution of the company authorising the payment of director’s remuneration to Mr Caplin and no evidence from Mr Caplin himself. It was not in issue that in BSVM’s July 2016 trial balance the payment was charged to Rezolve by Mr Agoh. The payment was nevertheless made by BSVM. Mr Campbell sought to explain this as an amount entered in an intercompany balance because BSVL owned 10% of the equity in Rezolve.. Neither Mr Agoh nor Mr Wagner were asked about this in their oral evidence but equally the payment was not mentioned in their statements. There is little or nothing to support the bare assertion that this was a payment by way of directors and remuneration and I conclude that this was not properly a payment which could be for the account of BSVM.

Accountancy fees

155. This element of the counterclaim related to payments made to BDO accountants in the sum of £3,198 and £9,270; a total of £12,468. It was accepted that payments made to BDO in respect of work done for BSVM in relation to its liability for corporation tax would properly be an expense of BSVM. It was not pursued at trial and therefore falls away as part of the counterclaim.

Joanne Slater/Eventess

156. Ms Slater is Mr Wagner's personal assistant. She was not called to give evidence. Eventess is her personal service company. Mr Wagner's case was that the total sum of £10,400 paid by BSVM was in respect of assistance that she gave to him in the chaotic period that followed Powa's administration. There were five separate payments in all, over a period between May and August of 2016. Only one invoice, for £2,400, appeared in Mr Wagner's disclosure. It was allocated to VC247 by Mr Agoh.

157. The Defendant's case was that it was highly likely that Ms Slater had been doing work for other companies and in the absence of proper disclosure of invoices it was impossible to discern precisely what work she was carrying out and for whom. Mr Agoh was not asked about this in cross examination. However, his evidence in relation to how his own salary was dealt with during this period indicates that a reference to VC247 and Powa fees was attributable to work done on closing down Powa subsidiaries (see further below).

158. Mr Wagner denied that Ms Slater had done any work for VC247, saying that the suggestion was totally incorrect and that VC247 had purely been used as a vehicle for billing given its available bank account. He emphasised that Ms Slater had no role and provided no assistance at all in relation to VC247. These were direct and forceful answers which I accept. I am not satisfied on the counterclaim that the payments have been charged to BSVM when they should not have been.

The de Boinville Indemnity and Powa Loan

159. This relates to the part payment by BSVM, in three tranches in June 2016, of the loan made by Nic de Bonville to Powa, guaranteed by Mr Wagner, and underwritten by the indemnity given to Mr Wagner by BSVL. Mr Wagner's evidence was that Mr de Boinville was not prepared to accept a guarantee from BSVL and insisted on a personal guarantee from him. He gave evidence about the urgency of the situation and his initial reluctance to give a guarantee. Both guarantee and indemnity were witnessed by Mr Sharpe who was not at that stage a director of BSVL.

160. Mr Wagner made the point that he was taking a risk that BSVL would be able to honour its indemnity to him and did not need to take on a personal liability. The Defendant's case was that he was simply passing on the risk of default by Powa to BSVL. Since BSVL was only a 60% shareholder it was incongruous that as a result of the indemnity it was assuming all of the risk. It was pointed out to Mr Wagner that in his June 2016 update to BSVL shareholders he made no mention of the indemnity, which had not been approved in advance by the board of BSVL. Mr Dunbar had in fact suggested that the update document should be prepared and sent out. It refers to payment of £330,000 having already been made in relation to the loan:

“Mr de Boinville lent £586,500 in October 2015 to Powa Technologies with Dan Wagner (DW) giving Personal Guaranty (PG). Repayment of £330,000 has been made so far between March and June as creditor is holding him personally liable and pursuing accordingly. Balance due by 30th June is £274,801 including interest of £18,301”

161. Mr Dunbar accepted that by this stage he (and by inference the other shareholders) knew that this was BSVL money that had gone to Mr de Boinville even though he (Mr de Boinville) had no agreement which entitled him to recover from BSVL. Mr Wagner’s email of 31 July under the heading “Accumulated Liabilities at BSV” said:

“As we came to the end of November 2015, BSV had no cash to prop up Powa for payroll so the only way the company could continue to trade was through third party convertible loans. \$8.5m was provided during this time and some required me to provide a personal guarantee. Had I not done so, we would have had to close the business down. \$5m in PGs were given of which \$4m to Ben White and his conspirators. The remaining \$1m needed to be settled when the business went under and BSV has now settled in full”.

162. Mr Dunbar agreed that he had raised no objection to this characterisation of the position at that stage. There was no issue but that the money was provided at a time when Powa faced a liquidity crisis and was seeking to raise bridging finance. It was also accepted that the loan benefited all of Powa’s investors and shareholders including BSVL as the majority shareholder. Mr Derbyshire and Mr Charmer were not aware (or could not remember if they were aware) of the indemnity but the payments made did not give rise to any queries from SMP (when the bank statements and financial records were checked) and Mr Charmer accepted that it was appropriate for BSVL to discharge Mr Wagner’s liability under the guarantee.

163. Mr Charmer’s oral evidence included the following:

Q... Well, they were extraordinary times in 2015 and 2016 for Powa, were they not?

A. Yes.

Q. And you would very likely have been aware at the time that the way it worked -- and I quite accept this is not standard procedure, but the way it worked was Mr de Boinville lent a large amount to Powa, that was guaranteed by Mr Wagner and he then had a what he calls a back-to-back indemnity with BSVL. Is that right?

A. I don’t recall that at the time. I don’t recall that we were aware of the back-to-back indemnity.

Q. Is it fair to say you might have been aware but six years later you simply can’t say?

A. That’s probably fair .

Q. But in any event, whether or not you were aware of a back-to-back indemnity, it looks to me as if you took the view that it was appropriate for BSVL to be repaying Mr de Boinville’s loan on behalf of Powa?

A. At that point, yes.

Q. Yes. And that’s because, as we discussed with Mr Derbyshire, Powa was -- I can’t remember whether it was you or Mr Derbyshire used this language -- was the jewel in the crown of the BSVL group, prior to its demise?

A. Yes, yes.

164. In these circumstances I do not consider that there was any breach of duty in relation to this payment. There was a valid commercial reason for the indemnity. Repayment via BSVM was within the scope of the service company role it was performing at the time payment was made.

Foreign Legal fees

165. This part of the claim related to expenses incurred in ‘winding down’ international Powa subsidiaries in the sum of US\$7,247 (Lee & Li) and £1,059.83 (Lex Compass LLC) as described earlier. Mr Agoh’s evidence supported the case advanced by Mr Wagner as to why these fees were incurred and indicated that they would have been recorded as a debt owed to BSVM by Powa. The evidence of the statutory directors was likewise that this was a role that they would have expected Mr Wagner to have performed. I do not conclude that there was any breach of duty in relation to the discharge of these expenses by BSVM.

Mobile Phone Charges

166. Mr Wagner had a number of Vodafone mobile phones and data dongles which he used for work for BSVL and the various investee companies. He gave an explanation in his evidence:

“Well, many of those numbers are data numbers. They are numbers used by dongles in my computer for internet access when I’m on the road, as well as my phones, I have two mobile phones and one of them has two SIMs in it, so I have three SIMs so — but bear in mind, it does sound maybe excessive, my Lord, that I have six numbers or six contracts, but I’m a mobile commerce executive. I mean that’s my business. So I have different types of phones to test out software and stuff. That was the case at Powa. And these contracts which you’re referring to and the Vodafone contract was transferred from Venda, where I was running an ecommerce business, to Bright Station Ventures in 2011, I think, or 2010 and just remained there ever since. Because transferring mobile phone numbers to a new corporate payee is a challenge so it wasn’t appropriate to — it was just easier to recharge them back to the various companies, which is what we did most of the time to Powa and others.”

167. Mr Agoh’s evidence was to the same effect. This category is similar, in terms of the issues that it potentially raises, to the counterclaim in respect of credit cards. It made obvious sense to meet these expenses from one source. It would be extremely difficult to disentangle personal phone and Internet use and I am certainly not in a position to do so. It would in any event give rise to issues as to whether or not additional charges were in fact incurred. I am satisfied that there was no breach of duty, that Mr Wagner was preponderantly using his mobile phones and dongles for the business of BSVL and the subsidiaries and that it was appropriate for BSVM to meet the bills in its capacity as a service company.

Henry Agoh

168. The majority of employee salary payments were paid via Powa Technologies. Mr Agoh's evidence was that after the administration he was no longer paid a salary from that company. Since BSVL did not have a payroll facility he continued to be paid by BSVM albeit on a somewhat ad hoc basis by way of transfers to his personal bank account from the bank account of BSVM. Again, this appears to be an indication of BSVM's expanded role as a service company when necessity dictated. Mr Derbyshire was aware that although Mr Agoh did not have a contract of employment with BSVL or BSVM, he was providing services to those companies and others within the group and would expect to be paid.

169. Mr Charmer's evidence was:

“Q. Did you know he was the bookkeeper for BSVM?”

A. Yes, upon reflection, yes, I did.

Q. As well as for some of the other companies such as Powa?”

A. Not necessarily aware but I would expect him to be, yes.

Q. And to the extent that Mr Agoh was providing those services , it would not have been of concern to you that he was being paid for those services by BSVM?”

A. No.

Q. Indeed, you would have expected that to be the case?”

A. Yes”

170. The total payments made to him which are in dispute are £88,102.34. As with Ms Slater's payments these were all made in 2016. Although it was accepted in cross examination that Mr Agoh would have sent out invoices (and he said that he did) they were not before the court.

171. It was however possible to see how these payments had been treated by Mr Agoh in the books of BSVM. The Defendant pointed out that the sum of £48,728.99 had been allocated either to Rezolve or in respect of the largest single payment to “VC247 and Powa fees”. Of course by this stage Powa had been placed in Administration. As Mr Agoh observed in his evidence it was for his purposes “non-existent” so that work in connection with Powa could only be paid by BSVM. There was extended cross-examination about the entries.

172. I do not think it is correct to say that Mr Agoh simply accepted that these payments should have been met by VC247 or Rezolve. That was his answer to a question about what was shown on the ledgers. The purpose of the questions was explained to him as being to establish what the services were for. He gave an explanation that his work had been in relation to the situation in 2016 in relation to the Powa subsidiaries and the group and not to unconnected work for VC247 and Rezolve. He was plainly not accepting that it was inappropriate for him to have been paid by BSVM whatever recharge was then entered in the books of the company. In the circumstances I am not satisfied that the payments have been charged to BSVM when they should not have been. Mr Agoh was well aware of the purpose of the questions he was being asked about his remuneration and I am sure that he would have accepted and acknowledged that he was working on unrelated matters if that had been the case.

Private Healthcare

173. Mr Wagner's health insurance was paid by way of direct debit from BSVL's account. His service agreement however makes no reference to the provision of such a benefit as part of his employment by the company. When asked about this Mr Wagner said that the payment of his health insurance was simply set against his salary since he was not drawing the salary. He could simply have taken salary and paid the health insurance himself but this was a more convenient way of dealing with the payments. On his case the health insurance was not on top of his salary. It was suggested to him that this was simply another example of him treating the companies as his own and dealing with them as he sought fit. The Defendant's case was that this either had to be director's remuneration, which it could not be in the absence of a resolution, or it was an employee benefit but was not referred to in the services agreement (see below). Mr Charmer said that he was aware of it. Despite the obvious lack of formality Mr Plewman's concluding submission contained an implicit concession: *"...if he was to have private healthcare and discussed it with the board and the board agreed that he should have it and in practice BSVM was operating as a service company, albeit not under obligation, then I accept that it would follow that it could not be said that such payments were in breach of directors fiduciary duty."* I conclude that the counterclaim is not made out.

Salary & The BSVL Services Agreement

174. There is a services contract document dated 1st of January 2012 between Mr. Wagner and BSVL ("the BSVL Services Agreement"). The terms mirror those in the Powa Services Agreement. Under this agreement Mr Wagner was entitled to a salary of £350,000 and, notwithstanding his agreement with Powa, was required to work full time for BSVL. The circumstances in which this agreement was produced and the date on which it was executed were explored in the course of the evidence at trial. The authenticity of the contract document had been challenged in the pleadings as:

- a. The statutory directors were entirely unaware of any agreement by the company to pay a salary to Mr Wagner; there was no reference to the service agreement in the board minutes, it was not formally discussed with the board, and it was not mentioned in correspondence until it came to be relied on.
- b. No salary was accounted for in BSVL's accounts as an accrual.
- c. There was no suggestion that the other shareholders were aware of the agreement.
- d. There had been no disclosure of an entitlement to salary under s.148 of the Isle of Man Companies Act 1931.
- e. No payroll or tax records were produced which referenced the agreement or any payments made under it. An agreement to work as the CEO of a Manx company was not consistent with BSVL's offshore status given that Mr Wagner was permanently resident in the UK.
- f. The metadata on the first version provided by Mr Wagner indicated that it was produced in 2017 giving rise to the suggestion that it was created later than its

ostensible date of the 1st of January 2012. A subsequent document with 2012 metadata was incorrectly dated.

- g. The first express reference to a document dated the 1st of January 2012 was made in the Reply and Defence to Counterclaim.

175. Mr Wagner gave an explanation in relation to the creation of the document, saying that it had been produced from a template originally drafted in 2010 so that it had been necessary to amend the date later. The two witnesses whose signatures appear on the agreement, Mr Emecz and Mrs Wagner, both provided witness statements supporting Mr Wagner's account.

176. Mr Emecz, who worked for Powa Technologies Limited, was called to give evidence. He said he had no specific recollection of signing the document but identified his signature on it. He said that he had been asked to sign documents on two or three occasions. He thought it was most likely that he had signed it with "wet ink" rather than electronically but could not recall how Mr Wagner had signed it. There is another document in the bundle which bears his signature. It was suggested that there was an exact resemblance between his signature on that document and the signature on the service agreement although there had been no forensic examination or evidence to support that suggestion.

177. Mrs Wagner was not called to give her evidence in person and ultimately, no allegation of forgery was put to Mr Wagner. As Mr Campbell submitted it was important in those circumstances to put to one side any oblique suggestions that the document had been fabricated or was suspicious. The Defendant's case settled on the contention that the agreement was created so that it could be relied upon at some future date if necessary but had not been intended to be effective so as to give rise to an additional salary entitlement beyond that due under the Powa Services Agreement. Mr Wagner said that this credited him with too much foresight as to the potential need for any such document. His evidence was that the agreement was created in the normal course of business to reflect his entitlement to salary and other benefits. His case was that the agreement was indeed a form of "back up" in the sense that he did not intend to "double dip" for salary but was able to draw on his BSVL entitlement when he was unable to be paid under the Powa Services Agreement or, as it emerged, needed to set payments made to him or on his behalf against salary. This was also the reason why no salary was accounted for in the accruals.

178. Mr Wagner made the point that his telephone and health insurance amongst other expenses were paid by BSVL and that this continued through until 2017, supporting his contention that he was working for and entitled to be paid for his services by BSVL.

179. Mr Agoh said that he was aware that Mr Wagner had a director's service contract with BSVL under which he was entitled to a salary. The arrangements for payment however were different from those in relation to his salary payments from Powa, which had a payroll function whereas BSVL did not. For that reason, payments were made gross, with Mr Wagner making his own arrangements to account for income tax and National Insurance. Mr Wagner suggested in evidence that he could supply his tax returns to substantiate that he had done so but did not, in the event, produce them. In fairness to him the exchanges in court may well have led him to conclude that it was

far too late to produce additional material of that nature but that did not explain why they had not been produced earlier.

180. In an internal email dated June 20, 2016, Mr Wagner refers to a salary entitlement. This was in connection with a proposed rights offer and, it was argued by the Defendant, was an attempt by Mr Wagner to exercise his rights without producing any cash (although this interpretation was disputed since Mr Wagner contended that he was intending to underwrite the rights issue). According to the email, he claimed that he had not received his salary from the company and was owed £1,950,000. This amount corresponds to 5 ½ years of salary at £350,000 per year, covering the period from January 2012 to July 2017. As Mr Wagner acknowledged this assertion contradicts his previous contention that he only drew a salary when necessary, and that the payments listed in annex B were indeed salary drawdowns.

181. The BSVL directors were initially unaware of Mr. Wagner's service agreement entitling him to a salary from BSVL. They grappled with the idea of multiple salary entitlements but accepted that if there was a valid salary entitlement from BSVL, it would be acceptable for BSVM to meet demands under it. Mr Agoh's evidence about salary payments was somewhat general in nature and the reference to salary in paragraph 21 of his witness statement did not expressly encompass the £163,500 of payments which were made between June of 2015 and October of 2016. However, and not without some misgivings, I consider that Mr Agoh was clearly aware that salary payments were being made, knew of the agreement and described a system in which personal expenditure was also covered by way of a drawdown against salary. For these reasons and given that the authenticity of the services agreement is not challenged I conclude that the counterclaim is not made out.

Worksmart

182. Worksmart provided phone and office support services for the London offices rented by BSVM. It was not in issue that these were used by various group companies including Powa. Mr Agoh's evidence was that BSVM did in fact recharge these bills. This therefore appears to be an example of BSVM acting as a services company for other associated companies in the group. It should be added that there was at one stage a counterclaim for amounts paid by way of rent for the offices but this claim was not pursued. Since BSVM was contractually liable to make these payments the Defendant accepted in the course of the trial that there was longer an issue that this was properly an expense of BSVM.

Books and Records

183. Mr Wagner accepted that his was the ultimate responsibility for the company's books and records but relied on the fact that he had appointed third party and internal professionals to draw up the accounts and keep the company's records. Because nothing had been said to him about the inadequacy of the company's records his position was that as a matter of fact proper books and records were kept. Had any deficiencies been drawn to his attention he would have attended to them.

184. It was pointed out to him that BDO was not the statutory auditor of BSVM. BDO merely prepared the financial statements relying on schedules produced by Mr Agoh and did not verify the completeness of the company records.

185. In its closing submissions, the Defendant reduced the scope and quantum of the counterclaim. It accepted that the sums counterclaimed in relation to the BDO forensic investigation were more appropriately to be viewed as costs rather than damages and the defendant reserved its position as to their recoverability as costs pending judgment.
186. It also accepted that the counter claim relating to monies expended for corporate tax compliance, some of which relate to periods after Mr Wagner had ceased to be a director of BSVM, might well have been paid in any event and that it was disproportionate, having regard to the sums claimed, to attempt a forensic exercise as to how the work would have differed if, on the Defendant's case, the books had been kept in good order.
187. This reduced the counterclaim to the overall sum of £13,363.50 comprised of a January 2019 invoice for preparing books and records in the sum of £9,163.50 and a March 2019 invoice for similar work in the sum of £4,200. These invoices were paid by Mr Dunbar. There was no evidence from BDO in relation to the nature of the work and I do not conclude on the limited evidence available that the expenditure was occasioned by any breach of duty on the part of Mr Wagner.

Consequential Matters

188. The parties suggested that having set out my findings in relation to each of the disputed heads within the claim and counterclaim I should leave it to them to agree what the outcome was in money terms and, if possible, agree an order giving effect to the judgment. I do so.