



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

FSD CAUSE NO 134 of 2022 (NSJ)

**IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)
AND IN THE MATTER OF UPHOLD LTD**

BETWEEN:

- 1. WILLIAM LAGGNER**
- 2. BEARING VENTURES LLC**
- 3. WEST END CAPITAL II LLC**
- 4. CHARLES SIMMONS**
- 5. PETER KEARNS**
- 6. MICHAEL ZAITSEV**

Petitioners

and

- 1. UPHOLD LTD**
- 2. ADRIAN STECKEL**
- 3. UPHOLD HOLDINGS LLC**
- 4. ASP CAPITAL SUB I INC**
- 5. AMHERST HOLDINGS LIMITED**

Respondents

Before: The Hon. Mr Justice Segal

Appearances: Mr Ben Valentin KC instructed by Mr Ian Huskisson and Mr Bhavesh Patel of Travers Thorp Alberga for the Petitioners
 Mr Graham Chapman KC instructed by Mr Liam Faulkner and Mr Harry Shaw of Campbells for the Second to Fourth Respondents
 Mr Timothy Collingwood KC instructed by Mr Nick Dunne and Mr Brett Basdeo of Walkers (Cayman) LLP

Heard: 16 -17 October 2023

Draft judgment circulated: 15 April 2024

Judgment delivered: 25 April 2024

HEADNOTE

Applications to strike out contributory's winding up petition – whether the petition was bound to fail either assuming the facts averred were true or on the basis of the uncontested primary facts as proved on the strike-out applications – substantial evidence adduced – application to strike out the claim for a buy-out order against the Fifth Respondent – whether a buy-out order could be made against a shareholder not alleged to have participated in the alleged misconduct on which the petition was based

JUDGMENT ON STRIKE OUT APPLICATIONS**Introduction**

1. I have before me two strike-out summonses (the *Summonses*) relating to a winding up petition presented by the Petitioners against Uphold Ltd (the *Company*). The petition was originally dated 10 June 2022 but was subsequently amended on 28 March 2023 (the *Amended Petition*). The first Summons was filed by the Second to Fourth Respondents (represented by Campbells) and the second Summons was filed by the Fifth Respondent (represented by Walkers). By the Summonses these Respondents seek an order striking out the Amended Petition in its entirety or in part.
2. Directions for the conduct of these proceedings have already been given pursuant to an order (the *Directions Order*) made by consent dated 30 January 2023 (filed on 28 February 2023). The Directions Order was made following the second hearing (on 30 January 2023) of the Petitioners' summons for directions (the *SFD*) (issued in accordance with O.3, r.11 (1) of the Companies Winding Up Rules, 2018 (*CWR*)) and the handing down of my judgment on 16 February 2023 (the *Judgment*) dealing with the issues raised at that hearing. By the Directions Order, it was ordered that:
 - (a). the Company be treated as the subject matter of the proceeding and must not participate or incur costs in the proceeding, save in respect of (i) any steps to oppose the petition (or the Amended Petition) that the Company's independent litigation committee of the board considers to be appropriate for the purposes of protecting the interests of its independent shareholders (subject to suitable safeguards being put in place to ensure the Litigation Committee can act independently and without improper interference from the Second to Fifth Respondents); (ii) discovery and

inspection of documents, and any other steps taken with the approval of the Litigation Committee for the purposes of facilitating the fair resolution of the proceeding and (iii) the preparation of evidence.

- (b). the Fourth Respondent be joined to enable it to respond to any allegations made against it in the petition (or the Amended Petition) and to oppose any buy-out order sought against it under section 95(3)(d) of the Companies Act.
- (c). the Fifth Respondent be joined as a respondent to the proceeding to enable it to respond to any allegations made against it in the petition (or the Amended Petition) and to oppose any buy-out order sought against it under section 95(3)(d) of the Companies Act.
- (d). the proceeding be treated as an *inter partes* proceeding between the Petitioners and the Second and Third Respondents, who shall be joined as respondents to the proceeding for that purpose.
- (e). the Company provide its independent shareholders with a copy of the petition, the Directions Order and the Judgment and that any independent shareholder shall be at liberty to make representations to the Company and/or the Court within 21 days of receiving such notice.
- (f). the Petitioners serve and file an Amended Petition no later than 28 days after the date the Directions Order to address, without limitation, the matters identified in paragraph 67 of the Judgment, as the Petitioners see fit.
- (g). within 28 days of the service and filing of the Amended Petition, the Petitioners and/or any of the Respondents may apply to vary the Directions Order and that if no such application was made the Petitioners shall apply for further directions no later than 35 days after service of the Amended Petition either by applying to relist the SFD for a further hearing or by inviting the Court to settle directions on the papers after filing of proposed directions and written submissions.

3. Following the making of the Directions Order, the Petitioners filed the Amended Petition (on 28 March 2023) and on 19 July 2023 the Second to Fourth Respondents and the Fifth Respondent filed the Summonses. No application was made to vary the Directions Order and no representations were made by the independent shareholders.
4. The Judgment sets out the background to the Amended Petition and the dispute between the parties, together with details of the position of and role played by the various individuals involved, which I do not repeat in this judgment (and I shall use in this judgment the definitions contained in the Judgment unless otherwise stated).
5. The Second to Fourth Respondents apply to have the Amended Petition struck out in accordance with GCR O.18, r.19 or pursuant to the inherent jurisdiction of the Court, upon the grounds that the Amended Petition (a) is scandalous, frivolous or vexatious; (b) is an abuse of process of the Court or (c) has no prospect of success at trial.
6. The Fifth Respondent seeks an order striking out the relief of a purchase order against it sought by way of alternative relief in the Amended Petition because, it says, there is no proper and sustainable pleaded basis for such relief against it and because the pleaded claim for such relief is hopeless and bound to fail (such that it constitutes an abuse of process). The Fifth Respondent claims that there are no allegations in the Amended Petition that it was itself (or through a director on its behalf) guilty of, or complicit in, any misconduct or any allegations that it received the commercial benefits bargained for with actual or constructive knowledge of any misconduct by others. Rather the Petitioners seek a purchase order against it purely on the basis of its receipt of shares in the Company as part of what it says were commercial agreements under which it provided funding to the Company. That, the Fifth Respondent says, is an insufficient basis for the granting of the relief sought against it and the claim to such relief is bound to fail and should be struck out.
7. The Petitioners oppose the Summonses.
8. I have decided that:

- (a). the Second to Fourth Respondents' application to strike out the Amended Petition on each of three grounds relied on should be dismissed.
- (b). I have concluded that they have not shown that the Amended Petition is bound to fail even if the facts and matters averred in it are proved at trial or that the Amended Petition is an abuse of process and bound to fail because the primary facts established by the evidence adduced show that the Court would not conclude at trial that a winding up order (or the alternative relief sought) was justified or appropriate. I have also concluded that the Second to Fourth Respondents have not established that the Amended Petition should be struck out because it is scandalous, frivolous or vexatious or otherwise an abuse of process.
- (c). as I explain below, while I consider that the Second to Fourth Respondents' evidence sets out a coherent and in some respects persuasive response to the facts and matters relied on in the Amended Petition, they have been unable to establish undisputed primary facts from which the Court can conclude at this stage that it is plain and obvious that the relief sought by the Petitioners will not be granted at trial. This is not a case in which the Court can conclude that the main primary facts are undisputed and that it is now plain that no reasonable Court could conclude that there was persistent misconduct by Mr Steckel and the Company's management which justified the Petitioners' asserted loss of confidence in that management (or claim of oppression). While the Amended Petition remains weak in parts and is not always as fully particularised as it should have been, it does in my view aver sufficient facts to establish that the Petitioners' case is not obviously unsustainable. Furthermore, facts averred and relied on by the Petitioners in the Amended Petition and the evidence they have adduced in support demonstrate that all or a substantial majority of the facts in issue are disputed and that a trial is needed to enable the Court to make reliable findings and determine whether to grant the relief sought.
- (d). a very substantial volume of affidavit and documentary evidence was adduced on the Summons traversing a wide range of disputed factual matters. This evidence is irrelevant to the Second to Fourth Respondents' application for a strike out to the extent that it is made under GCR O.18, r.19(1)(a) on the basis that the Amended

Petition discloses no reasonable cause of action. It is relevant however to the Second to Fourth Respondents' application on the other grounds including the application based on abuse of process. Because the Second to Fourth Respondents relied very heavily on this evidence I have summarised the key points made in the affidavits relied on by the Second to Fourth Respondents (some of which was filed by the Company). This has resulted in a very lengthy judgment (one that is much longer than I would have liked) but I have taken the view that it is only possible to obtain a proper understanding of the Second to Fourth Respondents' position and my reasons for dismissing their applications if the factual picture which they paint is set out in some detail. Of course, the strike-out process involves invoking a summary jurisdiction which was never intended to be exercised and should not be exercised by a minute and protracted examination of the documents and facts of the case. I have sought to exercise this summary jurisdiction and reach conclusions appropriate to it but in a case where part of the strike-out application requires an assessment of what primary facts are properly to be regarded as in dispute, and the Second to Fourth Respondents have sought to establish that the primary facts cannot be disputed but are clear and as they assert, it has been necessary for me to set out in some detail what their witnesses have had to say.

- (e). the Fifth Respondent's application to strike-out the buy-out relief sought against it by the Petitioners in the Amended Summons is granted but the Fifth Respondent should remain a party to the Amended Petition because it may be affected by the relief which may be granted and because it should be bound by the Court's decision on the issues which are raised by the Amended Petition.
- (f). I shall invite the parties to seek to agree a form of order to give effect to this judgment and consequential matters and to file within 21 days of the date on which this judgment is handed down. If a form of order is not agreed, the parties shall file a draft order in a form that identifies which parts are in dispute (with brief written submissions explaining the parties' respective positions on the points in dispute) and I shall settle the order on the papers.

The Evidence

9. A substantial volume of further evidence has been filed in support of and in opposition to the Summonses. That evidence is as follows.
10. The evidence filed by the Second to Fourth Respondents in support of its Summons was the First Affidavit of Mr Adrian Steckel (13 July 2023) (*Steckel 1*) and the evidence filed by the Fifth Respondent in support of its summons was the First Affirmation of Mr James Chen (13 July 2023) (*Chen 1*).
11. In opposition to the Summonses, the Petitioners filed the Third Affidavit of Mr William Laggner (4 September 2023) (*Laggner 3*) and relied on his earlier evidence (being Mr Laggner's First Affidavit (10 June 2022) (*Laggner 1*)). After the Respondents had filed their evidence in reply, the Petitioners filed a further affidavit from Mr Laggner, being Mr Laggner's Fourth Affidavit (12 October 2023) (*Laggner 4*). I gave permission for the Petitioners to file and rely on Laggner 4 on the first day of the hearing.
12. In reply, the Second to Fourth Respondents filed the Second Affidavit of Mr Steckel (27 September 2023) (*Steckel 2*), the First Affidavit of Robert Gregory Kidd (27 September 2023) (*Kidd 1*) and the First Affidavit of Timothy Parsa (28 September 2023) (*Parsa 1*). The Fifth Respondent filed the Second Affirmation of Mr Chen (29 September 2023) (*Chen 2*).
13. The Company filed the following evidence. The Fourth Affidavit of Mark Anderson (21 July 2023) (*Anderson 4*); the Fifth Affidavit of Mr Anderson (28 September 2023) (*Anderson 5*); the First Affidavit of Juan Pablo Thieriot (4 August 2023) (*Thieriot 1*); the Second Affidavit of Mr Thieriot (28 September 2023) (*Thieriot 2*) and the First Affidavit of Thomas Brooke (27 September 2023) (*Brooke 1*).
14. As I have said, the roles played by many of these individuals is outlined in the Judgment. To recapitulate briefly with respect to those who have given evidence plus Mr Watson (using the information contained in the Agreed Dramatis Personae Table filed by the parties):

- (a). Mr Steckel was appointed as a director of the Company in October 2015 as the nominee of the Series B investors, and remains a director. Between 8 August 2016 and 6 September 2018 Mr Steckel acted as the Company's CEO. Mr Steckel first invested in the Company in September 2014 as part of the Series A preferred financing round. He currently holds approximately 1% of the Company's shares in a personal capacity on a fully diluted basis. Mr Steckel is the sole manager and member of Uphold Holdings LLC, a Delaware limited liability company (**Holdings**), which is the Third Respondent, and the sole director, shareholder and President of ASP Capital Sub I Inc., a Delaware corporation (**ASP Capital**) which is the Fourth Respondent. Holdings now holds approximately 19.26% of the Company's shares on a fully diluted basis, whilst ASP Capital holds approximately 0.78%. The aggregate shareholdings of Mr Steckel, Holdings and ASP Capital amount to approximately 22% of the Company's shares on a fully diluted basis. Immediately following the exercise of the warrant granted to Holdings pursuant to the Transaction, Mr Steckel and Holdings together held over 50% of the Company's shares on a fully diluted basis.
- (b). Mr Chen is a director of the Fifth Respondent, which he owns and controls. The Fifth Respondent currently holds approximately 14% of the Company's shares on a fully diluted basis. It acquired its shares from another entity affiliated with Mr Chen, Chen International Holdings Limited (**Chen Holdings**) on 31 December 2020. Chen Holdings participated in the Series B capital raising round subscribing for 150,000 Series B Preferred Shares for \$270,000 and subscribed for 6,251 Series B1 Preferred Shares for \$1,531.50. In December 2016, the Company entered into a Participation Agreement with Holdings and Chen Holdings. Mr Chen has been a director of the Company since 27 January 2021 and holds 0.012% of the Company's shares on a fully diluted basis in his personal name.
- (c). Mr Laggner was a director of the Company from 16 September 2014 until 17 November 2016. In May 2019, following an earlier agreement in June 2016, Mr Laggner acquired ordinary shares in the Company from another shareholder, Mr Halsey Minor. Mr Laggner is also a director and shareholder in Bearing Ventures

LLC, the Second Petitioner, which holds a total of 396,934 shares in the Company, comprised of 360,000 Series A, 22,516 Series B and 14,418 Series B1 Preferred Shares. The aggregate subscription proceeds paid for those shares are \$370,238. Bearing Ventures LLC holds 0.10% of the Company's shares on a fully diluted basis

- (d). Mr Thieriot was a co-founder of the Company and been a director since 13 January 2014. He is also a shareholder, with (at the date of the petition) 5.45% of the Company's shares on a fully diluted basis.
- (e). Mr Kidd was a director of the Company between 9 March 2018 and 27 January 2021. He is the founder and CEO of Hard Yaka Ventures LP (*Hard Yaka*) which made a significant investment as part of the Series C Preferred Shares share issue. At the date of the petition Hard Yaka held 19.05% of the Company's shares on a fully diluted basis.
- (f). Mr Parsa was also a co-founder of the Company and a director from 28 August 2014 to 24 October 2016. He has a beneficial interest in Maslow LLC which holds 0.26% of the Company's shares on a fully diluted basis. Mr Parsa was the Company's President from 20 January 2014 until 20 May 2015 and its CEO from 20 January 2014 until 16 September 2014. Mr Parsa is also a co-founder of Cloud Money Ventures and AirTM.
- (g). Mr Mark Anderson is the General Counsel of the Company.
- (h). Thomas Brooke was corporate counsel to the Company from September to October 2015 and General Counsel from October 2015 to May 2017.
- (i). Mr Anthony Watson CBE was recruited by the Company in early 2015 and served as the Company's CEO from 9 July 2015 to 20 November 2018, its President from 20 May 2015 to 20 November 2018 and a director from 20 May 2015 until 17 October 2020. Mr Watson is no longer involved in the Company but remains the holder of 2,853,333 ordinary shares in the Company pursuant to the exercise of options granted to him in connection with his service as CEO and President of the

Company, which at the time of grant represented 5% of the Company's fully diluted shares outstanding. Mr Watson currently holds 0.87% of the Company's shares on a fully diluted basis.

The Amended Petition

15. In the Judgment (at [65]) I indicated that the petition was in need of further particularisation and identified (at [66]) the main areas where in my view such further particularisation was required. These were in [7], [19], [20], [24], [28], [29], [30], [33], [34] and [35].
16. The Petitioners have sought to address these deficiencies in the Amended Petition, in which amendments to each of these paragraphs have been made. They say that the Amended Petition now includes the best particulars that can be provided before discovery. The Respondents, however, argue that the Amended Petition has failed adequately to remedy these deficiencies and remains inadequately particularised.
17. The core allegations in the Amended Petition can now be summarised, and in my view are to be understood, as follows:
 - (a). the grounds on which the Petitioners rely to establish the Court's jurisdiction to wind up the Company are set out at [35(i)] and [35(j)] of the Amended Petition (under the heading "*Conclusions*") and are that (a) they have justifiably and irretrievably lost faith and confidence in the Company's board to manage the Company's affairs in the best interests of the Company as a whole and that (b) their rights and interests have been oppressed and wilfully disregarded and undermined. The Petitioners aver that it would be just and equitable to wind up the Company but that they seek as their primary remedy an order requiring Mr Steckel and/or the other Respondents to purchase their shares for fair value (to be determined by the Court, if not agreed). If the Court refuses to make such an order, the Petitioners seek a winding up order or, in the alternative, an order authorising the Petitioners to bring proceedings in the name and on behalf of

the Company “*to remedy the conduct complained of*” in the Amended Petition (see [3] of the prayer for relief in the Petition).

- (b). the facts which the Petitioners aver establish that these grounds exist are summarised at [35(a)] - [35(d)] of the Amended Petition (which were added by the Amended Petition), namely that (i) Mr Steckel, through the Transaction “*has taken control of the Company for the ultimate benefit of Mr Salinas and diluted and caused the Company to dilute further the Petitioners’ shareholdings in breach of the IRA and the Articles .. to the detriment of the Petitioners*”; (ii) Mr Steckel (in combination with Mr Thieriot, Mr Parsa and Mr Watson, who together with Mr Steckel were referred to as the Steckel Faction) caused the Company to enter into the Transaction and in doing so acted in breach of duty as a director and with lack of probity; (iii) after the Transaction and in the period up to the date of the petition, Mr Steckel (in combination with Mr Thieriot, Mr Parsa and Mr Watson) *has caused* the Company to operate in disregard of the “*principles of proper corporate governance*” and so as to prefer his own interests (and those of companies he controls), the interests of Mr Salinas and the interests of Mr Thieriot, Mr Parsa and Mr Watson over the interests of the Company and its shareholders (and I add, therefore it is to be inferred Mr Steckel and, for so long as they remained directors, Mr Thieriot, Mr Parsa and Mr Watson, acted in breach of duty) and (iv) the Transaction and Mr Steckel’s other wrongful conduct identified in the Amended Petition benefitted the interests of Mr Chen (through Amherst Holdings) and prejudiced the Company and the Petitioners.

18. The Petitioners’ case as set out in the Amended Petition can be summarised as follows:

- (a). by the first quarter of 2016 the Company was financially distressed ([18]).
- (b). at that time Mr Steckel, acting with Mr Thieriot, Mr Parsa and Mr Watson as directors of the Company, in breach of his ([20]) duties as a director failed to take proper steps to remedy the Company’s financial problems including by failing to conserve cash flow and failing to pursue third party interest in making offers and

offers made for further investment in the Company (in order, it is to be inferred, to engineer a cash crisis and create the conditions in which the Company would be required to accept an offer of financing from Mr Steckel and Mr Salinas on terms that would allow them to acquire control of the Company at an undervalue and were to their advantage and benefit and which resulted in a dilution of the Petitioners' shareholding ([19]). Mr Steckel was also acting as a shareholder (by way of his control of Holdings) ([7(a)] and [20]) to implement his plan and achieve this objective and conspired with Mr Salinas to effect a takeover of the Company ([20A]). Mr Steckel was acting for the benefit of and/or with the support of Mr Salinas ([20A]).

- (b). in June 2016 Mr Steckel, acting with Mr Thieriot, Mr Parsa and Mr Watson as directors of the Company, approved the Transaction in circumstances where (i) the Transaction was on uncommercial terms which were damaging to the Company (in particular the exorbitant rate of interest payable on the loans to be advanced by Holdings to the Company) ([29]); (ii) the Transaction gave Mr Steckel (through Holdings and for his own benefit and the benefit of Mr Salinas) the right to subscribe for shares giving control of the Company at an undervalue (for a nominal consideration) (24]), to the detriment of the Company and its other shareholders and resulting in the Company being in breach of its obligations under the IRA; (iii) there was a real alternative available, which was improperly rejected by Mr Steckel, acting with Mr Thieriot, Mr Parsa and Mr Watson, that would have resolved the Company's financial problems and been more advantageous to the Company and its other shareholders (so that Mr Steckel, Mr Thieriot, Mr Parsa and Mr Watson as directors had failed to exercise independent judgment or act in the interests of the Company); (iv) the Transaction was opposed by a majority of the Company's shareholders ([29] and [30]) and (v) no legal advice was obtained by the Company's board at the time.
- (c). the Transaction involved and comprised (*inter alia*) a revolving credit agreement (the **RCA**) dated 30 June 2016 between the Company (then called Bitreserve Ltd) and Holdings. The evidence shows that the RCA was governed by the law of the State of New York and that the Company granted security to Holdings over its

assets and certain guarantees were issued by the Company's subsidiaries. The Company also granted Holdings a warrant (the *Warrant*) entitling Holdings to subscribe for shares at a defined exercise price (the evidence shows that the original issue date of the Warrant was also 30 June 2016).

- (d). under the RCA the Company was entitled to borrow up to \$10 million but Holdings was given the right to increase this limit to \$15 million (which was defined in the RCA as the Increased Loan Limit). The interest rate was 2% per month. As additional consideration for Holding's agreement to make advances under the RCA the Company agreed (under section 1.3(d) of the RCA) to execute and deliver the Warrant giving Holdings the right to acquire up to 77,531,842 ordinary shares at a price of \$0.01 per share which constituted (and the amount of shares to be issued was if necessary to be increased to ensure that Holdings received) 50% of the Company's issued and outstanding ordinary shares on a fully diluted basis. The evidence shows that the exercise period of the Warrant was ten years.
- (e). the issue of the Warrant resulted in a breach by the Company of the existing IRA and of its articles (see [30] which refers to the failure to provide preference shareholders with the right to subscribe for an equivalent amount of shares to be issued under the Transaction). This IRA required that each time the Company proposed to offer shares or securities convertible into or exchangeable for any shares it must first offer such shares to shareholders who were parties to it, including the Second Petitioner and the Third Petitioner. Article 3.22 prevented the Company from issuing shares or creating a right or security convertible into shares having a preference over or being pari passu with any series of preferred shares without the approval of the holders of the Series A Preferred Shares.
- (f). on 21 July 2016, the Company belatedly circulated a term sheet (the *Series B2 Term Sheet*) containing an offer to the parties to the IRA to subscribe for B2 Convertible Preferred Shares for \$0.255 per share. However, this failed to comply with the terms (and therefore did not remedy, or prevent there being, a breach) of the IRA, which required the Company to make an offer of equivalent shares before

issuing or offering further shares (which it had done at the time of the issue of the Warrant) ([30]).

- (g). the Company was required (pursuant to article 17.1.1) to obtain shareholder approval for the increase in share capital required as a result of granting the Warrant and the offer to parties to the IRA. However, the Company failed to convene and hold an EGM for this purpose (in 2016) because the Steckel Faction knew that a majority of shareholders would not support or vote in favour of the Transaction (see [30] of the Amended Petition).
- (h). in the second half of 2016, Mr Steckel agreed with Mr Chen to share (and procured that the Company's board agreed to permit that Mr Chen share) the benefits of and rights granted to him (Holdings) under the Transaction including the Warrant ([33]). Mr Chen, through Chen Holdings and subsequently Amherst, was allowed to advance US\$5 million under the RCA (or to fund an advance of such amount pursuant to the agreement with Mr Steckel) and exercise the right to subscribe for shares (21 million shares) under the Warrant, and the Company agreed that both Mr Steckel (Holdings) and Mr Chen (Chen Holdings) were permitted to pay the exercise price under the Warrant by setting off the outstanding interest owed under the RCA loans. Furthermore, additional rights to subscribe for shares, beyond those granted by the Warrant, were given to Mr Steckel (Holdings) and Mr Chen (Chen Holdings). In agreeing these terms the Company's board benefitted Mr Steckel (Holdings) and Mr Chen (Chen Holdings) and paid no regard to the interests of the Company or its shareholders ([33]).
- (i). Mr Laggner was removed from the board in November 2016 to prevent him from scrutinising the activities of the board and questioning the implementation of the Transaction and its consequences ([32]).
- (j). subsequently Mr Steckel, *qua* shareholder and through his control of Holdings and ASP, has *caused* the Company to operate in breach of the principles of proper corporate governance and so as to promote his own interests rather than its interests or those of its shareholders (see [34] which has been amended to refer to Mr Steckel

rather than Mr Steckel and Mr Thieriot, Mr Parsa and Mr Watson but the amendments have omitted to substitute “*him*” for “*them*”).

- (k). seven examples (pending discovery) of this conduct are given and relied on ([34](a)-(g)). These are described as follows in the Amended Petition.
- (l). first, the Petitioners complain ([34(a)]) about the alleged failure to comply with proper procedure when the Company’s memorandum and articles were purportedly amended on 23 February 2017 to create five additional classes of shares and to give the board authority to issue additional Series A and Series B Preferred Shares (with a large proportion of these being issued to Holdings and Chen Holdings). While shareholder approval is recorded in a minute of an EGM on that date (or of a resolution passed at an EGM) (signed by Mr Steckel) notice of an EGM was not given to all shareholders and no meeting was held. It appeared that votes had been cast pursuant to proxy forms all but one of which had been signed by Mr Steckel. The Petitioners say that it is unclear that the proxy forms were properly signed and therefore whether Mr Steckel was properly authorised to act for shareholders other than Holdings and himself. There were therefore serious doubts whether the amendments were properly approved and whether the issue of shares to Mr Steckel and Mr Chen was valid.
- (m). secondly, the Petitioners aver that ([34(b)]) in or about 2015 Mr Steckel and Mr Parsa caused the Company to licence intellectual property rights owned by the Company to another Company called AirTM (which is run by Cloud Money Ventures LLC) and then to waive sums owing by AirTM to the Company under the licence. Mr Steckel and Mr Parsa have invested in Cloud Money Ventures LLC and therefore had a conflict of interest and acted improperly by favouring their own interests over those of the Company and its other shareholders by permitting AirTM to use the Company’s intellectual property rights for free.
- (n). thirdly, the Petitioners say that ([34(c)]) in 2016-2017 Mr Steckel and Mr Watson diverted to themselves, and benefited at the expense of the Company from, the opportunity which the Company was pursuing to obtain a digital bank licence and

to start a digital bank business. The Company had been progressing a plan for such a business that would have involved the Company holding shares in the Bank of London (*TBOL*). However, after the Bank of England had indicated that it was unable to grant such a licence to the Company (as a cryptocurrency company), rather than pursuing an alternative transaction that would have allowed the Company to obtain substantial financial benefits from starting and conducting such a business, Mr Steckel, in breach of his duty as a director, procured (instigated) the Company to alter and restructure the licence application in a way that resulted in the Company only holding 9% of TBOL and Mr Steckel (with Mr Salinas and Mr Watson) holding a significant share of the equity in TBOL. Mr Watson was also in breach of his duties to the Company.

- (o). fourthly, the Petitioners claim that ([34(d)]) as a reward for supporting the Transaction the Company issued shares to Mr Steckel, Mr Thieriot, Mr Parsa and Mr Watson, Mr Chen and to Mr Kidd, on favourable terms that were not at arms' length or for fair value, and which favoured their interests at the expense of the interests of the other shareholders.
- (p). fifthly, the Petitioners assert (at [34(e)]) that in 2018 Mr Steckel and Mr Thieriot (together with Mr Kidd) promoted their own interests above those of the Company (in a manner that had an adverse effect on the Company's financial position) in relation to the Company's participation in the development of a cryptographic protocol called Universal Protocol. The Petitioners claim that Mr Steckel, Mr Thieriot and Mr Kidd with others developed Universal Protocol and when it was launched they "*appointed the founder of Cred, Dan Schatt, to be CEO*" and failed to disclose their interest in Universal Protocol to the Company:

"while Cred partnered with [the Company] and subsequently filed bankruptcy. In essence, Cred was rehypothecating [the Company's] customer funds while Messrs Steckel, Thieriot and Mr Kidd were raising money for Cred [and the Company] was subsequently sued for illegally issuing securities by a Universal Protocol investor."

- (q). sixthly, the Petitioners also assert (at [34(f)]) that in 2021 Mr Steckel acted improperly and favoured his own interest by causing the Company to pay his own

legal fees incurred in connection with the earlier winding up petition presented by the Petitioners, since he was not entitled to be reimbursed by the Company.

- (r). seventhly, the Petitioners claim (at [34(g)]) that it appears that in “late 2022” the Company sold its shares in a French technology company called Ledger at a significant undervalue. The Company’s shareholders were informed on a call in March 2023 that these shares had been sold at cost but were not told why or to whom the shares had been sold. According to reports in the specialist media, Ledger was valued at US\$1.5 billion in June 2021 and if this valuation remained accurate in late 2022 the Company had sold its shares at approximately one-fifth their value. The Petitioners aver that it is to be inferred (from the fact that the sale appears to have been at a substantial undervalue) that the sale was not conducted at arm’s length is further evidence of “*mismanagement on the part of Mr Steckel to the prejudice of the Company’s shareholders generally.*”

The evidence in support of the Amended Petition

19. Mr Laggner sets out the Petitioners’ evidence in support of the petition in Laggner 1. This was a short document (although it exhibited a substantial number of documents) in which Mr Laggner provided some but only a limited elaboration on the facts averred in the petition:
- (a). he reviewed the circumstances surrounding his initial involvement with the Company in 2013 and the Series A investment round in 2014 including the IRA.
- (b). he also reviewed the events leading up to, and the approval of, the Transaction (and his understanding of the relationship between Mr Steckel and Mr Salinas and the latter’s business activities). He said that, while he had not yet seen all of the relevant communications, he firmly believed that the majority of the Company’s board had acted in concert with Mr Salinas and Mr Steckel to impose the Transaction on the Company without any consideration of whether it was in the Company’s best interests, he was confident that discovery would reveal the full extent of “*a conspiracy to wrest control of the Company unlawfully from our group*” ([80]) and

asserted (at [79]) that the directors and Mr Salinas “*were rewarded with significant stock options and salary increases.*”

- (c). he complained about Mr Chen “*changing sides*” and the manner in which he and Mr Steckel “*were allowed*” ([87]) to pay the heavily discounted exercise price payable under the Warrant by applying (deploying) the extortionate interest payable under the RCA and to subscribe for preference shares which carried additional rights to the ordinary shares to be issued pursuant to the Warrant.
- (d). he asserted that the only shareholder to sign the February 2017 resolution approving the amendment to the Company’s memorandum and articles had been Mr Steckel and that he had not seen evidence demonstrating that Mr Steckel was authorised to do so.
- (e). he briefly reviewed the facts relating to three of the seven examples of the Company’s failure to operate in accordance with principles of proper corporate governance, namely TBOL, AirTM and the Universal Protocol. As regards TBOL (in a single paragraph) he asserted that Mr Steckel and Mr Watson had used the Company’s resources in setting up TBOL and benefitted personally at the expense of the Company and that the Company had failed to take action in response to their breach of directors’ duties. As regards AirTM, Mr Laggner said that the Company acquired its customers either from marketing and referrals or by having a relationship with applications built on their application protocol interface, and that since many of AirTM’s features were similar to the Company’s offering there was a risk that over time AirTM could take market share from the Company. He said that concerns had been expressed by Mr Minor in August 2015 as to the conflicts of interest and breaches of non-competition agreements by Mr Steckel, Mr Thieriot and Mr Parsa to which the proposed AirTM transaction gave rise. He had been told by former employees of the Company that Mr Parsa had been using the Company’s technology and employees to build AirTM and that Mr Watson had said that it was his impression that the Company’s intellectual property had been stolen. He said that he believed that a significant part of the substantial value of AirTM represented value derived from the Company and that the Company’s 2020 investigation into

what had happened had been perfunctory which had assumed that the statements made by those under investigation were correct and proceeded on the basis that the Company had no meaningful records of the AirTM transaction and its consequences (which he did not accept was the case). He also complained about the shares and options issued to Mr Thieriot. As regards the Universal Protocol, he merely repeated the brief assertions made in the petition.

20. Mr Laggner has substantially supplemented his evidence (in Laggner 3 and Laggner 4) in response to the evidence filed by the Respondents in support of the Summonses. The following are the main points of note.
21. Mr Laggner reviewed and provided further details of the board discussions and decision making leading up to the approval of the Transaction:
 - (a). Mr Laggner said that the Company's financial statements exhibited to Steckel 1 and referred to in the summary table at [37] of Steckel 1 demonstrated the strong financial position that the Company was in during the period before the Transaction and that it was not the case that the Company was about to go into liquidation in the middle of 2016. The Respondents and the Company had failed to deal with the identity and position of the creditors of the Company. The only creditors of the Company in early 2016 were Mr Winston Ling (**Mr Ling**) (who was known to Mr Laggner and also subscribed for Series B2 Preferred Shares in 2016), the employees and some relatively small suppliers. There was therefore no basis for the assertion that, but for the Transaction, the Company was at risk of entering into an insolvency process. In fact, at the same time that Mr Thieriot now claimed that the Company was in severe financial difficulty he was busy signing term sheets in connection with an acquisition of a significant holding in a City National Bank of New Jersey (**CNB**) who had themselves valued the Company at US \$516 million in the CNB term sheet. The same value was used as part of a convertible note facility to be provided by Mr Ling (and his family/friends) in the sum of \$1.3million as of 29 March 2016 when Mr Ling became the largest creditor of the Company.

- (b). Mr Laggner referred (at [13] of Laggner 3) to and exhibited two emails from Mr Parsa (the **Parsa Emails**) to Stephen Abletshauer of Palladium Partners and Mr Ling dated 2 January 2018 in which Mr Parsa had been very critical of Mr Steckel, Mr Watson and the Company's management and discussed the possibility of bringing and the basis of an action by shareholders against the Company. Mr Laggner said that these emails supported the Petitioners' claims of continuing and serious mismanagement. Mr Parsa had said in the emails (*inter alia*) that Mr Watson had run the Company out of money in June 2016; that he had persuaded Mr Salinas to save the Company; he had made clear to Mr Salinas that certain incompetent and unethical officers needed to be removed (including Mr Thieriot and Mr Watson) and that they had been responsible for the US\$2.5 million "*hole in [the Company's] reserves*"; the Company's board had accepted the Transaction because the alternative was bankruptcy; Mr Steckel had failed to follow up on Mr Parsa's recommendations; in August 2016 the board had, against Mr Parsa's wishes, approved the appointment of Mr Watson to head "*[the Company's] UK bank initiative*" (the Company had an opportunity to acquire an application for a challenger bank licence from MSBB); shareholders had approved the issue of shares related to the Warrant but not the Warrant itself; and that he had resigned from the Company's management in March 2017 "*due to continued mismanagement and unethical behaviour by Dennings who was promoted by [Mr] Steckel to COO.*" He also said as follows (underlining added):

"Although there are a myriad ways that [the Company's] management had arguably breached even the generous business rule definition of fiduciary duty ... I think the better approach might be to argue that the Steckel loan with warrant constituted a Liquidation Event under Cayman Law and that formalities were not appropriately observed....."

They operate in an unlicensed way in the US and EU violating money transfer laws in many US states and in the US.

There were investigations into the hole in the reserve that began soon after [Mr] Steckel took control of [the Company]. A preliminary version of the report was intercepted by [Mr] Dennings and shared with [Mr] Watson (both were found responsible along with Thieriot for the hole). [Mr] Steckel was made aware of the interception and decided to try to cover up the report, its interception and related failures to remediate the issues that led to [the Company's] insolvency.

It seems that [the Company] has transferred the UK bank license application to a company controlled by [Mr] Watson (on the latest shareholder call [Mr] Steckel mentioned that the FSA had responded to [the Company's] application that they could not approve due to [the Company's] dealing in cryptocurrency and because [Mr] Halsey Minor .. had gone bankrupt. Transfer to [Mr] Watson cannot be considered an arm's length deal..."

22. Mr Laggner also exhibited to Laggner 3 copies of emails from Mr Ling to Mr Parsa in June 2018 (copied to Mr Brooke) in which he had referred to meetings at which Mr Steckel had spoken. Mr Ling had said that Mr Steckel had "lied a lot" and that after having attended "so many similar calls with [Mr Steckel] reporting wonderful news and plans for the future ... [he had detected] a consistent pattern of deceit" (underlining added). Mr Steckel had been talking "bullshit." In addition, the exhibit to Laggner 3 contained an earlier email exchange in July 2017 between Mr Parsa and Mr Carlos Ponce relating to Mr Brooke's Reserve Report (which had raised issues of wrongdoing involving consumer and securities related fraud for which Mr Steckel was not suggested to be directly responsible, which is discussed below) in which Mr Carlos had asked "What is [Mr Steckel] thinking still having these crooks in the company. What is his end game plan ..." In Laggner 4, Mr Laggner discussed and exhibited emails from Mr Parsa to the Company's investors in July 2020 relating to the C Series preference share issue, in which Mr Parsa had expressed concerns at the "massive dilution," the issue of so many further shares after the Transaction and the RCA and the huge amount of options issued to old and current management which seemed, he said, "like a lot of shares for piss-poor performance." He went on to say that the "overarching theme .. is baffling bad management and corporate governance. The board is packed by the same managers that resulted in the company running out of money twice (I resigned from the board in protest when [Mr Watson] was deemed indispensable to secure a UK banking licence for [the Company] which proved the opposite of prescient)" (underlining added).

23. Mr Laggner provided further details of the basis of the Petitioners' challenge to the validity of the resolution passed in February 2017 which retrospectively had authorised the increase in share capital needed for the Company to issue to Mr Steckel (and others) the very shares that Mr Steckel was voting on the resolution. He claimed that the notice of the meeting was not properly given and that the Company should in any event not have proceeded with the meeting and to pass the relevant resolutions. Mr Laggner said

that the explanation provided in Steckel 1 at [222] – [228] contradicted the explanations previously provided by the Company in connection with the 2021 Petition and that the fact that only four shareholders responded to the EGM notice should also have raised serious questions in the directors’ mind as to whether all shareholders did in fact receive notice of the EGM, particularly when the Series B investment round, which had only completed a few months earlier, had resulted in over an additional 150 shareholders investing in the Company. The Company’s evidence (exhibited to Anderson 1) did not show which shareholders were sent the notice and in any event the notice emails were not received at least five clear days before the date of the EGM. Mr Laggner claimed that in circumstances where the EGM was amending the Company’s articles such that the Company would then issue shares that would dilute shareholders’ interests, it was improper for the Company and the board to have provided such limited notice then to proceed with the EGM when only four shareholders had responded. Mr Laggner said that two of the Petitioners, Mr Simmons and Mr Zaitsev, had confirmed to him that they did not receive notice of the EGM. Furthermore, there were doubts as to whether Mr Steckel was properly authorised to act as a proxy. He had signed the proxy forms that authorised himself, as chairman, to vote on behalf of Kylie and Chen International and therefore required suitable authority to act for Kylie and Chen International but no evidence of such authority had been disclosed. Out of the five shareholders in attendance, Mr Steckel was the person responsible for sending back proxy forms for four of them and the fifth may not even have been a registered shareholder entitled to vote at an EGM (and while Mr Steckel had provided details of the identity of the shareholders at the time of the Transaction and at various other times when fund raisings occurred, he had not provided details as to who the Company’s shareholders were (on a fully diluted basis or otherwise) immediately after the Warrant was exercised, or, importantly, at the time of the February 2017 EGM.

24. As regards AirTM, in Laggner 3 Mr Laggner said that the Petitioners’ complaint concerned the Company’s decision not to pursue a claim against AirTM for non-payment of licensing fees (rather than the investment by certain of the directors and shareholders in to AirTM at its inception) which relate to action (and inaction resulting from the inadequate responses to questions raised by the Petitioners) by the Company from March 2020. He asserted again that AirTM was built by the Company’s engineers and that other

Cloud Money Ventures applications were also built by those engineers. He claimed that AirTM had licensed the intellectual property that the Company had created and that the Company's intellectual property had been licensed by AirTM under an oral licensing agreement pursuant to which AirTM was required to pay licence fees. He challenged Mr Steckel's evidence that there was no formal licensing agreement. He asserted that Thomas Brooke, the attorney who was in charge of the Company's investigation, was also an investor in AirTM. He asserted that the Company had substantial claims ("*hundreds of thousands of dollars*") against AirTM which had never paid the licence fees and that the decision of the Company's board not to pursue any claim against AirTM was motivated by a conflict of interest and was clearly not in the best interests of the Company. In Laggner 4, Mr Laggner noted that the Petitioners' application in the US under 28 USC section 1782 had resulted in AirTM disclosing a substantial volume of further documents (in the hundreds of thousands of pages) and that the Petitioners and their legal advisers had not yet been able to review them all.

25. As regards TBOL, Mr Laggner (again in Laggner 3) asserted that the Company had been heavily invested in obtaining its own banking license in 2016. Mr Watson was leading this process. Mr Laggner said that Mr Watson had confirmed in 2016 and 2017 that there would be an "*Uphold Bank*" and (Mr Laggner claimed) obtaining a UK banking licence was a key objective of Mr Salinas and had been described by Mr Thieriot as the "*holy grail*" (Mr Laggner exhibited a copy of an email dated 22 June 2016 from Mr Thieriot to Mr Parsa, which was copied to Mr Steckel, in which he said that the "*Most important feature of UK Bank is DIRECT access to rails...This is the holy grail, equates to control of one's own destiny, access to global banking etc*"). Mr Laggner asserted that Uphold Group PLC had been incorporated in December 2016 to pursue the licence application and to employ Mr Watson and noted that Mr Watson's employment contract (which was dated 8 August 2016 and exhibited to Laggner 3) recorded that he was to have a 5% stake in Uphold Group PLC as an incentive. Mr Laggner claimed that the balance of 95% must have been a Company asset because the Company was pursuing the banking licence and providing all the funding, and the opportunity for Mr Watson to incorporate Uphold Group PLC. Mr Laggner noted that it appeared from Companies House records that on incorporation Uphold Group PLC's shares were held by Mr Watson personally although he inferred that Mr Watson must have held the shares on trust for the Company. However,

for reasons that had not been explained, Uphold Group PLC (which subsequently changed its name to TBOL) obtained the banking licence but the Company's interest in TBOL had gone down from a 95% shareholding to 5% (according to both Mr Thieriot and Mr Anderson). The result was that Mr Watson and Mr Steckel had acquired a controlling interest in TBOL and there was no evidence that the Company had received any value for the 90% share in the venture that appeared to have been diverted into the hands of Mr Watson and Mr Steckel (Mr Laggner noted that Mr Thieriot had confirmed in his evidence that the Company still holds 5% of TBOL and that Mr Anderson had said that TBOL's majority shareholder is Mr Watson and that Mr Steckel also holds an undisclosed interest). Mr Laggner also said that following the presentation of the petition he had obtained copies of relevant documents pursuant to preliminary discovery in proceedings he had commenced in the United States pursuant to section 1782 of Title 28 of the United States Code. He listed and exhibited eleven such documents including an email from Mr Watson on 16 June 2016 in which he confirmed "*it is reasonable to expect our license [will be] worth £150m.*" Mr Laggner noted that Mr Anderson had referred to the Company very recently having pursued some kind of claim against Mr Watson and that Mr Steckel had said that an independent committee had considered the issue and concluded there was nothing of concern. But neither the Company nor the Respondents had provided evidence in sufficient and proper detail to rebut the serious concerns raised by the Petitioners averments and evidence (and the concerns were exacerbated as a result of the delay in proving any answers to the Petitioners' questions). The evidence strongly supported the view that this was an opportunity for the Company from which Mr Watson and Mr Steckel had profited in breach of their fiduciary duties to the Company.

26. As regards Ledger, Mr Laggner challenged the evidence of Mr Anderson and Mr Steckel, which he said had failed to explain why the shares in Ledger had been sold or how the sale price could be justified. The former had said that the sale was necessary because the Company's financial position had worsened by late 2022 and it needed cash again. However Mr Laggner noted that the summary table at [37] of Steckel 1 indicated cash balances of over US\$26m in 2022. He said that it was impossible to understand how there could be any justification for selling such a valuable, high performing asset at a loss.

27. Mr Laggner also referred to various documents (including emails) he had obtained which he said were evidence of continuing mismanagement. These documents related to the misuse of customer reserves, the subsequent suppression by Mr Steckel of a report into a hole in the Company's reserves, the hiring of a compliance officer (Sameer Ismail) with a serious criminal record and the resignation of three prominent board members (Messrs Milby and Watson in October 2020 citing concerns as to failures of proper corporate governance and the resignation of Stefan Thomas in March 2023) and a class action lawsuit filed against the Company in 2022 alleging that thousands of customers had had their funds stolen from their accounts as a result of the Company's inadequate security practices, which a federal US court had ruled in August 2023 should not be fully dismissed. Mr Laggner said that it would not be until discovery had taken place in these proceedings that a fuller picture will emerge of the details and the scale of the mismanagement involved.
28. Mr Laggner referred in particular to a draft email to Mr Steckel prepared by Mr Brooke (the Company's former General Counsel) prior to his resignation setting out his concerns as to the complete breakdown of proper corporate governance at the Company. Mr Brooke had referred to a failure *by Mr Steckel* to deal with the issues he had identified or respond to respond appropriately, had referred to the Company's executives acting in a reckless and irresponsible manner and to Mr Steckel as having directed him to change the focus of the investigation away from the wrongdoing. He had also written that:

“ I am also quite mindful of a pattern of behavior where those who object to wrongful acts are ostracized/retaliated against and ultimately pushed out, and worse, later blamed falsely for acts that the company knows are committed by others or contrives to rationalize its own bad acts. I am unwilling to allow that to happen to me. As such, I am documenting issues that (1) were created by others, (2) I raised to your and other stakeholders' attention, and (3) the company simply failed to address or worse attempted to obfuscate.”

29. While the email had not, for some reason, been sent, it was said by Mr Laggner to evidence allegations of serious misconduct and support the allegations made by the Petitioners. Further support was to be obtained from other statements made at the time of the resignation of senior members of staff. On 17 October 2020 Mr Watson had resigned from the board and had explained the reason for his resignation being *“I do not have confidence in management's ability to effectively ensure basic governance.”* The

next day Mr Milby had resigned citing his concern that the Company was unable to comply with “*even simple, standard governance such as the issuance of board minutes*” and it appeared from documents received from Mr Parsa that the reason for his departure was also because of Mr Steckel and his running of the Company.

The Second to Fourth Respondents’ evidence in support of their Summons

30. Evidence on behalf of the Second to Fourth Respondents was given, as I have noted, by Mr Steckel in Steckel 1 and Steckel 2, Mr Parsa and Mr Kidd
31. The key parts of Mr Steckel’s evidence can be summarised as follows:
 - (a). Mr Steckel provided details of the current directors of the Company, the directors at the time of the Transaction and the changing composition of the board over time. He denied that he controlled the Company directly or indirectly in general meeting or at board level. He also set out the current shareholders in the Company. The total shareholding of all entities affiliated with him was 22% on a fully diluted basis and he had one vote on a seven member board (Steckel 1 at [21]).
 - (b). Mr Steckel denied that there was a faction of the board in the first half of 2016 comprised of Mr Thieriot, Mr Watson, Mr Parsa and himself (which the Amended Petition defined as the Steckel Faction) or that these directors were acting for a nefarious purpose and breached their fiduciary duties to the Company by approving the Transaction (Steckel 2 at [10]). He said that on or around 16 June 2016 he had received but declined an unsolicited approach from the Company to provide short term financing to the Company for an urgent six-month facility under which the Company would pay 8% interest per month and the lender would receive a controlling interest in the Company if the loan was not repaid in accordance with its terms (this was set out in the Bridge Convertible Note Financing term sheet which was exhibited to Steckel 1). At around the same time, he had engaged in discussions with Mr Laggner as a fellow director and, as the contemporaneous emails showed there was no animosity and no factions, just a desire to find a

solution to the Company's situation. In an email from Mr Laggner to Mr Steckel on 16 June 2016 he had provided his thoughts on the Company and potential development/growth strategies and did not mention the various complaints and conspiracies he has now raised (see Steckel 2 at [18] and [19]).

- (c). Mr Steckel said that the Parsa Emails did not support the Petitioners' case. Instead they showed that while Mr Parsa had been critical of the operational performance of Mr Thieriot and Mr Watson in the lead up to June 2016 and subsequently critical of Mr Steckel's performance as CEO after the completion of the Transaction in June 2016 (which criticisms Mr Steckel did not accept), Mr Parsa had not been part of any faction or under Mr Steckel's control or acting at his direction. As a co-founder of the Company, Mr Parsa had discharged his function as a director independently. The Parsa Emails also confirmed that the Company had run out of money by June 2016 and needed saving and Mr Parsa had laid the blame for the Company's financial position squarely at the feet of Mr Watson and Mr Thieriot. The Parsa Emails confirmed that the Company's board had approved the Transaction in June 2016 as the alternative was bankruptcy (see Steckel 2 at [11]). The Company, Mr Steckel said, had thrived for the benefit of all shareholders since the Transaction. As at 12 July 2023 the value of the Company's shares on the secondary market was US\$1.81 per share (Steckel 1 at [38]-[41]).
- (d). Mr Steckel said that as regards Mr Minor, he had initially been supportive of an investment from Mr Salinas but his position had changed on 22 June 2016 when Mr Parsa sent an email to the board with summary terms of funding which included a five-year option to purchase the shares of Mr Minor and Mr Watson for \$10 million. At that point, it became clear to Mr Minor that any offer of funding would require board and operational control to be transferred from Mr Minor and Mr Watson to an appointee of the lender. In an email sent by Mr Minor to Mr Steckel on 22 June 2016, following his resignation at the board meeting held that day, Mr Minor had offered to sell all of his shares in the Company for US\$5 million as part of a clean exit from the Company. His alternative suggestion was for the Company to file for immediate bankruptcy protection, which confirmed that this was the realistic alternative if funding could not be obtained. Mr Steckel said that paying

Mr Minor US\$5 million for his majority shares in the Company would not have provided the Company with the necessary injection of funds to enable it to continue operating, and was not therefore a viable rescue deal. The Company needed the funding directly if it was to avoid bankruptcy. As at June 2016 the ordinary shares in the Company were “*essentially worthless in a bankruptcy scenario*” which was why Mr Minor's offer to sell over 50% of the Company's shares was not taken up. Two days later Mr Minor had entered into the Stock Purchase, Transfer & Voting Agreement (the *SPTVA*) to sell a portion of his shares with Mr Laggner (see Steckel 2 at [22] and [23]).

- (e). as regards the cause and extent of the Company's cash crisis in 2016, Mr Steckel denied (Steckel 1 at [87]-[94]) that he had engineered an unnecessary cash crisis either in his capacity as a shareholder (he only held approximately 1.4% of the shares at that time on a fully diluted basis) or as a director (as a non-executive director he had was not involved in the day to day operations of the Company). He said that he had no reason to believe that Mr Thieriot, Mr Parsa, Mr Watson and Mr Milby had not discharged their duties properly or acted independently in June 2016 (Steckel 1 at [116]). He exhibited to Steckel 2 an email chain that included an email dated 28 June 2016 from Ms Diane Gray-Smith (who had joined the Company as its Chief Financial Officer in October 2015) to Mr Thieriot in which she referred to the growing “*urgent remedial cash requirement*” of \$1.135m by month end, a reserve shortfall of \$1.9 million (this amount rose to \$2.5 million) which had to be paid and total funding of \$8.7 million to continue operating to the end of November 2016, after which point “*we are back running on empty*”. Mr Steckel said that this email chain showed that Mr Parsa blamed Mr Watson (the CEO) for the Company's financial predicament. He further said that the summary table at [37] of Steckel 1 did not, as Mr Laggner had asserted, show that the Company was in a strong financial position as at June 2016. It showed that (i) for the year ended 31 December 2015 the Company generated \$90,052 in revenue and made an operating loss of \$13,553,613 and (ii) in the first six months of 2016, the Company generated just \$114,693 in revenue, with operational losses remaining constant. The Company had been operating at a significant operational loss which could not continue unless further funding was obtained. Mr Steckel said that there

had been no board meetings between August 2015 and 17 June 2016, during which period the Company had operated under the direction of its executives, primarily Mr Watson, Mr Minor and Mr Thieriot. Concerns started to arise concerning the Company's financial position in late May to early June 2016. Mr Laggner's criticism directed at Mr Steckel and other directors to the effect that they should have called board meetings more promptly to review funding options, as well as taken action to reduce costs, was unjustified (although such criticism must apply to Mr Laggner himself as one of those directors) since the non-executive directors including Mr Steckel were unaware of the full extent of the situation until late May to early June 2016 because it had not been communicated to them by the executive officers of the Company (primarily Mr Watson and Mr Minor) (see Steckel 1 at Steckel 2 [24]-[28]).

- (f). as regards the proper valuation of the Company in June 2016, Mr Steckel said that the valuation included in the non-binding CNB term sheet (and the Greener Equity Report referred to by Mr Laggner) were not reliable and that the valuation of US\$516 million was never used as part of a convertible promissory note facility issued to Winston Ling on 29 March 2016. A good indicator of the Company's actual value as of June 2016, he said, was the terms of the Transaction and an even more reliable indicator of the market value of the Company's shares in late June 2016 was the price at which Mr Minor sold his shares to Mr Laggner and Outpost Capital Management pursuant to the SPTVA on 26 June 2016. Mr Minor had agreed to sell 4,843,890 ordinary shares in the Company to Mr Laggner for an aggregate consideration of US\$1 and a further 4,843,890 ordinary shares to Mr Bechtel/ Outpost Capital Management for an aggregate consideration of US\$1, i.e. 9,687,780 ordinary shares in the Company for a total of US\$2, subject to certain contingencies being met (Steckel 2 at [29]-[35]).
- (g). Mr Steckel said that the board had properly considered alternative funding proposals in June 2016 (Steckel 1 at [139]-[161]) and that the process for approving the Transaction was properly conducted (he had recused himself from the board deliberations and exercised no voting rights as a director or as a shareholder in

respect of the Transaction). He maintained that Mr Laggner had given his approval (Steckel 1 at [169]-[183] and Steckel 2 at [36]-[44]).

- (h). Mr Steckel noted that the Series B2 Term Sheet had been approved by the board. The Company had hoped to raise US\$6,631,861 through issuing 26,007,299 Series B2 Preferred Shares for US\$0.255 per share. US\$6,631,861 was the undrawn amount of the RCA and it was proposed that all preferred shareholders be entitled to participate in this facility through subscription for Series B2 shares. A revised term sheet dated 24 August 2016 was subsequently sent to all shareholders showing that the financing amount had been increased to US\$9,354,042 (to be raised through the issuance of 36,682,520 Series B2 Preferred Shares). A total of twenty shareholders participated in the Series B2 Preferred Shares share offering subscribing for 3,061,957 such shares for a total consideration of US\$780,799 (just 12% of the amount the Company was seeking to raise). There had been little interest from investors. The largest investor had been Mr Ling who subscribed for 1,000,000 shares for US\$255,000. Of the Petitioners, only the Fifth Petitioner had subscribed for Series B2 Preferred Shares (12,500 shares for US\$3,098.25). Mr Steckel did not accept that this resulted in a breach of the IRA but even if it did the remedy was a breach of contract claim which had never been brought (and the damages suffered by the Fifth Petitioner would have been very small). The Second to Fourth Petitioners had opted not to subscribe but had they done so they would have avoided dilution (the total of the required subscription price payable was US\$169,390.12). Mr Steckel did not accept that shareholder approval was required (pursuant to article 17.1(a) rather than article 17.1.1). (Steckel 1 at [184]-194]).
- (i). Mr Steckel said that since very few shareholders wished to participate in the Series B2 Preferred Shares fundraising there had been a shortfall of US\$8,573,243 and it turned out that there was only one other shareholder who was willing to invest a material sum. This was Mr Chen acting through Chen International who subscribed for 150,000 Series B2 Preferred Shares for US\$250,000 (and 6,251 Series B1 Preferred Shares for US\$1,531.50). Mr Steckel said that Mr Chen had, as part of the proposal made by Mr Laggner, indicated a willingness to invest more and substantial sums and that he and Holdings were content to share in the risk involved

in the RCA lending. Shareholders were informed in a letter dated 23 August 2016 that the Company needed the US\$15 million and that Holdings was providing US\$10 million of that. In December 2016, the Company, Holdings and Chen International had entered into a participation agreement (the *Participation Agreement*) under which Chen International was granted a 20.26% participation interest in the RCA. Since Holdings had by then already advanced US\$10 million it was agreed that Chen International would advance US\$2 million, that the US\$540,000 that it had previously paid to the Company would be treated as a loan under the RCA and that it would then participate with respect to 20.26% of future RCA advances. The Participation Agreement had been negotiated on an arm's length basis. The participation had been increased to 33.3% by the first amendment to the Participation Agreement on 11 May 2017 so that Chen International was required to participate with respect to US\$5 million of the US\$15 million RCA. Mr Steckel said that the Company was still operating at a loss in mid-2017. The terms of the amendment included a provision that would result in Holdings' shares in the Company being transferred to Chen International if the Company defaulted under the RCA and these shares were put into escrow. As a result, Holdings was required to put its ownership interest at risk in order to secure the further funding that the Company needed. Since 1 July 2016 the Company had carried out three further rounds of financing to fund the Company's continued growth (Steckel 1 at [198]-[216]).

- (j). Mr Steckel said that an EGM had been held on 23 February 2017 and that notice had been given (as was recorded in the minutes) to all shareholders of record. No shareholders had attended in person and the only proxies received were from Chen International, Kylie Holdings, Caroline Turner, and Mr Steckel himself who all voted for the resolution proposed. Consequently there was a quorum present and the resolution was properly passed. According to the Company's Cap Table, Ms Turner was a shareholder. As a result, the Company's articles were amended and restated in March 2017 which allowed the Company to raise funds by issuing the Series B2, B3 and C Preferred Shares. The Fifth Petitioner had subscribed for Series B2 and Series B3 Preferred Shares (Steckel 1 at [222]-[228]).

- (k). as regards AirTM, Mr Steckel said that there was no formal licensing agreement between the Company and AirTM. “*The Company allowed AirTM, as well as other clients, to use the Company’s API to interact with the Company’s users in order to drive users to the Company’s platform.*” This was a commercial decision taken by the Company’s board (at a time when Mr Laggner was a director). His interest in AirTM and that of Mr Parsa and Mr Thieriot had been disclosed to the board at the time and the board had agreed to grant waivers of potential conflicts of interest in relation to AirTM. These were required because Mr Parsa and Mr Thieriot were subject to restrictive covenants in favour of the Company. Mr Steckel also says that within a year of becoming CEO (on 8 August 2016) he made AirTM pay for access to the Company’s API on the same terms as other enterprise customers and in 2017 AirTM was disconnected from the Company’s platform. This was done at the request of the Company’s then Chief Operating Officer (Mr Dennings) “*for reasons of compliance .. which could have affected the Company’s standing with state regulators in relation to [its] money transmissions licenses*” (Steckel 1 at [229]-[237]). He exhibited to Steckel 2 (i) an email chain which commenced on 9 December 2016 in which he stated that the Company needed to start charging AirTM for usage of the Company’s API and to enter into a formal agreement, and that the terms of that agreement would need to be approved by the nonconflicted board members of the Company and (ii) invoices which were sent to AirTM in 2017. He said that payments were made by deductions from the AirTM wallet held with the Company but that he could not recall if any formal agreement was concluded (Steckel 2 at [52]). Mr Steckel noted that while Mr Laggner had alleged at [52] of Laggner 3 that the Company was entitled to hundreds of thousands of dollars under the alleged oral licensing agreement no particulars had been provided as to how those fees were said to have been incurred, or relevantly for limitation purposes when they were due and payable. The Company’s Litigation Committee had considered the Petitioners’ concerns and did not consider there to be any merit in them.
- (l). as regards TBOL, Mr Steckel said that the Company had never applied for a UK banking licence but had instead agreed to acquire MSBB (MSBB Money Limited), which was UK payments services company. MSBB itself was applying for a UK

bank licence in late 2016. The board by resolution had approved the purchase of the shares in MSBB but in “*around 2017*” the Company’s legal counsel had advised that MSBB’s application would be refused if the Company held more than 9.8% of MSBB’s shares. Based on this advice the Company “*chose not to complete*” the MSBB share purchase. Instead “*the Company chose to transfer its rights to purchase MSBB to TBOL in return for 9.8% of TBOL. However, .. TBOL itself chose not to acquire MSBB and subsequently MSBB was sold to another party*” (Steckel 1 at [238]-[241]). In Steckel 2 Mr Steckel said that the Company's Litigation Committee had been tasked with investigating any rights or claims which the Company may have in respect of TBOL and that he had recused himself from all such matters. He also said that in September 2020, approximately three years after the Company received this legal advice, he had acquired 24,431 shares of TBOL from Anthony Watson, through ASP for US\$305,000. As TBOL has 994,065 total shares outstanding, his shareholding constituted a 2.46% shareholding in TBOL so that he did not have anything close to a controlling position in TBOL. To the best of his knowledge, and based on publicly available documents, Mr Salinas did not have any shares in TBOL and never had any such shares (see Steckel 2 at [53]-[59]).

- (m). as regards the Universal Protocol, Mr Steckel said that in 2018 the Company had organised and participated in the creation of the Uphold Protocol Alliance and this effort was organised and led by Mr Thieriot. Its goal had been to give credibility to the coins that would be minted by the Alliance with services performed by the Company and paid for by money raised by the Alliance. He believed that in the summer of 2018 this had resulted in approximately \$2-3 million being paid to the Company. Contrary to the assertions made in the Amended Petition, this project had a positive effect on the financial condition of the Company. He did not believe that any individual from the Company had any personal participation in the Alliance. The Company was also given UPT tokens which the Board hoped would go up in value. Tokens were also given to many members of management. This effort had nothing to do with Cred, which the Company did not do any business with until later. Whilst a baseless law suit was brought against the Company in relation to Cred, it was subsequently dismissed as being without merit.

Furthermore, the Litigation Committee had investigated the complaint and found no wrongdoing (Steckel 1 at [250]-[253]).

- (n). as regards the stock options about which the Petitioners had complained, Mr Steckel denied the allegations made at [67]-[72] of Laggner 3 that stock options were granted to Mr Thieriot, Mr Watson, Mr Milby or himself as a reward for their approval of the Transaction. He said that stock options were granted to a large number of employees, executives and officers of the Company so that those employees were incentivised to share in the growth of the Company. This was typical in early stage tech companies such as the Company. The bulk of Mr Thieriot's options were granted in 2021 as part of an overall grant to the Company's management and that plan was designed in consultation with a well-known outside specialist and was approved by the board in 2021. It was entirely unrelated to the Transaction which had concluded five years earlier. Furthermore, Mr Laggner was not removed as a director of the Company because of any concerns he had regarding management. He was removed as a director because of his ongoing litigation with Mr Minor (see Steckel 2 at [67]-[70]).
- (o). as regards Ledger, in 2021 the Company had purchased US\$15 million of Ledger stock as part of a financing round. The board had unanimously approved of this investment at a meeting on 2 June 2021. Ledger has a 70% market share for personal devices for cold storage of crypto. The objective of the Company's CEO was that the investment would facilitate strategic discussions which were ongoing between the Company and Ledger at the time. However, no strategic relationship has yet been formed. In 2022, the Company sold approximately US\$5 million of the Ledger stock at the same price in Euros as the purchase price, which was the market price at the time. However, due to the Euro/Dollar exchange rate the Company made a USD loss on the investment. Mr Steckel said that he had had no involvement in the sale but had been told by the board that the sale was made to an unconnected third party which is not affiliated with the Company or any of its shareholders. This sale was entirely arm's length. (Steckel 1 at [258]-[262] and Steckel 2 at [72]-[75]).

- (p). as regards the alleged misuse of customer reserves, which Mr Steckel said was a reference to the US\$2.5 million hole which accrued in the reserves in 2015/2016, when Mr Laggner was a board member and prior to the Transaction, the hole had originally been approximately US\$1.9 million (and subsequently increased to approximately US\$2.5 million). It had been filled (or removed) in 2016 with funding provided under the Transaction. Mr Steckel said that he had first become aware of this in the days following the 17 June 2016 board meeting (which was the first board meeting conducted in 2016) and that the hole had not resulted from any misuse or misappropriation of the customer reserves by management. He had learned after the 17 June 2016 meeting that the deficiency arose from the actions of the financial operations staff in relation to cryptocurrency hedging by not charging customers for transactions which generated cost for the Company (Steckel 2 at [71]).
- (q). as regards the alleged suppression of a report into the hole in the reserves, this was a reference to an internal report prepared in late 2016 or 2017. Mr Steckel said that there had been no such suppression although he was aware from the Company's then general counsel, Mr Brooke, that he had concerns that Mr Watson had sought to interfere in the report. Mr Steckel also said that when Mr Sameer Ismail had been hired as a compliance officer by one of the Company's subsidiaries a UK Disclosure and Barring Service record check had been undertaken and this had revealed no convictions or red flags. Upon the Company becoming aware of Mr Ismail's record, his employment was terminated in around May 2021. Furthermore, the mere fact that the Company had been named to a class action lawsuit in 2022 complaining about the Company's security practices did not evidence misconduct by management (Steckel 2 at [71]).
32. Mr Parsa said that there was never any conspiracy or secret agreement or understanding that he would use his position on the board to help Mr Steckel or Mr Salinas take control of the Company and that he never received any instructions or requests from either of them to act or vote in a particular way, either as a director or shareholder of the Company. He also said that he had never participated in any effort to engineer a cash crisis within the Company or intentionally mis-managed the Company to assist Mr Steckel or Mr

Salinas to achieve a takeover of the Company and that he did not receive any stocks, warrants or other form of benefit or enrichment as a reward. Aside from his founder shares in the Company and the Series A Preference Shares he had purchased in 2013 he had not received any additional upside in the Company. He said that he had voted to support the Transaction because it was the best option available to the Company under the circumstances. The alternative was insolvency and a complete loss to investors. He and the other directors at the time carefully considered the alternative funding proposal put forward by Mr Laggner but this was rejected because there was no guarantee of the money being readily available and, given the Company's dire financial position, there was a risk that the commitments would not materialise. He also gave evidence regarding AirTM. He said that AirTM was not liable to pay any licencing fees to the Company and there was no licencing agreement between AirTM and the Company, whether oral or otherwise. The Company had in-house and external legal counsel and would not have relied upon an oral agreement for something as complex as the licencing of intellectual property. AirTM (and other developers) had free use of the Company's API, which was designed to drive user traffic to the Uphold platform. The Company's strategy was explicitly to encourage the creation of applications that were strategically beneficial to the Company. This policy changed over time (after Mr Laggner was removed from the board in November 2016) and negotiations subsequently occurred between the Company and AirTM resulting in AirTM paying fees to the Company for a period of time before it became independent of the Company. The Company had no basis to charge AirTM (or any other developer) for the previously free use of the API. He said that it was untrue that AirTM and other CMV applications were built by the Company's engineers and that was not supported by the documentary record (AirTM had paid for its own engineers). He acknowledged that he had not been a director in 2021 when the Company made the decision not to pursue any claim against AirTM. However, he could not see that there would be any basis for such a claim.

33. Mr Kidd responded to the references made in the Amended Petition to Hard Yaka:

(a). he noted that [34(d)] of the Amended Petition stated that the Company had issued over 34 million Series C shares to Hard Yaka Inc and that the Petitioners did not accept that these shares were issued at arm's length or for fair value. Mr Kidd said

that Hard Yaka Inc's investment had been made at arm's length and on commercial terms. It had been the largest investor in the Series C round, subscribing for 34,709,880 Series C preferred shares for aggregate subscription proceeds of \$14,930,024 and its investment accounted for around 44% of the total Series C round. There had been no pre-existing relationship between Hard Yaka Inc and the Company or any of its principals or affiliates and the parties had entered into an Investors Rights' Agreement dated 31 December 2018 to record the rights of Hard Yaka Inc as a significant investor in the Company.

- (b). he also noted that at [68] of Laggner 3 Mr Laggner had complained that Hard Yaka Inc had received options as compensation for "*some unparticularised technology development*" and of warrants being issued to him on terms which allowed him to acquire shares at \$1.13. Mr Kidd denied any suggestion that these options and warrants were not agreed on an arm's length basis or were not in the interests of the Company and its shareholders. He said that the technology development referred to related to the perfection of the Company's business-to-business offering such that developers could more easily offer its products and services via third party wallets. The Company's decision to move into the business-to-business develop space had made commercial and practical sense (rather than only operating in a crowded business-to-customer space).
- (c). as regards AirTM, Mr Kidd had been a board member until 27 January 2021 and so was aware of the complaints made from March 2020 onwards regarding AirTM. The complaints were baseless. There was no intellectual property licensed to AirTM by the Company and no licensing agreement existed, oral or otherwise. The Company's board had properly investigated these complaints, took appropriate legal advice, and determined there was no claim to pursue.
- (d). as regards the Universal Protocol, save for the fact that Mr Schatt was part of the Universal Protocol and was also the lead at Cred, those two entities and activities were unrelated. When Cred was determined to be operating on an insolvent basis the Company had severed all ties with Mr Schatt. Mr Kidd accepted that the Company may have suffered potential reputational damage by being associated

with Cred however he was not aware of adverse financial impact on the Company and did not agree that Mr Thieriot, Mr Steckel or he put their own interests above the Company. *“The Universal Protocol simply never took off due to resource constraints and late-to-the-market timing in a turbulent market (rather than some sort of differential benefit to some individuals at the expense of the Company).”*

The Company’s evidence

34. The evidence on behalf of the Company was given by Mr Thieriot in Thieriot 1 and Thieriot 2, Mr Anderson in Anderson 4 and Anderson 5 and Mr Brooke in Brooke 1.
35. Mr Thieriot gave a comprehensive account of the Company’s capital raising. He said that by the end of Q2 2016 the Company needed to raise capital again absent which it was going to become insolvent. He had been involved in the Company's fundraising efforts from an early stage and was aware of the difficulties the Company was having in raising funds. The gravity of the Company's position only became clear to the board in or around 10 June 2016, when it appeared that the Company would become insolvent by the end of that month and the Company was not in a position to pay its employees' monthly salaries for June 2016. The Company had only been saved by Mr Chen’s advance of US\$540,000. Mr Thieriot considered that neither another share issuance nor external commercial finance were viable options. He reviewed in detail the funding proposals considered by the board in June 2016, what was discussed at the board meeting on 22 June 2016 and why the majority of the board considered that the Transaction would be in the best interests of the Company. Although the effect of the Transaction was to dilute the shareholding of existing shareholders in the Company, including his own shareholding and those of the other board members, there was no other alternative apart from an insolvency process. In Thieriot 2 he reviewed the financial position of the Company in detail and sought to rebut Mr Laggner’s evidence and arguments regarding the proper value of the Company and as to available cash. He rejected the challenges and criticisms made by Mr Laggner. Mr Thieriot noted that section 3.3 of the RCA had given the other holders of Preferred Shares the right to participate in the RCA financing (and to receive additional ordinary shares) by tendering additional principal within thirty days. Although the prior written approval of Holdings LLC, in its reasonable discretion, was required

before they could do so there was no cap on the amount of their participation. He said that he had taken steps to ensure that key preferred shareholders, including Mr Ling and Mr Chen, were made aware of their ability to participate in the Transaction. This, along with the fact that Mr Laggner (and by extension his claimed group of White Knight investors) was on notice of the terms of the RCA, meant that the investors who were most likely to want to participate in the Transaction would have had an opportunity to do so. As regards AirTM, he said that he did not recall Mr Laggner or any of the Petitioners making complaints about the AirTM transaction at the time or shortly after its founding in 2015. In March 2020 Mr Laggner, in association with some other shareholders, had made enquiries and complaints about the AirTM transaction. As a result of these complaints, the board established an independent special committee to investigate the AirTM transaction. The Special Committee was comprised of Greg Kidd, Dan Schatt, Peter Chapman and Stefan Thomas, who were not on the board or otherwise involved in the AirTM transaction at the time. The Special Committee obtained Cayman Islands and US legal advice which confirmed that the Company had no actionable claim against AirTM. Mr Thieriot said that this advice had been provided to Mr Laggner. The Special Committee had therefore resolved not to pursue any claim against AirTM. He said that there was no evidence that Mr Steckel ultimately participated in AirTM beyond an initial investment or how he allegedly profited from that involvement at the Company's expense.

36. The main elements of Mr Anderson's evidence can be summarised as follows:
- (a). he denied that Mr Steckel and Mr Chen had ever controlled the board of the Company.
 - (b). he confirmed that the litigation committee (i) had no reason to believe that shareholders were not duly informed of the extraordinary general meeting convened to vote on amending the articles of association in February 2017 and (ii) had concluded that it was not in the Company's best interests to pursue a claim against AirTM in respect of the AirTM transaction.

- (c). as regards TBOL, he said that the Company had attempted to obtain a banking licence in the UK, starting in 2016. Mr Watson, then CEO, was tasked with leading this effort, and he continued to do so after he was replaced as CEO by Mr Steckel. The original plan had been to acquire MSBB which represented itself to the Company as being well-advanced on the process of applying for a licence and the Company had acquired the right to purchase MSBB. But difficulties had emerged. In March 2017 Mr Watson and Mr Milby had met with the UK Financial Conduct Authority and Prudential Regulation Authority (*PRA*) to discuss the possibility of the Company applying for a banking license in its own right and the response was not favourable. The Board was advised by the Company's English solicitors that the maximum ownership stake that the Company could have in a company that owned a licensed UK bank without triggering increased scrutiny of its ownership as a control person was less than 10% and that it was uncertain whether the PRA would in fact grant a UK bank licence to a company (such as MSBB) of which the Company was a control person (i.e. with a stake of more than 10%). The fact that the Company was involved in crypto-currency was cited as another potential difficulty. In light of these serious difficulties, the board had decided to transfer to TBOL the right to purchase MSBB in exchange for a 9.8% stake in TBOL and Mr Watson pursued the issue of a banking licence in his own right, which he succeeded in obtaining four years later. Mr Anderson said that he understood that Mr Watson ultimately did not use MSBB as the means of doing so, as it transpired that MSBB was not as far advanced in the licensing application path as had been understood. The Company did not pay Mr Watson for the stake it received in TBOL and its contribution had been limited to the time spent on the project by its executives, the funding of operational expenses and salaries and the expenditure on KPMG and other consultants during its incubation period, which ceased on 31 December 2017 when Mr Watson pursued the project in his own right. The total expenditure by the Company on TBOL-related matters during this period had been approximately US\$1.5m. Mr Anderson said that in light of the advice given to the board at the time about the difficulties in obtaining PRA approval, he was not aware of any viable alternative transaction that could have benefitted the Company more than the arrangement that was ultimately reached with TBOL. Mr Laggner's suggestion that the Company could have issued shares in Uphold Bank to the Company's

existing shareholders seems to suffer from the same problem in terms of ownership, and may not have been approved by the FCA and PRA, in addition to creating potentially significant tax issues for such shareholders. Given the challenges to the Company pursuing a UK banking licence in its own right, and given that there was nothing to stop Mr Watson from doing so in his own right, the alternatives for the Company, as I understand them, were either to do nothing and abandon the project, or to take as big a piece of TBOL as it could.

- (d). as regards options, Mr Anderson said that the Company had issued Series B3 and C shares to Holdings and Chen International for no additional consideration beyond the RCA to repay the monies owed under the RCA. At the time of repayment, the Company was under a legal obligation to repay the sums due under the RCA and was not in a position to repay these amounts in cash, and so its options were either to default on its indebtedness, with all the draconian consequences under the RCA that would entail, or to repay the loan amount through the issuance of shares. This capitalisation of the debt was completed on 31 December 2018. He also confirmed that the Company has issued 34,708,880 Series C shares to Mr Kidd's company (now in the name of Hard Yaka after an internal reorganisation of Mr Kidd's companies). These were issued at an effective discount to the price at which other Series C shares were sold as the issuance was part of a series of commercial transactions between the Company, its affiliates, and Mr Kidd's companies involving technology development and licensing as well as a backstop against third party hacks of the Company's systems. The price paid was negotiated by the Company with Mr Kidd and his companies, and approved by the board. Mr Chen had received 200,000 options as consideration for his service to the Company as a member of the Board and Mr Steckel had received 2,555,839 options as consideration for his service to the Company as CEO and subsequently 200,000 options as consideration for his service to the Company as a member of the board. Mr Anderson said that these were consistent with grants to the other non-executive director/non-Chairman board members (i.e., excluding Messrs Thieriot, McLoughlin, and Hilton) and that the negotiation of the stock options and warrants have always been approved by the Board. Neither Mr Parsa nor his company Maslow LLC had ever received any options or warrants from the Company. Since the Transaction, Mr Thieriot has been issued 15,686,284 options in consideration

of his services to the Company as a senior executive, of which 5,856,250 have been cancelled, leaving 9,755,034 outstanding, in accordance with the terms of the Company's 2016 Equity Incentive Plan and 2021 Equity Incentive Plan. Since 19 May 2021 Mr Watson has held 2,853,333 ordinary shares in the Company, which he acquired in accordance with the terms of the Company's 2014 Equity Incentive Plan, in connection with his role as CEO and President of the Company from 2015 through 2016.

- (e). as regards Universal Protocol, in or around 2018, Universal Protocol had been developed by a consortium of six crypto firms, called the Universal Protocol Alliance which included the Company. The Company's involvement was a matter of public record, and in fact the Universal Protocol Alliance went through an Initial Coin Offering. Engineers from the Company did work on developing the Universal Protocol and the Company was paid for its services. Mr Schatt of Cred was appointed as CEO of Universal Protocol Alliance by the members of the consortium, including the Company, not by Messrs Steckel, Kidd and Thieriot. Any fundraising that was done by the Company was for Universal Protocol Alliance and not for Cred ("Cred, being the payments company set up by Mr Schatt and another ex-PayPal executive). Cred did not partner with the Company with respect to the Universal Protocol Alliance other than in both companies' respective capacities as members of the Universal Protocol Alliance. It was correct that the Company was sued by two Universal Protocol investors and was fully and vigorously defending those claims, which it considered to be wholly without merit (the investors in question were at all times fully informed about the nature of the business of Universal Protocol Alliance's business and they knowingly participated in an entirely offshore transaction not subject to US securities laws). The claim was originally brought as a lawsuit in the state of Washington, and the court there agreed with the Company that the dispute should be submitted to arbitration in Singapore, as agreed in the relevant contracts. In addition to defending itself against this spurious claim, the Company was seeking compensation for the costs it has incurred in defending itself.
- (f). as regards Ledger, Mr Anderson said that in late 2021 the Company had invested US\$15,354,076 in Ledger SAS, a French company that produces secure hardware

cryptocurrency wallets. The Company was cash rich at the time and the board had considered that an investment in Ledger was a good use of excess cash. But by late 2022 the Company's financial position had worsened, in line with much of the crypto market at the time, and it needed cash for operating expenses. The Company was presented with an opportunity to sell US\$5m worth of its investment in Ledger for the same price as it had paid, effectively unwinding a portion of the investment. There was no liquid market for shares in Ledger but since that time Ledger has raised additional capital at the same price per share in Euros, though due to the varying exchange rates between the Euro and US Dollar, the price per share expressed in US dollars was marginally lower. The sale was at arms' length to Outpost International IP Ltd., a purchaser who had no prior business dealings with the Company or any members of the board. The Company still holds more than two-thirds of its initial investment in Ledger and had no plans to sell. The proceeds from the Ledger sale were used to fund the Company's business operations.

37. Mr Brooke also responded to a number of the allegations made in the Amended Petition:
- (a). he said that he had been "*intimately involved*" in the Company's affairs and had seen no evidence that Mr Steckel had engineered a cash crisis so as to create the conditions in which he could engineer a takeover on favourable terms. The cash crisis was real and resulted from financial mismanagement (with which Mr Steckel had not been involved). The board had understood at the time of the Transaction that the Company was facing insolvency and that urgent action was needed.
 - (b). he noted that the Petitioners had claimed that a US\$2.5 million hole was discovered in the customer reserve account after the Transaction caused by "*management accessing client money*" and that Mr Parsa and Mr Steckel had attempted to cover up the problem by instructing him not to disclose his report on the subject. Mr Brooke said that it was correct that the Company did have an accumulated deficit of approximately US\$2 million in its client reserve in mid-2016 but the losses had occurred in advance of the Transaction and even before Mr Steckel had joined the board (at a time when Mr Laggner had been on the board). The deficit arose because of management failure including the 2015 board policy to offer free customer

transactions and a failed cryptocurrency hedging strategy. There was no misappropriation or deliberate cover up.

- (c). the draft email dated 9 July 2017 that he had prepared shortly after his departure from the Company, which was never sent, had referred to the bad acts of Mr Watson and Mr Dennings and not Mr Steckel, who was unaware of the deficit until a short period after the 17 June 2016 board meeting. Mr Brooke said that he had wanted to notify Mr Steckel as CEO that Mr Watson and Mr Dennings had attempted to conceal the failures from the board and to avoid his reputation being sullied by their action. He had decided not to send the email because he realised that his *“anger toward Mr Watson and Mr Dennings ...had been unfairly directed at Mr Steckel as the new CEO....Based on my interactions with Mr Steckel his primary concerns as CEO was on ensuring that the hole was filled and on minimising any resulting reputational damage to the Company...”*
- (d). Mr Brooke said that Cayman counsel had been consulted in relation to the Transaction and challenged Mr Laggner’s evidence as to the attitude of Mr Minor, the reasons for the rejection of what was described as the White Knight term sheet in the Amended Petition and that he had consistently opposed the Transaction. He said that by close of business on 29 June 2016 only the proposal from Holdings met the board’s criteria for funding commitments and that from the moment that the White Knight term sheet was rejected by the board on that date Mr Laggner was supportive of the Holdings proposal. The limited reservations that Mr Laggner had raised in early July 2016 had been retracted shortly afterwards and not raised again. The board minute for the meeting on 15 July 2016 was accurate in recording the board’s unanimous approval of the Transaction and Mr Laggner had never contacted Mr Brooke to request a correction.
- (d). Mr Brooke also said that he was directly involved in organising the February 2017 EGM (the process for which had been coordinated with Cayman counsel) and that proper notice had been given to all shareholders.

- (e). he denied that AirTM was built by the Company's engineers or that AirTM used the Company's intellectual property in its codebase. AirTM did integrate with the Company via the Company's API but this had been done based on a published developer's terms of service which permitted all developers and not just AirTM free access to the Company's API.

The Second to Fourth Respondents' submissions

The Second to Fourth Respondents' position in outline

38. Mr Chapman KC in opening his oral submissions said that the grounds of the Second to Fourth Respondents' strike out application were relatively narrow and that he relied on seven main points:
- (a). first, that there was no prospect of the Court at trial ordering that the Company be wound up on the petition of shareholders holding just 1.62 per cent of its shares on a fully diluted basis when the petition was not supported by the other shareholders and the Company was successful and thriving.
 - (b). secondly, the principal ground relied on in the Amended Petition for seeking to engage the just and equitable jurisdiction, namely the alleged loss of confidence in the board of the Company, was unsustainable because no allegations were made against the majority of the current board (so that it was impossible for there to have been an objective loss of confidence in the board as a whole) and because the pleaded allegations were essentially historic and inconsequential and therefore insufficient to found and sustain a present lack of confidence in the current board.
 - (c). thirdly, the only other ground relied upon was oppression, which was also unsustainable, particularly in circumstances where the Petitioners cannot point to any conduct that can be said to have particularly been directed at them.

- (d). fourthly, the Amended Petition fails to address the defects in the original petition which the Court had previously indicated required attention, in particular on the ground of lack of particularity.
- (e). fifthly, even if the Petitioners' allegations are not otherwise demurrable, they would on the Petitioners' own case have given rise to adequate, alternative remedies, such that a winding up order in respect to the Company would not be made.
- (f). sixthly, the Amended Petition is scandalous, frivolous and/or vexatious for essentially the same reasons as those rendering it bound to fail (the Second to Fourth Respondents say that the Amended Petition forms part of a pattern of conduct by the Petitioners, and the Petitioners through Mr Laggner in particular, which is designed unduly to vex the Company and the Respondents with a view to commercial gain for improper ulterior motives).
- (g). seventhly, the Amended Petition is also an abuse of process for essentially the same reasons as relied upon on the other grounds, particularly because, having been directed by the Court effectively to remedy defects in the original petition, the Petitioners have failed to do so.

The law – winding up on the just and equitable ground

39. The Second to Fourth Respondents submitted that whether it was just and equitable to wind up a company was an inference of law to be made from the facts of the case (citing Jessel MR during argument in *Re Rica Gold Washing Co* (1879) 11 Ch.D 36) and that the equity must be founded on facts alleged in the petition (citing *Re Wear Engine Works Co* (1875) LR Ch App 188 per James LJ at page 191). Furthermore, the Court was required to decide this by reference to and in light of the circumstances existing at the time of the hearing (*Re Fildes Bros Ltd* [1970] 1 WLR 592). The implication and effect of this, they said, was that a petitioner was unable to rely on the regurgitation of past ills - to wind up a company was a drastic measure and to do so based on past complaints would not be equitable (the Second to Fourth Respondents relied on the statements made to this effect in the Prince Edward Island Supreme Court case of *Hillcrest Housing Ltd*

(1998) 165 Nfld & PEIR 181 at p 233 which is cited in French, *Applications to Wind Up Companies* at [8.139]).

40. The Second to Fourth Respondents said that the principal factors affecting the Court's decision on a contributory's petition under the just and equitable clause included the circumstances of the company as they affect the petitioner; the petitioner's interest in the company; the opposition of other members; the drastic character of the remedy; the availability of alternative remedies; and the petitioner's own responsibility for the company's circumstances.
41. The Second to Fourth Respondents accepted that a justified irretrievable loss of confidence in a company's management was one of the established bases on which a winding order on the just and equitable ground could be made. The lack of confidence must be grounded on conduct of the directors in regard to the company's business which demonstrates a lack of probity (by reason of fraud, serious misconduct or serious mismanagement of the affairs of the company) and must not spring from dissatisfaction at being outvoted on ordinary business decisions. A dispute which is a mere domestic quarrel between groups of shareholders, which should be settled by majority vote under the company's constitution, will not justify winding up (citing *Loch v Blackwood Ltd* [1924] AC 783).
42. They also accepted that oppression was another established basis on which a winding order on the just and equitable ground could be made. But oppression must include either a lack of probity or fair dealing to a member (citing *Fortune Nest Corporation*, unreported, Mr Justice Cresswell, 5 February 2013). They relied on the following *dicta* to show what had to be established to demonstrate oppression:
 - (a). in *Re Jermyn Street Turkish Baths Limited* [1971] 1 WLR 1042 Buckley LJ had said as follows:

"Oppression occurs when shareholders having a dominant power in a company either (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs, and when such conduct is unfair or, to

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use the expression adopted by Viscount Simonds in Scottish Co-operative Wholesale Society v Meyer [1959] AC 324 "burdensome, harsh and wrongful" to the other members of the company or some of them and lacks that degree of probity that they are entitled to expect in the conduct of the company's affairs. Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor."

- (b). in *Elder v Elder Watson Ltd* [1952] SC 49, where the petitioning shareholder averred that they had suffered oppression by being removed from office as directors at the instigation of another who had sought to obtain control of the company for the benefit of himself and his nominees and there was no allegation that the business had been mismanaged to the detriment of the shareholders, Lord Keith (at pages 55 and 60-61) had said that:

"Where the "just and equitable" jurisdiction has been applied in cases of this type, the circumstances have always, I think, been such as to warrant the inference that there has been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy....."

The company's affairs must be conducted in a manner oppressive to some part of the members, and that connotes to my mind an abuse of power by some person or persons controlling the company, resulting in injury to the rights of some part of its members. ... In the present case I am satisfied that there are no circumstances averred in the petition relevant to infer oppression within the meaning of the section. ... I can find, however, no suggestion that anything that was done was designed to injure the petitioners in their rights as shareholders or did in fact do so. At the most, the averments seem to me to disclose no more than differences of opinion as to the management of the company, giving rise perhaps to animosities and to exclusion of the first and second-named petitioners from office and employment in the company. There is nothing to suggest that the company is not being conducted efficiently by the existing board in the interests of the members as a whole."

43. As regards stale claims, the Second to Fourth Respondents relied on Justice Mangatal's judgment in *Re Washington Special Opportunity Fund Inc* (unreported, 1 March 2016) where the learned judge had dismissed a contributory's winding up petition. The case concerned complaints about amendments to the Company's articles some seven years prior to the petition being presented. Justice Mangatal had noted that winding up was a drastic measure and concluded that it would not be equitable on the facts to make a

winding up order based upon past conduct. She also decided that it was no part of the Court's function to deal with old claims or to conduct an *ex post facto* trawl through the entire history of the subject company. The Second to Fourth Respondents argued that the Petitioners in these proceedings had engaged in what Mangatal J had referred to as a “*substantial regurgitation of stale claims and alleged past ills.*”

The law – striking out a winding up petition

44. The Second to Fourth Respondents noted that a pleading, including a just and equitable winding up petition, was subject to GCR O.18, r.19 which provides the Court with the power to strike out anything in any pleading (or the entire pleading) on the ground that it disclosed no reasonable cause of action or defence; it was scandalous, frivolous or vexatious; it may prejudice, embarrass or delay the fair trial of the action or it was otherwise an abuse of the process of the court. The Court may also strike out a petition under its inherent jurisdiction for the same reasons and where the petition had no prospect of success at trial. The powers under the Court's inherent jurisdiction were expanded, not diminished, by GCR O.18, r.19.
45. As regards the circumstances in which a just and equitable petition would be struck-out, the Second to Fourth Respondents relied in particular on the judgments of Mr Justice Kawaley in *CTrip Investment Holding Limited v EHI Car Services Limited* [2018 (1) CILR 641] (*CTrip*), Mr Justice Parker in *In the matter of Circumference Holdings Ltd* (unreported, 3 May 2021) (*Circumference*) and Mr Justice Smellie (as he then was) in *RCB v Thai Asia Fund* [1996 CLR 9] (*RCB*).
46. In *CTrip* Mr Justice Kawaley struck out a petition having held that the complaints of misconduct were unsustainable and unmeritorious and that the main purpose of the petition was for the petitioner to advance a rival takeover bid rather than the class interests of shareholders that the petitioner purported to represent. Justice Kawaley had observed (underlining added by me):

“ The strike-out jurisdiction, for the reasons explained above, is not limited to cases which disclose no reasonable cause of action. It may be engaged in relation to claims which are unsustainable on their merits as well. (at [25])

While I accept that improper motive is an allegation which is often proved through circumstantial evidence, the party making such an allegation must at the strikeout stage at least be able to point to primary facts which might be established at trial from which the requisite inference can be drawn.” (at [30])

The petitioner cannot properly use a just and equitable winding-up petition to gain leverage for its own merger bid. It can only seek relief designed to vindicate the rights of shareholders generally (or at least shareholders of its class). The sustainability of this complaint must be tested in the following way: has the petitioner made out an arguable case that the company is proposing to raise capital not because the company actually needs it but because non-conflicted directors are likely to be suborned by the chairman into supporting the merger agreement?” (at [38])

47. In *Circumference* Mr Justice Parker observed that:

“[36] The winding up procedure is generally intended to be used in clear cases. It is not for the resolution of disputed debts or other contentious disputes that should properly be resolved by writ actions or other litigation processes. In addition, in relation to any petition brought on the just and equitable ground, it must self-evidently be just and equitable to obtain the relief sought. ...

[38] Further if any action is not brought bona fide for the purpose of obtaining the relief sought but for some ulterior or collateral purpose it will, ex hypothesi, not be just and equitable. It may be struck out as an abuse of the process of Court Bringing a petition simply to exert pressure on the Company will also be an abuse of process.”

48. Mr Justice Parker had further noted than in deciding whether to strike out a contributory’s petition on just and equitable grounds, the Court must consider whether there is an alternative remedy available to the petitioner and whether the petitioner is acting unreasonably in not pursuing that alternative remedy. If these questions were answered in the affirmative, the Court could be expected to take the view that the presentation of the petition was abusive or bound to fail because it is not just and equitable. The petitioner must show that the winding up procedure provides the only sufficient remedy to deal with the wrong about which he complains and that there is no adequate alternative available to him.

49. The Second to Fourth Respondents accepted that a strike out application was not the forum in which to resolve disputed issues of fact but said that the judgment of Mr Justice Smellie in *RCB* (in which he had struck out the petition finding that it disclosed no cause

of action, was vexatious, and an abuse of process) made it clear that a petition did not have to go to trial merely because it made serious allegations of bad faith and oppression against the directors. As the consequences of going to trial would be serious to the company, the Court should be prepared to scrutinise the available undisputed evidence supporting the allegations and to strike out the petition if it was obviously unsustainable. Smellie J had said this (at pages 18-19) (underlining added by the Second to Fourth Respondents):

“In this case the important primary facts are undisputed. If on any reasonable examination of those facts, it is plain that they cannot sustain the charges raised in the petition, it must surely be wrong, as Mr Mowschenson submitted, to allow the petition to proceed to trial, with the attendant adverse consequences for the company and all its shareholders in the meantime. This must be particularly so when the charges raise allegations of bad faith against the directors as the basis for petitioning to wind up on the grounds that it is just and equitable to do so.

*There is authoritative support for that approach: see *In re Saul D. Harrison & Sons Plc ... (Saul Harrison)* a case in which the petition sought, inter alia, relief on the basis that it was just and equitable to wind up because the directors had acted in bad faith. In the English Court of Appeal, Hoffmann, L.J. (as he then was) examined the undisputed facts and said ([1994] BCC at 492):*

*“But the question in this case is whether on the evidence taken as a whole and assuming in favour of the petitioner any disputed questions of primary fact, there is any case to answer. Of course it is always possible to answer that discovery and cross-examination may produce some written or oral confession that the board were indeed acting in bad faith. But I do not think that the petition can be allowed to proceed to trial simply in the hope that something may turn up ... I think that the consequences for the company mean that a court should be willing to scrutinise with care the allegations in a ... petition and, if necessary, the evidence proposed to be adduced in support, in order to see whether the petitioner really does have an arguable case. This is particularly so when the petition rests on allegations of bad faith akin to fraud: see Sir George Jessel, M.R. in *re Rica Gold Washing Co ...*”*

In any event, it is just as well to note now that the evidence falls to be examined when the court considers the other grounds of the strike out summons, i.e. whether the petition is frivolous or vexatious or an abuse of the process of the court. And it is also settled that in the exercise of the court’s inherent jurisdiction, the evidence can be considered at large.”

50. The Second to Fourth Respondents submitted that the Petitioners must show at the strike out stage that there was an objectively sustainable case which was likely to result in a winding up (see Justice Richards’ judgment in *Fideicomiso F.000118 v Madera Technology Fund (CI) Ltd*, unreported, 3 November 2021 (**Madera**) at [112]). If the facts

which must be taken to be true, or the facts, where the evidence is admissible, which are established by evidence which is not disputed, lead the Court to the clear view that the petition is bound to fail, then it would be pointless to allow the petition to go to hearing and thereby to protract the uncertainty that hangs over the company (citing Peter Gibson J in *Re a Company No. 003096 of 1987* [1988] 4 B.C.C 80) (*Re a Company*).

The Second to Fourth Respondents' case

51. I have already noted the seven main points relied on by the Second to Fourth Respondents. The following further points are worth noting.

52. The Second to Fourth Respondents said that the Amended Petition was nothing more than a cash-grab by a tiny minority of shareholders who were not seeking any class remedy. The Petitioners represent just 1.62% of all shareholders on a fully diluted basis and putting aside Mr Laggner's shares (1.46%) that were acquired years after the majority of the conduct complained of occurred, the balance held by the other Petitioners is just 0.16%. The Second to Fourth Respondents noted that all other shareholders (approximately seven hundred of them) had been notified of and served with the Amended Petition and had the opportunity to support it. Not a single other shareholder had done so. Accordingly, ignoring those shares held by the Respondents, there remained a substantial majority of independent shareholders by value and by number who did not support the allegations made in the Amended Petition. The Second to Fourth Respondents submitted that a winding up order could never be just and equitable in these circumstances where it would negatively impact the interests of the substantial majority of shareholders who should be taken to oppose the relief sought. Furthermore, the loss of faith and confidence which the Petitioners must show could not be objectively justified where over 98% of the Company's shareholders by value (and 99.14% by number) including the Respondents did not share the Petitioners' stated concerns (or at least the lack of support from any other shareholders was evidence that the Petitioners' complaints were purely subjective and not reasonably justifiable).

53. [35(i)] of the Amended Petition contained a bald plea that the Petitioners had lost all faith and confidence in the directors of the Company but it was not supported by the facts and matters pleaded in the Amended Petition and was hopeless. The plea was not supported

by an allegation (still less a properly particularised allegation) of a loss of confidence in the current board. As regards the current board, allegations were only made against Mr Steckel and perhaps Mr Thieriot (who was also alleged to have been a member of the Steckel Faction). The Amended Petition failed to make any complaint against Mr Chapman, Ms Slemmer, Mr Hilton or Mr McLoughlin, who together constituted a majority of the current Board of the Company. There was only a complaint that related only to two out of the seven members of the current board. The only pleaded allegation of misconduct involving an alleged lack of probity was advanced against Mr Steckel and only in relation to the Transaction. None of the other complaints alleged misconduct, still less a lack of probity, on the part of any other current director. Furthermore, none of the pleaded complaints related to current or ongoing misconduct on the part of the current board. On the contrary, the complaints were entirely historical in nature. The gravamen of the complaint and the only one where there a lack of probity was pleaded related to the Transaction in 2016 so that the Amended Petition represented a classic case of the regurgitation of stale claims and alleged past ills.

54. As regards the Petitioners' allegations of oppression, the Second to Fourth Respondents said that these did not relate only to the Petitioners. The alleged complaints were not unique to them. The Petitioners had not alleged that the Company had been managed in a way to cause oppression to them specifically, or even to any particular class of shareholder of which they were members. The Petitioners' complaints appeared to relate to alleged defects in the further issue of preference shares and the failure to respect the rights of the Petitioners other than Mr Laggner to participate in the further fundraising rounds. But only one of the Petitioners had wanted and chose to participate in the further fundraising and share issues and if they did have legitimate complaints about a breach of their rights under the IRAs then they could and should have brought claims against the Company (for a breach of the IRAs or the Company's articles). Mr Laggner's claim based on oppression was even weaker since as a holder of ordinary shares he did not have the benefit of any contractual anti-dilution protections. Furthermore, he had only acquired his shares in 2019, with full prior knowledge of everything now complained of. In these circumstances, the claim based on oppression was hopeless and unsustainable.

55. The Second to Fourth Respondents submitted that the credibility of the Petitioners' allegations was undermined in material respects by the difference between the allegations contained in the Amended Petition and the Petitioners' previous winding which had been presented in February 2021 (the *2021 Petition*). In the 2021 Petition, the petitioners had sought a winding-up order on a number of grounds including that "*the board [meaning the then current board] has failed to act in the best interests of the Company and its shareholders and that the directors had demonstrated a lack of probity in their actions and had committed clear breaches of their fiduciary duties by engaging in a series of actions tantamount to a conspiracy to allow one of the Company's shareholders and directors, Adrian Steckel, to gain [de facto control of] the Company.*" So by way of contrast to the complaints in the Amended Petition, the petitioners had previously felt able at least to make the allegation that all the directors had demonstrated a lack of probity. But there was no plea in the 2021 Petition of there having been a Steckel Faction, no allegation that the financial position and financial pressures facing the company in 2016 were either engineered or made worse by Mr Steckel, no allegation complaining about the issue of shares and options to Mr Steckel, Mr Chen and Mr Kidd and no complaints relating to TBOL or the Universal Protocol. The Second to Fourth Respondents argued that the timing of the 2021 Petition was significant since it showed that the Petitioners had waited until the Company's financial strength had been assured (through the continued efforts of the board over many years and the substantial financial commitments of several of the Respondents and other investors) and it was to be inferred that if the Company was still struggling financially, as it had been for many years even after the Transaction and during which time the Petitioners all remained silent, the Petitioners would never have come forward with their manufactured complaints attempting to justify a buy-out order. In electing to delay for so long, the Petitioners had shown that their concerns were not genuinely held. The Second to Fourth Respondents said that it was also telling that the contemporaneous documentary record suggested that the Petitioners' allegations had been manufactured after the event.
56. The Second to Fourth Respondents argued that it was relevant that the evidence showed that the Transaction had been approved by the majority of the Company's board including Mr Milby against whom no complaints had been made by the Petitioner. There was also no justification for the complaint concerning the resolution passed at the EGM

held on 23 February 2017. At that EGM the Company in general meeting had approved an amendment to the articles to create five additional classes of shares and to give the board authority to issue additional Series A and Series B preferred shares. The best the Petitioners had been able to say was that there was a “*serious doubt*” as to whether the shareholder resolutions were validly passed. The evidence clearly showed that the EGM was validly convened in accordance with the articles and the notice requirements were complied with; all shareholders were notified in advance of the intention to amend the articles and that the purpose for the amendment was to permit the issuance of new shares; there were no irregularities concerning the votes; the resolutions passed at the EGM were valid; all shares issued by the Company were validly issued and authorised by the Company; the share issues by the Company were *intra vires* and the directors’ power to issue shares was exercised for a proper purpose, i.e. equity fundraising and that no Petitioner had raised any contemporaneous complaint.

57. Furthermore, Mr Laggner’s approval of the Transaction and his position generally meant that there was no prospect of him being granted the equitable relief he seeks so that even if the Court is not minded to strike out the Amended Petition in its entirety the Court should strike out Mr Laggner as a petitioner. The Second to Fourth Respondents noted that at [1] of the prayer of the Amended Petition Mr Laggner sought an order that the shares he acquired in the Company in May 2019 for a price per share of US\$0.00000021 be purchased by Mr Steckel and/or the other Respondents for fair value in an amount to be determined by the Court by making “*all necessary adjustments*” to the composition of the Company’s shareholdings to take into account the “*disproportionate*” number of shares that were acquired by the Second to Fifth Respondents as a result of the Transaction in June 2016 and “*all other necessary adjustments to achieve a fair valuation*”. In doing so, Mr Laggner invited the Court to value his shares in the Company by disregarding the shares which were issued by the Company over the last seven years (but query taking into account the benefit of the substantial equity investments received by the Company pursuant to which those same shares were issued, and the Company’s financial success and growth since June 2016). The Second to Fourth Respondents submitted that it could not be just and equitable to provide such relief on a winding up petition to an individual such as Mr Laggner who had approved a funding transaction in July 2016 as a director of the Company, subsequently acquired around 1% of the

Company's shares in or around May 2019 for a mere US\$1 relying on that transaction (in his litigation with Mr Minor, Mr Laggner had expressly relied upon the completion of the Transaction as the basis for his contractual entitlement to acquire Mr Minor's shares for \$1) and who then presented a petition to wind up a solvent company with over 700 shareholders on the just and equitable basis based on historic complaints concerning events which occurred more than six years ago, including actions which he himself approved as a director at the time (including that very transaction). Mr Laggner had already sold 40,000 shares on the secondary market at a price of US\$7.00 per share (US\$280,000 total purchase price, at a cost to Mr Laggner of just US\$0.01) and had therefore already made a substantial profit on his investment. He had also demonstrated that he is able to sell his shares on the secondary market should he wish to do so such that the relief sought on the Amended Petition was unnecessary.

58. Even if concerns were really held at the time of the events now complained of, or concerns have developed with time, the complaints were stale. While there was no limitation period in relation to winding up petitions, the events in 2016 and 2017 which are at the heart of the Amended Petition ought to have been the subject of a writ action at the time and could not found the relief now sought. The Second to Fourth Respondents submitted that the Petitioners failure to pursue the alternative remedies available to them was an independent ground for striking-out the Amended Petition.
59. The Petitioners' only attempts to confront the Company and the Respondents for their alleged mismanagement and misconduct had come in the form of the 2021 Petition and the Amended Petition. The Second to Fourth Respondents said that the Petitioners plainly considered that the winding up jurisdiction would heap the most pressure on the Company and the Respondents to buy-out their minority shareholding at an inflated price. Both petitions were an abuse of process in circumstances where the Petitioners had failed unreasonably to pursue alternative remedies, which remedies include:
 - (a). the complaint regarding the Transaction and its dilutive effects amounted to an allegation that the terms of the IRAs and the Company's articles were not complied with. A claim in contract would have been the obvious remedy to pursue. Further, the alleged mismanagement by the directors in connection with the approval of the

Transaction would, on the Petitioners' case, support a claim against the then directors (via a derivative action).

- (b). the complaint concerning the 2017 EGM appeared to be based on an allegation that the Company's articles were not complied with. Again, a claim in contract would have been available (at least by those Petitioners who were shareholders at the time).
 - (c). the complaints in relation to TBOL, AirTM, the Universal Protocol Alliance, and Ledger were all complaints about corporate governance and alleged mismanagement and, on the Petitioners' case, would give rise to claims against the directors for breach of duty or a claim against AirTM which could be pursued via a derivative claim or declaratory relief.
 - (d). the claim that the Company had permitted the issue of further shares, options and warrants to certain individuals would also be answerable via a derivative claim or declaratory relief in respect of the alleged wrongdoing of the directors in permitting the shares, options and warrants to be issued or alleged breaches of duty or trust. Any individuals who had benefited from or been complicit in such wrongdoing could be joined as defendants to a writ action on the basis of knowing receipt or dishonest assistance.
60. In any event, all matters complained of had been shown to be legally and commercially defensible based on reliable and independent contemporaneous documents. The Second to Fourth Respondents submitted that the evidence currently before the Court clearly established that the Petitioners' historic complaints lacked merit, were not genuinely held, and did not objectively justify a loss of all faith and confidence in the current board so that the Court could safely conclude at this stage that the Petitioners' pleaded case cannot succeed at trial. They accepted that the evidence filed was extensive for a strike-out application but said that this had been inevitable and justified as a result of the scattergun approach taken by the Petitioners. The Second to Fourth Respondents said that applying the approach adopted by Smellie J in *RCB* and Kawaley J in *CTrip*, this evidence could be taken into account and allowed the Court to conclude at the strike-out

stage that the Petitioners' case had no prospects of success and was bound to fail. The complaints made in the Amended Petition could not succeed on any reasonable examination of the undisputed primary facts. There was no evidence to support the allegation of a breach of duty by the directors in relation to the Transaction or the other acts said to give rise to mismanagement and no attempt had been made by any of the Petitioners to bring a derivative action on behalf of the Company against the directors concerned for breach of duty within the applicable limitation period. The Petitioners had no prospect of establishing at trial an objectively justified loss of all faith and confidence in the current board based on a lack of probity by the current directors. The Court was not being asked to resolve any disputed issues of fact or make findings in relation to credibility. Rather, the Court was entitled to have proper regard to all the evidence before it, including all of the contemporaneous documents as well as the affidavit evidence from neutral and independent witnesses (Messrs Kidd, Parsa, Brooke, Anderson and Thieriot were not financially invested in the outcome of these proceedings and were to be treated as independent). The Second to Fourth Respondents should be relieved of having to meet a claim which had no prospect of succeeding at trial and the Amended Petition should be struck out in its entirety at this stage.

61. The Second to Fourth Respondents submitted that while the Court was not required to conduct a mini-trial and resolve disputed issues of fact or make credibility findings on a strike-out summons, the contemporaneous documentary record and the unchallenged affidavit evidence reliably illustrated how the pleaded allegations were incapable of being established at trial. This was particularly so as regards the allegations that might arguably concern the current board. The extensive and independent evidence filed by the Respondents showed that each of these allegations, which were often formulated without adequate particulars and specificity, were unfounded:
 - (a) the AirTM complaint had been fully investigated by the board in 2020/2021 with the assistance of legal counsel and found to be baseless. The independent evidence of Mr Kidd, Mr Brooke and Mr Parsa ought to be determinative. The Petitioners had alleged this claim may be worth "*hundreds of thousands of dollars*" but this was of negligible financial significance given the size of the Company and the Petitioners' 1.62% interest in it. The Amended Petition did not provide particulars

of the alleged oral licensing agreement, its terms, the Company's right to payment, the amount of that payment or when the payment fell due. But the evidence clearly showed that there was no written or oral licensing agreement between the Company and AirTM; no intellectual property was licensed by the Company to AirTM; the Company's board in 2015, which included Mr Laggner, took the commercial decision to allow AirTM, and other clients, to use the Company's API; in order to drive users to the Company's platform; AirTM was not built by the Company's engineers but was built using AirTM's own resources on top of an API developed by the Company's engineers; the Company's developer's terms of services permitted all developers, not just AirTM, licence free access to the Company's API; the Company did not have a claim against AirTM for use of the Company's API from 2015 or otherwise; the interests of Mr Steckel, Mr Parsa and Mr Thieriot in AirTM were disclosed to the board at the time and the board granted waivers of any potential conflicts; following the Transaction, the Company started charging AirTM to access the Company's API on the same terms as its other enterprise customers; in response to the Petitioners' concerns in 2020 the Company established a special committee comprised of Mr Kidd, Mr Schatt, Mr Chapman and Mr Thomas, none of whom had an interest in AirTM or were directors at the time the fees were allegedly incurred, which committee obtained Cayman Islands and US legal advice which confirmed that the Company had no actionable claim against AirTM. Furthermore, a lack of probity on the part of Mr Steckel or Mr Parsa had not been pleaded in the Amended Petition in relation to AirTM.

- (b). as regards TBOL, the evidence showed that the Company had attempted to obtain a banking licence in the UK, starting in 2016; in late 2016 to early 2017, the Company acquired the right to acquire MSBB which was in the process of applying for a UK bank licence in late 2016; the Company was advised by its English law solicitors (Paul Hastings) in 2017 that the maximum ownership stake that the Company could have in a company that owned a licensed UK bank without triggering increased scrutiny of its ownership as a control person was less than 10%, and that it was uncertain whether the PRA would grant a UK bank licence to a company such as MSBB if the Company was a control person with a stake of more than 10%; as a result of the legal advice received, the Company transferred

the right to purchase MSBB to TBOL in exchange for a 9.8% stake in TBOL and Mr Watson pursued the issue of a banking licence in his own right through TBOL, which he succeeded in obtaining four years later but not through MSBB; the Company's stake in TBOL was acquired by way of a share issuance agreement dated 1 January 2018, which was made pursuant to the memorandum of understanding between the Company and TBOL dated 5 October 2017; the Company did not pay Mr Watson for the stake it received in TBOL and the Company's total expenditure on matters related to TBOL was approximately \$1.5m; the Company enforced its rights against TBOL in 2021 and received the full number of shares it had a right to in 2022; the Company's current shareholding in TBOL is valued at around \$50 million; there was no evidence to suggest that Mr Steckel carved out significant equity in TBOL for himself, Mr Watson and Mr Salinas or took any step or action *qua* shareholder or director of the Company to do so; public filings by TBOL showed that TBOL has various third party shareholders including unaffiliated venture capital firms; Mr Steckel's interest in TBOL was confined to 24,431 shares held indirectly which were acquired from Mr Watson in September 2020 for consideration of \$305,000 and there was no evidence that Mr Salinas holds or has held any shares in TBOL.

- (c). as regards Universal Protocol the evidence showed that in 2018 the Company, led by Mr Thieriot, organised and participated in the creation of the Universal Protocol Alliance, a consortium of six crypto firms; other than the fact that Mr Schatt was part of the Universal Protocol and was also the CEO at Cred, those two entities and activities were unrelated; Mr Schatt was appointed as CEO of Universal Protocol by the members of the consortium, including the Company, but not by Messrs Steckel, Kidd and Thieriot; when it was determined that Cred was insolvent, the Company severed ties with Mr Schatt; the Universal Protocol never took off due to resource constraints and late-to-the-market timing in a turbulent markets; the Company was sued by two Universal Protocol investors and is fully and vigorously defending those claims, which it considers to be wholly without merit and there was no adverse effect on the financial position of the Company as a result of these events.

- (d). as regards the Ledger complaint, it only concerned a small loss on an asset sale resulting from currency fluctuation between the purchase date and sale date and the evidence showed that in late 2021 the Company had acquired shares in Ledger SAS through its wholly owned subsidiary, Uphold Ventures Inc, at a cost of EUR 12,025,248.46, which at the time was equivalent to US\$15,534,036; subsequently Uphold Ventures was restructured into a limited liability company and its membership interests were denominated as 15,534,036 units split into two classes – Class A units (totalling 2,534,036) and Class B units (13,000,000). Class A had certain rights more favourable than Class B in terms of voting control; in late 2022 the Company sold 5,000,000 Class B units of Uphold Ventures to Outpost International IP Ltd, a purchaser who had no prior business dealings with the Company or any members of the Board. Outpost International IP Ltd is not affiliated with Dave Bechtel; Uphold Ventures has not disposed of its shares in Ledger; the Company has sold for market value an indirect economic right to slightly less than one-third of the interest it previously held for US\$5 million; the Company managed to receive more or less the same price as it paid for the economic value of its investment in Ledger; due to a change in the Euro-US Dollar exchange rate, the effective price received by the Company for the Class B units as against the price paid for the Ledger shares in 2021 decreased slightly but the difference is marginal; the sale was at arms' length to Outpost International IP Ltd and the proceeds from the Ledger sale were used to fund the Company's business operations.
- (e). the indemnification complaint ought to be abandoned in light of the Petitioners belated consent to the validation of indemnification payments to the Second and Third Respondents.
62. While Mr Laggner had recently suggested (in Laggner 3) that the Steckel Faction also included Mr Kidd and Mr Chen, this had not been pleaded in the Amended Petition. The existence of the allegedly illicit faction of directors, now comprising five different individuals who were all said to be under Mr Steckel's spell, was central to the Petitioners' case. Unfortunately for the Petitioners, this conspiracy theory had absolutely no basis in reality and its existence had been forcefully denied by every alleged member

(save for Mr Watson who was not asked to give evidence). Mr Brooke had also denied its existence based on his daily interactions with the board during his time as General Counsel and Mr Kidd was vehement and clear that the notion that his venture capital firm would invest significant money into the Company to then vote in league with Mr. Steckel and/or Mr Salinas would be farcical.

The Fifth Respondent's evidence

63. Mr Chen, as I have noted, filed two affirmations in support of the Fifth Respondent's strike-out summons. In Chen 1 Mr Chen noted that the Fifth Respondent had opposed joinder to the Amended Petition, reviewed the allegations relating to the Fifth Respondent and Mr Chen in the Amended Petition, referred to the correspondence between the Fifth Respondent's attorneys and the attorneys acting for the Petitioners in which the Fifth Respondent asserted that the Amended Petition did not claim that Mr Steckel's alleged agreement with Mr Chen amounted to the Fifth Respondent participating in any misconduct, gave no particulars of any participation in wrongdoing by the Fifth Respondent and said that unless the Amended Petition was further amended to provide proper particulars on these matters the Fifth Respondent would make a strike-out application. In Chen 2 Mr Chen said that he is an independent investor who had always acted independently in relation to his investment in the Company. He had not been introduced to the Company by and did not owe any allegiance to Mr Laggner (so the suggestion made by Mr Laggner and the Petitioners that he had changed sides was nonsensical) and had no business dealings with Mr Steckel outside the Company (and owed no allegiance to and was not under the influence of Mr Steckel). It was untrue to suggest that Mr Chen or any of his companies would cause their shares to be voted in accordance with the instructions of someone else, including Mr Steckel.

The Fifth Respondent's submissions

64. The Fifth Respondent submitted that there was no legally sustainable basis in the Amended Petition for a purchase order being made against it and the claim for that relief was bound to fail. The question when the Court was considering whether to grant alternative relief was whether, in the circumstances, it was appropriate as an alternative

to a winding up order to make an order pursuant to section 95(3) of the Act (*Asia Pacific Ltd v ARC Capital LLC and Haida Investments Ltd* [2015] 1 CILR 299 at [39] (*Asia Pacific*)). Accordingly the Amended Petition should be struck out as it related to the Fifth Respondent. The test for a strike-out was whether it was plain and obvious that the relief claimed would never be granted.

65. The Fifth Respondent noted that under section 95(3) of the Act the Court may only make an order granting alternative relief once the petitioner had established as a threshold matter that it would be just and equitable to wind up the company (*Camulos Partners Offshore Ltd v Kathrein & Co (3)* [2010] 1 CILR 303] at [38]). The core legal threshold which the petitioner must establish in order to justify a winding up order was that the company “*cross[ed] the forbidden line so as to constitute a visible departure from standards of fair dealing and the conditions of fair play which a shareholder is entitled to expect*” (*CTrip* at [5]).
66. The Fifth Respondent argued that once the threshold for relief had been achieved, the Court had a wide discretion as to what relief to grant and the Court was required to consider whether “*in the circumstances, it would be appropriate ‘as an alternative to a winding up order’ to make an order under s.95(3)*” (*Asia Pacific* at [39]). The Court must therefore take into account all of the circumstances. The Fifth Respondent further submitted that, although the jurisdiction relating to a just and equitable winding up (and alternative relief) was distinct from that in other legal systems for relief from unfair prejudice (such as that in England and Wales under section 996 of the Companies Act 2006) the Court when considering whether to grant alternative relief should be guided by the same factors which are relevant to the grant of a remedy under those analogous statutory unfair prejudice jurisdictions. The Fifth Respondent relied on the statement of principle made by Mr Robin Hollington KC in *Hollington on Shareholders’ Rights (9th ed. 2020)* (at [10-18]) in his chapter on winding up on the just and equitable ground and the section dealing with the Court’s discretion to make an order:

“In the exercise of its discretion the court will be guided by the same factors as influence the grant of a remedy on the unfair prejudice ground.”

67. The Fifth Respondent said that in the context of exercising its discretion as to whether to grant relief for unfair prejudice under sections 994-996 the factors which the English Court will take into account include consideration of responsibility for the relevant matters of complaint. Other than in the straightforward situation where an act of which complaint was made was carried out by the person or their agent against whom relief was sought, the test was whether “*the defendant is so connected to the unfair prejudicial conduct in question that it would be just, in the context of the statutory regime contained in sections 994 to 996, to grant a remedy against the defendant in relation to that conduct*” (*F&C Alternative Investments Ltd v Barthelemy (No.2)* [2012] Ch 613 at [1096] applied in *Re Bankside Hotels Ltd* [2019] 1 BCLC 434 at [22]-[23]) (**Bankside**). It was also established that under sections 994-996 “*the relief sought must be proportionate to the unfairly prejudicial conduct of which the petitioner complains*” (*VB Football Assets v Blackpool Football Club (Properties) Ltd* [2017] EWHC 2767 (Ch), at [425(iv)]).
68. The Fifth Respondent submitted that the Court should apply the same factors when considering whether, on hearing a winding up petition on the just and equitable ground, to make an order for alternative relief against a person who had not been responsible for the misconduct which founded the claim for a winding up order on the just and equitable ground. In particular, the Court should consider (a) whether that person’s conduct was sufficiently connected to the matters of complaint that it would be just to grant the alternative remedy and (b) whether the particular alternative relief was proportionate as against that person.
69. The Fifth Respondent further submitted that in accordance with long-standing authority on the striking-out of a just and equitable petition, the Court was concerned only with the allegations made in the petition. It was impermissible for a petitioner to seek to rely on allegations made in the evidence but not pleaded. As Mr Justice Megarry had said in *Re Fildes Brothers Ltd* [1970] 1 All ER 923 (**Fildes Brothers**), at 927 f - j.

“... *the petitioner is confined to the heads of complaint set forth in his petition. His evidence may no doubt amplify and explain those complaints, but I do not think that he can rely upon any new head not fairly covered in his petition... In Re Lundie Brothers Ltd* [1965] 1 WLR 1051, 1058, Plowman J said:

‘It was suggested in the course of argument that it was really the evidence and not the allegations in the petition which was of importance in this matter.

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I entirely dissent from that proposition. It seems to me that it would be wrong for the court to travel outside the allegations in the petition, particularly in a case of this sort where the petition is based on the proposition that the respondents to it have been guilty of some oppression or some lack of probity.”

70. Accordingly, the Petitioners were confined to their case as set out in the Amended Petition which still made no complaint of misconduct against the Fifth Respondent or any complaint that the Fifth Respondent was party to any misconduct (certainly no such complaints could be said on a fair reading of the Amended Petition to have been made or properly particularised). The Fifth Respondent was not alleged to be a member of the Steckel Faction (nor to have a representative in the Steckel Faction) and there was no pleaded allegation that the Fifth Respondent (or Mr Chen) were party to the alleged conspiracy or the plan to take over the Company. The allegations included in the petition that Mr Chen had caused the Company to act without proper governance so as to prefer his interests over those of the Company had now been abandoned in the Amended Petition.
71. The Amended Petition did contain in [7(c)] an averment that the Fifth Respondent had “*participated in and/or benefited from the conduct complained of.*” However, there was no express allegation of participation (beyond that bare assertion) or an explanation of what was alleged or any allegation against the Fifth Respondent of impropriety or misconduct. The only supporting allegation made (in [7(c)]) was that the Fifth Respondent had received 14.75% of the issued shares in the Company following the Transaction. [33] of the Amended Petition referred to an agreement between Mr Steckel and Mr Chen for the sharing of benefits of the Transaction but no facts were pleaded which established any terms or the nature of the alleged agreement (save for the executed commercial documents). The Petitioners’ pleaded case was limited to the entry of Chen Holdings into the Participation Agreement pursuant to which it provided funding. There was no allegation as to any impropriety in Chen Holdings agreeing to terms that were offered in the form of the Participation Agreement (and related agreements) and all that the Amended Petition does is to allege the receipt of the benefits under a commercial bargain. No allegation is made as against the Fifth Respondent (or Mr Chen) of knowledge or constructive knowledge (or any attribution of knowledge) of any impropriety by Mr Steckel. Relief was only sought against the Fifth Respondent on the

basis that it (and Mr Chen) have benefited from the wrongful conduct of Mr Steckel and so was designed to make the Fifth Respondent liable for the misconduct of another person (even in the absence of knowledge or impropriety on its part).

72. The Fifth Respondent noted that there had been some further references to it and Mr Chen in the Petitioners' evidence but submitted that these should be given no weight because they were unparticularised and ambiguous and had not been pleaded in the Amended Petition.
73. The Fifth Respondent submitted that in these circumstances the Petitioners' claim for a purchase order against the Fifth Respondent, based only a bare allegation of receipt, was hopeless. The Amended Petition had failed to assert (or aver facts from which there could be inferred) a sufficient connection between the Fifth Respondent (or Mr Chen) and the alleged misconduct upon which the claim for a winding up order (and for equitable relief) was based. Making such a purchase order would be manifestly excessive, disproportionate and inappropriate so that there was no prospect that it would be awarded at trial. It would, the Fifth Respondent argued, be punitive to make it, as an innocent recipient of shares and rights under an arm's length commercial agreement which only holds 14 per cent of the Company's shares, purchase 1.6 per cent of the Company's shares (at a value considerably in excess of the value of the Petitioners' shares at the time of the Transaction).

The Petitioners' submissions

The Petitioners' position in outline

74. The Petitioner argued that its case as set out in the Amended Petition if proved at trial would entitle it to the relief it sought and that the Summonses simply revealed that there were a series of hotly contested factual disputes that could only properly be resolved after cross-examination and a trial. Accordingly, striking-out the Amended Petition (in its entirety or as it related to the Fifth Respondent) was unjustified and the Summonses should be dismissed.

The Summonses

75. The Petitioners noted that GCR O.18, r.19 provides as follows:

“(1). The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

- (a) it discloses no reasonable cause of action or defence, as the case may be; or*
- (b) it is scandalous, frivolous or vexatious; or*
- (c) it may prejudice, embarrass or delay the fair trial of the action; or*
- (d) it is otherwise an abuse of the process of the court,*

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a).

(3). This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.”

76. The Petitioners then noted that the Second to Fourth Respondents’ Summons applied, as I have noted above, for the striking out of the Amended Petition under both GCR O.18, r.19 and the Court’s inherent jurisdiction on three grounds (set out at [1.1]-[1.3] of the Summons), namely that the Amended Petition was scandalous, frivolous or vexatious; was an abuse of process and/or had no prospect of success.

77. The Petitioners submitted that the Second to Fourth Respondents were therefore not seeking the striking out of the Amended Petition on the ground (in GCR O.18, r.19(1)(a)) that it disclosed no reasonable cause of action. They argue that there is now no longer any attack on the adequacy of the Amended Petition as a pleading (either in terms of its substance or its particulars). By the deliberate omission of any complaint about the adequacy of the Amended Petition in their Summons the Second to Fourth Respondents had in effect conceded that, on the assumption that the facts stated in the Amended Petition were true, it disclosed a reasonable cause of action justifying the granting of relief. The Second to Fourth Respondents had confined themselves to an attack on the facts. The Petitioners also said that it was to be noted that the contention that the Amended Petition had “*no prospect of success at trial*” (which was denied in any event).

This was not one of the grounds in GCR O.18, r.19 or within the inherent jurisdiction of the Court. The Petitioners submitted that in the absence of any application for summary judgment, this ground could not legitimately be invoked in aid of a summons to strike out the Amended Petition.

The applicable law

78. The Petitioners submitted that the following eight propositions accurately represented the relevant law:

- (a). a petitioner is entitled to the Court's adjudication on the merits of its petition at trial and after a proper trial process unless it is established that it is plain and obvious that the petition will not succeed. There is a statutory right to petition, and it is for that reason that the strike-out jurisdiction is to be exercised, as the courts have emphasised, very sparingly (see Bingham LJ in *Re Copeland & Craddock Ltd* [1997] BCC 294) (*Copeland & Craddock*).
- (b). it is the respondent making a strike-out application that bears the burden of proof.
- (c). the hearing of a strike-out application was not the place for the resolution of factual issues. It followed that if the Respondents' applications involved, explicitly or implicitly, an invitation to the Court to treat the affidavit evidence filed in support of the Summonses as true, or to give it more weight than the evidence filed on behalf of the Petitioners, that is an invitation which the Court should very firmly resist. The Court should also be slow to reach conclusions at the interlocutory stage on contested issues. As the Court of Appeal noted in *Tianrui (International Holdings Co Limited v China Shanshui Cement Group Ltd* [2019 (1) CILR 481] (*Tianrui*) (at [40]) "It [was] impermissible for the judge to have reached a conclusion on the material available to her at an interlocutory stage." The Court of Appeal had clearly warned against the danger of a Court prejudging the facts when considering an application to strike out a winding-up petition.
- (d). the correct approach on a strike-out application was to treat the facts stated in the petition as true. Factual disputes were matters for trial. In *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* (CICA

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Appeal Nos. 7 & 8 of 2019, 23 April 2020) (*Family Mart*), Moses JA in the Court of Appeal had said that (in a part of the Court of Appeal's judgment that was not affected by the appeal to the Privy Council):

“None of these submissions came, in my judgment, anywhere near justifying striking out the Petition. There was and is no basis for consideration of these appeals other than on the basis that the facts asserted are true. Whether the evidence is adequate and whether it justifies winding up on the just and equitable ground is a matter for the hearing of the Petition, subject to the question of arbitration.”

- (e). it was only necessary for a winding up petition to set out a “*concise statement of the grounds upon which the winding up order is sought*” (CWR O.3, r.2(2)(d)). The petition was not a pleading and should not be challenged or criticised for lacking the particularity and specificity of a pleading. The Court had the power to order a contributory to file and serve points of claim (CWR O.3, r.2(4)) where that was justified but in this case the Respondents had not sought or applied for such an order.
- (f). as Martin JA had said in *Tianrui* at [25] “*because ... in the Cayman Islands the sole gateway to obtaining alternative relief is by bringing a just and equitable petition .. it cannot be an abuse to petition where the primary purpose is to obtain s.95(3) relief rather than the winding up of the company.*” All shareholders had a statutory right to petition even if they only had one share so that the Second to Fourth Respondents were wrong to assert that the Petitioners had no right to relief in view of their small shareholding in the Company. The risk that the winding up petition might cause damage to the Company was also not a justification for striking it out (as Martin JA had also noted in *Tianrui*).
- (g). in cases where there are disputed issues of fact on which a just and equitable petition is based, the Court should not at the strike-out stage determine that the relief sought by the petitioner would be denied on the ground that he/she has unreasonably failed to pursue alternative remedies. A petitioner is entitled to have the contents of its petition determined upon evidence where the range of facts, and inferences from fact, to which the petition gives rise have not been and cannot be

determined without hearing the evidence at trial before a decision is made as to whether it would have been reasonable and appropriate for him/her to have pursued the available alternative remedies rather than use the winding-up jurisdiction. This was the approach mandated by the Court of Appeal in *Tianrui* where Martin JA said this (at [37]):

“The company suggests that if the underlying complaint is as we have identified, [the company] can bring its association... to an end by selling its shares [and so on].....”

In our view, these assertions epitomise what is wrong with the company’s position. If the actions of the company, prompted by the directors appointed at the instance of a majority of its shareholders, have resulted in a justifiable loss of confidence in management, Tianrui has a statutory right to petition for the winding up of the company on the just and equitable ground. It cannot be deprived of that right merely because the company can point to other remedies which, alone or in combination, might arguably go all or some of the way to compensating Tianrui for what has occurred. In our judgment, Tianrui may legitimately take the view that it prefers the company to be wound up to having to pursue piecemeal a series of actions, by litigation or otherwise, or by a combination of litigation and other steps, that might be capable of addressing some or even all of its concerns. It is entitled to have the circumstances investigated in the context of a winding-up petition that it is entitled to bring; and if it succeeds in establishing its complaints, it is entitled under the statutory scheme to have the court consider at the end of the investigation whether the appropriate remedy is winding up or another [of those] ... set out in s.95(3) of the Law. The suggestion that Tianrui need not have all the contents of the petition determined upon evidence because it is obvious that a derivative action, or some other combination of actions, will provide substantial justice to Tianrui is untenable in circumstances where the range of facts, and inferences from fact, to which the petition gives rise have not been determined.”

- (h). where the petition is brought on the just and equitable ground it was very doubtful that the principle that a petition can only be brought to advance a class remedy was applicable. It is always likely in a just and equitable petition that the petitioner will be complaining of matters specific to them. It was not a bar to the Amended Petition that the Petitioners were advancing their own complaints. This point was made in the Court of Appeal’s judgment in *Tianrui* [at 40]:

“Although we accept [the Court of Appeal said] that in the context of a creditor’s petition, the fact that the petitioner is not invoking a class remedy may mean that the petition is an abuse [citing an English case], we are very doubtful whether the principle can apply in the context of a contributory’s

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petition brought on the just and equitable ground. In such a case, it is likely that the petitioner will complain of matters specific to him that may not necessarily apply to any other shareholder. We do not think that fact alone can be a reason for restraining the petition: at most, it may support an argument that the petition is brought for an improper purpose.”

79. The Petitioners submitted that there was nothing stale about the conduct and complaints on which they relied. They had been complaining for a long time (as was evidenced by the 2021 Petition) about that conduct without obtaining any satisfaction or redress, or indeed without any real and substantive responses from the Company. It was significant that *Washington Special Opportunity Fund, Inc.* (Unreported, 25 February 2016) was a case decided after a trial and not a strike-out case, so that the full factual position had been tested and ascertained at trial.
80. The Petitioners submitted that the Second to Fourth Respondents had been wrong to rely on the withdrawal of the 2021 Petition as being prejudicial to and undermining the Petitioners’ case. The 2021 Petition had been compromised on confidential terms so that the Court could not infer anything about the reasons why it was compromised, one way or the other. The Petitioners noted that the 2021 Petition and the Amended Petition focused at least to some extent on similar grounds of concern.

The Petitioners’ case had adequate evidential support and if proved at trial was capable of supporting a finding that the Petitioners had justifiably lost trust and confidence in the management of the Company

81. The Petitioners submitted that Mr. Laggner’s characterisation of the Transaction was supported by his own affidavit evidence and to the extent that evidence was disputed by the Respondents the dispute could only be resolved at trial. To reach any other conclusion would involve a departure from the principles clearly established in the case law.
82. Furthermore, the evidence demonstrated that there was a good deal of factual material that supported this part of the Petitioners’ case, some of which had emerged only recently through the discovery applications in the United States. The Petitioners relied in particular on the evidence that the Transaction was unnecessary given the Company’s strong financial position at the time, the opportunities to cut extravagant costs (but the absence of any effort to do so) and the absence of any evidence of any actual creditor

threat or action at the time; the egregious terms of the Transaction including its extortionate rate of interest; the absence of any serious consideration of alternative options despite a large number being available; the evidence of the close involvement of Mr. Salinas, his close connection with Mr. Steckel, and his desire for control through the Transaction consistent with his usual *modus operandi* for improperly obtaining control of companies; the evidence that Mr. Steckel was determined that the board should approve Mr. Salinas' terms and threatened to withdraw the proposal if it was not signed within a very short time frame or if other funding options were considered; the absence of any Cayman law advice before the Transaction was concluded; the failure to hold a general meeting to approve the Transaction and the share issues that followed from it; the unsatisfactory, and unexplained position with respect to the rapid exercise of the warrant one month after the Transaction and the adverse consequences of the acquisition of control of the Company by Mr. Steckel (and through him, Mr. Salinas).

83. The Petitioners submitted that their case regarding the steps taken by Mr Steckel in connection with and the serious doubts as to the validity of the February 2017 EGM, if proved at trial, was clearly capable of supporting a finding that the Petitioners had justifiably lost trust and confidence in the management of the Company. The Petitioners' allegations were fully supported by Mr. Laggner's affidavit evidence and, once again, any testing of that evidence was properly a matter for trial. The Petitioners' case was that following the exercise of the Warrant and the acquisition of majority control of the Company, Mr. Steckel had engineered the apparent passage of a resolution at the February 2017 EGM that purported retrospectively to authorise the increase in share capital needed for the Company to issue him and his associates the shares that he was voting at the EGM, as well as authorising further future dilutions. This had improperly diluted the other shareholders, including the Petitioners. There was reason to doubt that the meeting was properly convened and that the resolutions were validly passed (see, for example, Laggner 3 at [42] and Laggner 1 at [90]). The Petitioners said that it was telling that the Respondents (and Mr. Steckel in particular) had not provided any details of the Company's shareholder position either immediately after the Warrant was exercised or at the time of the February 2017 EGM and that Mr. Brooke's recent evidence asserting that the proper formalities were complied with and that Cayman Islands counsel were involved had failed to provide any documentation in support.

84. As regards AirTM, the Petitioners said that their case was supported by Mr Laggner's evidence and if proved at trial would establish conduct which was capable of supporting the conclusion that the Petitioners had reasonably lost confidence in the management of the Company. That case was that (a) Mr. Steckel and Mr. Parsa (who worked closely with Mr. Steckel's son) hold an investment in Cloud Money Ventures LLC, which runs a rival cryptocurrency platform called AirTM, (b) in about 2015 Mr. Steckel and Mr. Parsa had caused the Company to enter into an agreement with AirTM pursuant to which the Company would license its intellectual property to AirTM, (c) AirTM then breached its payment obligations to the Company, (d) but Mr. Steckel and Mr. Parsa caused the Company to waive the royalties that AirTM owed to the Company which meant that AirTM made free use of the Company's intellectual property, (e) this involved a conflict of interest with the duties which Mr. Steckel and Mr. Parsa owed to the Company by favouring their interests (as investors in AirTM) over those of the Company, (f) the Company's purported investigation of the AirTM transaction was flawed because it assumed that Mr. Steckel's version of events was correct and (g) the harm to the Company was continuing in the sense that the decision to waive royalties was made in 2021 and continued to impact the Company's revenue stream (and to benefit investors in AirTM, including Mr. Steckel and Mr. Parsa) at the expense of shareholders in the Company. The explanation that AirTM was not valuable and would have been unable to satisfy any judgment at the time is now no defence when AirTM is a very valuable and profitable entity.
85. As regards TBOL, the Petitioners once again said that their case was supported by Mr Laggner's evidence and if proved at trial would establish conduct which was capable of supporting the conclusion that the Petitioners had reasonably lost confidence in the management of the Company. The allegation of the diversion of the opportunity to Mr. Steckel and Mr. Watson was fully supported by the affidavit evidence of Mr. Laggner and in Laggner 3 Mr Laggner had also referred to documents (obtained as a result of the recent discovery applications under section 1782 of Title 28 of the United States Code) which (a) contradicted the Company's assertion that it never applied for a UK banking licence, (b) demonstrated that obtaining a UK banking licence was a key component of Mr. Salinas' operating plan or the "holy grail" as it had been described; (c) state that the

bank was to be an Uphold entity (d) include, for example, a damning email, in draft, from Mr. Brooke to Mr. Steckel in July 2017, to the effect that he had been pressured to produce a sanitising report for the purpose of the UK banking licence application in the event that other investors ever enquired about it and (e) also included Mr. Steckel's letter to the Company's shareholders in December 2016 in which he described the licence application as "*a critically important milestone for the Company.*" The Petitioners said that the TBOL issue was current and continuing. They had only learned for the first time (see Anderson 4 at [13]) that some sort of claim was asserted against TBOL in 2022 which had led to the Company receiving a 9% share in the venture. This was wholly unsatisfactory because the Company's interest should be closer to 95% and nothing appeared to have been done to seek an account of profits from Mr. Watson or Mr. Steckel, who between them now seemed to own most of TBOL. Mr. Anderson had attempted to explain this by reference to concerns that, as a company operating in the cryptocurrency sector, the Company could never have held more than a 9% stake but the Petitioners did not accept that there had been no way to structure the ownership of TBOL that preserved the Company's 95% interest in it. Even if the Petitioners were wrong about that, as a matter of law directors in the position of Messrs Watson and Steckel were liable to account to the Company for all profits they had made from a maturing corporate opportunity such as TBOL, regardless of the fact the Company could not pursue the opportunity (see, for example, *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443). The Petitioners argued that the fact that the so called independent litigation committee had apparently turned a blind eye to this egregious conduct was itself concerning and itself supported a loss in confidence in the current management. In any event, these were all matters that could not be resolved on a strikeout application.

86. The Petitioners argued that their allegations concerning the issue of shares and stock options, the payment by the Company of the Mr Steckel's legal fees and in relation to Ledger also if proved at trial would establish conduct which was capable of supporting the conclusion that the Petitioners had reasonably lost confidence in the management of the Company:

- (a). the issue in 2016 and 2017 of substantial numbers of shares and stock options to Mr. Steckel and others who had supported the Transaction were evidence of

improper paybacks to Mr Steckel's supporters given in disregard of the Company's best interests.

- (b). the payment by the Company of Mr. Steckel's legal fees, incurred in a personal capacity, in connection with the 2021 Petition when there was no obligation to indemnify Mr. Steckel in respect of these fees involved a breach of duty by the Company's directors in once again improperly favouring the interests of Mr Steckel over those of the Company. If the Respondents wished to challenge the Petitioners' allegation that the Company was not under a binding obligation to pay these fees and indemnify Mr Steckel then it will be necessary for expert evidence of New York law to be filed and tested in cross-examination at trial (since the indemnity arrangements were governed by New York law).
- (c). the unexplained sale at a substantial loss by the Company in late 2022 of its valuable shareholding in Ledger was at least evidence and suggestive of a sale that was not conducted on an arm's length basis and represented the most recent of a long series of episodes of mismanagement on which the Petitioners rely in support of the core allegation in the Amended Petition.

87. The Petitioners said that they did not just rely on Mr. Laggner's evidence. They also relied as evidence of serious mismanagement on the documentary evidence that they had obtained pursuant to the continuing US discovery process, in particular:

- (a). Mr. Brooke's damning draft email to Mr. Steckel, prepared in July 2017, which details various instances of mismanagement and calls out Mr. Steckel for failing to address them (see Laggner 3 at [78]). The fact that Mr. Brooke had recently been prevailed upon to file reply affidavit evidence in support of the Company's position on the Summonses did not remove the significance and probative value of this evidence. Mr Brooke's evidence will need to be explored in cross-examination at trial.
- (b). the emails from Mr. Parsa's referred to by Mr Laggner in which he had alleged unethical and improper conduct and an abuse of shareholder rights by management. Once again, the fact that Mr. Parsa had been prevailed upon to file reply affidavit

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evidence in support of the Company's position on the Summonses did not remove the significance and probative value of this evidence. Mr Parsa's evidence would also need to be explored in cross-examination at trial.

- (c). Mr. Watson's observation, on resignation from the board in October 2020, that: "*I do not have confidence in management's ability to effectively ensure basic governance*" and Mr. Milby's observation, upon his own resignation the following day, that the Company was unable to produce "*even simple, standard governance such as board minutes*" (see Laggner 3 at [79] and the exhibit to Laggner 3, WL-3, at pages 281-28). The Petitioners said that in light of this material it will be their case at trial that both men resigned because of serious concerns about the way in which Mr. Steckel was running the Company.

Even though some of the Petitioners' complaints related to events that had taken place many years ago they were still sufficient, when taken together with the Petitioner's other allegations, to support a finding that the Petitioners had reasonably lost confidence in the management of the Company because they demonstrated a pattern of management misconduct that was continuing

88. The Petitioners said that it was important to note that the allegations about the Transaction and the February 2017 EGM were not historic (as the Respondents had argued). They were material to (and causative of) the Petitioners' loss of trust and confidence in management even though they occurred several years ago. The Petitioners have been asking for information and documents relating to their complaints for a number of years and it had only been during the course of evidence for these Summonses that it has become apparent that there were issues with the manner in which the EGM was notified and subsequently convened. Further, Mr. Steckel remained on the board and continued to exercise *de facto* control of the Company, which was only made possible by the Transaction and the February 2017 EGM. The Transaction and the February 2017 EGM were therefore the essential context for the other examples referred to in the Amended Petition, which represented a pattern of egregious mismanagement of the Company by Mr. Steckel and others since 2016/2017.

There were disputes on fact that could only fairly and properly be resolved at a trial so that a strike-out was inappropriate

89. In Laggner 3 Mr Laggner listed what he said were the main issues of fact that needed to be and could only be resolved at trial. While a lengthy account, in view of the importance of this issue it is worth quoting in full. He said this at [11]:

- a. *The circumstances that led to the Company entering into the ..Transaction.*
 - i. *The Company's value prior to the ... Transaction was not an issue, as confirmed by the board's \$516m valuation only one month before the transaction ...There were liquidity/cash flow problems, but to quote [Mr Parsa] these came about because "Anthony Watson ran the company out of money."*
 - ii. *In his evidence, Mr Thieriot identifies numerous other potential sources of funding that were not pursued at the time (see [Thieriot 1] page 436 et seq.). In [Laggner 1] I identify other potential sources of funding which the Company should have explored (as I was pressing on the board to do), but they did not do so in a timely fashion. Mr Thieriot also claims that shareholders were exhausted and could not stomach another round of equity financing, however the White Knight funding proposal that I put forward was to be funded by existing shareholders who were frustrated with the Company's poor governance.*
 - iii. *Whilst the Respondents' evidence goes to painstaking lengths to try and emphasise how the Company was facing apparently imminent insolvency and was going to be unable to pay its debts if the Steckel proposal wasn't accepted, there is no mention in the evidence (let alone any corroborating material) of who the creditors were at the time, and whether they had given any indication that they would take action to recover their debts through an insolvency process. The largest creditors at the time were Winston Ling (who was going to be part of the White Knight proposal and had given no indication of calling in his debt), and employees of the company, however the cash injection from Mr Chen (who was part of my initial funding group) satisfied any payments due to them so it is not at all clear why there was no time to consider alternatives. Instead, the board (with me dissenting) pushed ahead with the worst funding option available to the Company.*
- b. *The relationship between Mr Steckel and Mr Salinas and the true reason behind the Steckel Transaction.*
 - i. *I am in no doubt that Mr Salinas and Mr Steckel acted in concert. Mr Parsa describes Mr Steckel as Mr Salinas' proxy for the .. Transaction ... Mr Steckel has now confirmed that Mr Salinas funded a substantial portion of the ... Transaction ... but does not disclose the terms on which the funding was provided or attempt to explain how it was in the Company's best interests for the funding to be provided indirectly.*
 - ii. *The Petitioners assert that Mr Salinas required control of the company and that this was the motivation behind the structure of the transaction and the*

refusal to consider alternatives. Page 456 of [Steckel 1] states that Mr Salinas' proposal required 'Board and Operating Control (need legal mechanism to transfer sufficient common board appointing power from HM to Salinas Group or his appointee)'. He also appears to have had a strong interest in the company acquiring a banking license, which I believe was because of regulatory issues he was having at the time. Mr Thieriot exhibits at page 725 of JPT-1 the shareholding in the Company immediately after the Steckel Loan was drawn down (but before the warrant was exercised), and that list already shows 'Lender' as having 50% (despite Mr Steckel claiming to the contrary in his evidence).

- iii. *The note to the table and that entry is particularly interesting because it indicates that the equity was only meant to convert upon non-payment of the Steckel loan, yet in reality the warrant gave Uphold Holdings the ability to convert its debt to equity before repayment by the Company was even an option.*
- iv. *I note also that this course of dealing is something that Mr Salinas has undertaken in respect of other companies previously, as can be seen in the judgment from a US case, Espiritu Santo Holdings, LP v. Libero Partners, LP, No. 19 CIV. 3930 (CM), 2019 WL 2240204 (S.D.N.Y. May 14, 2019) [pages 11 – 41]. The judgment contains findings of fact that Salinas engaged in various "types of misfeasance" including tak[ing] steps to obtain . . . sole ownership and control of the [company's] technology," offering extortionate loans with 67% interest to attempt to take over the company and its intellectual property rights, and taking "several steps in derogation of [a] Partners Agreement.... The RCA contained onerous interest (2% per month, 24% per annum) and was designed to allow for immediate control of the Company and its valuable technology. Clearly, this option was not in the best interest of the company, yet it is consistent with the lender's established modus operandi.*

c. *The 2017 EGM/corporate governance issues*

- i. *The notice materials for the EGM held in February 2017 were purported to have been sent to all shareholders however the evidence provided by the Respondents only confirms an email was sent, with no detail on the recipients... In any event, the timing of that notice was after office hours on a Friday night (4.32pm Pacific Standard Time, which would have been 7.32pm in the Cayman Islands), and the requisite notice period under the Articles of Association of 5 days was not met, or if it was then the directors should have given shareholders more time in light of only 4 responses having been received from over 200 shareholders.*
- ii. *The proxy forms that were returned were, except in the case of Caroline Turner, all signed by Mr Steckel... He signed on behalf of Mr Salinas' company, Kylie Company Limited and claims he had a power of attorney from Chen International, but has provided no evidence of either.*

- iii. *The other response was from a Caroline Turner, who Mr Anderson claims was a B Shareholder despite the fact she was not listed as such in the list of B shareholders attached to the IRA and no evidence of her shareholding has been produced. There is no mention or record of Crowdcube Investors prior to the Respondents' latest evidence.*
 - iv. *These votes are important because without the resolutions passed at that EGM ...the Company was unable to increase its authorized share capital to issue further shares to Messrs Steckel and Chen (through their companies) which diluted the Petitioners.*
 - v. *Further evidence of Mr Steckel's disregard for corporate governance has recently been disclosed by Mr Parsa. I refer for example to an email from shareholder Winston Ling to Mr Parsa complaining that in a shareholder meeting Mr Steckel "lied a lot". He elaborated: "I can detect there is a consistent pattern of deceit. Yesterday for example they only started recording the session when Bill Lagner started to talk and ask his question. None of Adrian's bullshit talk was recorded." .. Mr Parsa also adds that "uphold could still have a lot of value but not with those guys running it. Might also be too late given all the liabilities and failures. I feel both bad for my old friends and very pissed by their actions. They have destroyed so much potential and squandered so much money."*
- d. *AirTM*
- i. *The Company's decision not to pursue AirTM for royalties it owed the Company was made in or around 2020 (see [[80] of Thieriot 1] and pages 874 – 980 of JPT-1). That decision was taken after the Petitioners complained about the Company's lack of pursuit against AirTM for monies or the return of valuable IP..... To be clear, the Petitioners' grievance is not with the fact that a number of the directors and shareholders were also invested in AirTM, but rather that the Company did not issue proceedings against AirTM to recover monies that AirTM should have paid for use of the Company's IP (which was agreed in a licensing agreement). The Company's investigation and analysis on the claim is a sham, impacted by the fact that a number of the directors and shareholders are themselves shareholders in AirTM (including Mr Steckel himself, and Mr Thomas Brooke, the Company's former general counsel who conducted the purported investigation into AirTM's lack of payment).*
 - ii. *In July 2017, documents make clear that AirTM was attempting to poach a Company business prospect in India, and in doing so, AirTM denigrated the Company's technology and capabilities. It is also clear that, at the time, AirTM was still reliant on Uphold's API, yet this nascent competitor was not charged a commercially reasonable fee for Company technology used to directly compete.*
- e. *TBOL*
- i. *Obtaining a UK banking license was a key objective of Mr Salinas and was*

described by Mr Thieriot as the “holy grail” [page 74]. Mr Steckel claims that the Company never applied for a bank license at paragraph 239 of his affidavit, but this is contradicted by Mr Anderson’s affidavit (paragraph 13.1) as well as the contemporaneous evidence including communications from Mr Steckel himself reporting on the progress of the Company’s application ..

- ii. *It is clear from the documents available as well as public records that Uphold Group PLC was incorporated to pursue the license application and to employ Mr Watson. Mr Watson’s employment contract records he was to have a 5% stake in Uphold Group PLC as an incentive ...and the balance was to be a Company asset (even though on incorporation the shares seem to have been held by Mr Watson personally). This venture was never a personal asset of Mr Watson so I infer the shares upon incorporation of Uphold Group PLC were initially held by him on trust for the Company, probably due to regulatory concerns about crypto companies.*
- iii. *For reasons that have not been explained Uphold Group PLC has since obtained the license but has changed its name to TBOL and the Company’s interest in TBOL has gone down from 95% shareholding to 5%. Between them, Mr Watson and Mr Steckel now have a controlling interest in TBOL. There is no evidence that the Company has received any value for the 90% shareholding in the venture that appears to have been diverted into the hands of Mr Watson and Mr Steckel.*
- iv. *Given TBOL’s most recent valuation of \$1bn (in the Company’s own evidence at paragraph 92.1 of Anderson 4th Affidavit), and a subsequent raise of US \$200m [pages 91 - 99] which would further increase the valuation, this appears to be a hugely valuable corporate opportunity diverted from the Company to its fiduciaries Messrs Steckel and Watson, with no explanation as to why that happened or for what consideration.*
- v. *The Company’s position on this concerning issue has been evasive and wholly unsatisfactory, notwithstanding the recent changes in composition of the board. No credible explanation has been given for why this valuable opportunity has ended up being diverted into the hands of Messrs Watson and Steckel. Although the Company appears to have recently made at least some attempt to address the issue there is no disclosure whatsoever on what has been done and Mr Steckel continues to seek to dismiss the Petitioners’ concerns as historical and trivial, as seemingly confirmed by an independent committee. All this is very troubling to the Petitioners.*

f. *Ledger*

- i. *There is a dispute as to whether the recent sale of shares in Ledger for a fraction of their true value was an arms’ length transaction in the best interests of the Company. The timing of the sale seems illogical. If the Company needed cash funding, it had just undertaken a funding round and the financials indicate a healthy balance sheet position at the time. To sell a valuable asset at such a dramatic loss relative to market is not justified with any sensible reasoning. The purchaser, Outpost, is connected to David*

Bechtel, who is a friend of Mr Steckel's from their time at Yale University together, and who also invested in Cloud Money Ventures/AirTM.

- g. Relationship between Board Members/certain shareholders and Adrian Steckel.*
- i. Mr Steckel lists all of the directors of the Company and explains why they have no connection to him. He does, however, have a history or connection to all of them as follows:*
 - ii. Mr Thieriot is one of Mr Steckel's friends since they attended college at Yale together. The same applies to Mr Parsa and Mr Westerfield.*
 - iii. Mr Kidd and Mr Steckel met through the Company and began working on other projects together shortly thereafter. A number of current board members were introduced by Mr Kidd to the Company.*
 - iv. Mr Watson was brought into the Company for the purposes of pursuing the banking license. I understand that he and Mr Steckel met via the Company but have a number of significant ventures together. They both have continuing interests in TBOL.*
 - v. Mr Steckel clearly still has a large say on the board. Whilst he and Uphold Holdings LLC do not own a majority just by themselves, when taken alongside the shares held for Mr Chen, on behalf of Mr Salinas, and for Mr Kidd, they represent over 50% of the Company.*
- h. There are other clear instances of serious mismanagement that are emerging as the Petitioners gain access to contemporaneous records. For example, emails from Mr Parsa show that after the Holdings Transaction a \$2.5m hole in the Company's reserves was discovered [page 9]. This had been caused by management accessing client money. There was then a report prepared (which has not been disclosed) which, according to Mr Parsa, Mr Steckel attempted to cover up [page 10]. There is also evidence that Mr Steckel instructed the Company's general counsel not to take action [pages 101 - 104]."*

90. The Petitioners said that their case was that the board is controlled, one way or another, by Mr Steckel on behalf of Mr Salinas. While there was obviously a dispute about that between the parties it was not a dispute that the Court could resolve at the strikeout stage. The Court could not safely assume that what Mr Parsa had said in his affidavit was the truth or the whole truth. His evidence will need to be tested at trial against the contemporaneous documents that continue to emerge through the US discovery process, and would no doubt have to emerge if the Amended Petition goes to trial through the usual discovery process in this jurisdiction. There was also a credible challenge to the reliability of Mr Thieriot's evidence (the Petitioners relied on what Mr Parsa had said about him) and his voluminous evidence would also need to be tested in cross-

examination. The same was true of Mr Brooke's evidence in light of the contemporaneous documents (in particular his draft email which, the Petitioners said, he had been unable convincingly and definitively to explain away). And, the Petitioner said, the same was true of Mr Steckel's evidence. He had been described as a liar by Mr Ling and had been heavily criticised in the contemporary documents that had been put in evidence (from both Mr Parsa and Mr Brooke).

Mr Laggner's position

91. The Petitioners submitted that the Second to Fourth Respondents' challenge to Mr Laggner's standing, or being allowed to continue, to petition should be rejected.
92. Mr Laggner, who had become a shareholder before the presentation of the petition, clearly had standing to petition. So there was no *locus standi* issue.
93. Mr Laggner, the Petitioners argued, had acquired a beneficial interest in the shares he acquired from Mr Minor at the time that the condition subsequent in the agreement with Mr Minor was satisfied. The agreement had been entered into on 26 June 2016 and stated that the closing of the transactions contemplated thereby would take place when the Company approved its next financing. The next financing occurred at the time of the Transaction in July 2016. Mr Laggner had been required to sue Mr Minor for the shares and in those proceedings he alleged that the obligation to transfer became unconditional on 21 July 2016, being the date on which the board approved the Transaction, being the Company's next financing. Mr Laggner therefore had a tangible interest in the Company and those shares from July 2016 onwards. The amount that he had paid for the shares was irrelevant.
94. The claim that Mr Laggner was approbating and reprobating was unfounded. He was not seeking to unwind the Transaction but rather to have his shares purchased at a fair value. The impact of the timing of his acquisition of his shares and the timing of the Transaction only went to valuation and what Mr Laggner was entitled to be paid as fair value if an order to buy his shares was made in due course. As a shareholder with standing to petition at the date the petition was presented Mr Laggner was entitled to complain about the

board's continuing failure to address the matters of a complaint in the Amended Petition, including management's conduct in relation to the Transaction and the 2017 EGM, where that conduct was properly relevant to an assessment of confidence in the current board (which included Mr Steckel and Mr Thieriot and where the current board continued to defend the Amended Petition). Further, Mr Laggner was clearly entitled, aside from the Transaction, to complain about the more recent matters covered by the Amended Petition. The impact that those matters had on a buy-out order was to be evaluated at or after the trial. The Petitioners submitted that it was wrong in principle for the Court to take a red pencil to parts of the Amended Petition to allow the claims of some of the Petitioners to go forward to trial against some of the Respondents when all of the Petitioners had standing to petition. To the extent that there were issues arising from the date on which particular Petitioners acquired their shares, they were ultimately for evaluation if the Court was persuaded to grant relief.

The Fifth Respondent

95. The Petitioners said that they had described Mr Chen as one of Mr Laggner's investors because of his commitment to support and participate in the White Knight funding. He had signed and given a commitment to fund between US\$1.5 million and US\$2.7 million (and had advanced substantial funds in anticipation of proceeding with this investment). It was therefore appropriate to refer to Mr Chen as having changed sides.
96. But the Petitioners' main response to the Fifth Respondent's Summons was that a member of the company whose interests might be affected by the relief that was sought in the petition should be joined as a respondent whether or not allegations of misconduct were made against it. The Petitioners relied on the judgment in *BSB Holdings*.
97. The Petitioners submitted that if this Court was satisfied at trial that it was just and equitable to wind up the Company at that stage all of the remedies in section 95(3) would come into play and there was no requirement that a party could only properly be and remain a respondent to a just and equitable petition which seeks alternative relief if that party was directly involved in the wrongdoing that made it just and equitable to wind up the company or, indeed, to order a buyout.

98. In this case, the Petitioners said, the core allegation was that there was an agreement between Mr Steckel and Mr Chen that the benefits of the Transaction would be shared between them. There was therefore an allegation that the Fifth Respondent was directly concerned in the Transaction about which complaint is made because it participated in receiving the benefits from it and as a result might be ordered to buy the Petitioners shares, depending on the facts found at trial, in order to provide a remedy for the damage to the Petitioners resulting from that transaction and the related misconduct. It would be legitimate for the Court to make an order for alternative relief which affected the position of the Fifth Respondent. If the Fifth Respondent was properly made a party to the Amended Petition, as the Court had held that it should be in the Judgment, then it would be wrong to strike it out as a respondent now.
99. As the prayer for relief in the Amended Petition made clear, primarily what was sought was an order providing for the purchase of the Petitioners' shares by Mr Steckel. Ultimately it was an issue for trial whether it was appropriate for a buyout order to be made in respect of the other respondents, or indeed Mr Steckel himself, in light of the findings that the Court makes at trial. The Petitioners submitted that it could not be said at this stage that it would be wrong to make buyout order in respect of Fifth Respondent given that it is alleged that the agreement between Mr Steckel and Mr Chen involved the Fifth Respondent receiving the benefits of the Transaction. The Fifth Respondent had argued that it had only acted as a commercial lender providing funding under an arm's length transaction but the precise role played by the Fifth Respondent and Mr Chen, and the nature of their relationship and agreement, were in dispute and matters for the trial. It was also relevant to note that if the Court concluded at trial that some of the Respondents should be ordered to buy-out the Petitioners it may need to grant consequential relief affecting the other Respondents including the Fifth Respondent. For example, in relation to valuation, necessary adjustments may need to be made to take into account the disproportionate number of shares that were acquired by Mr Steckel and Mr Chen's companies as a result of the Transaction.

Discussion and decision: the Second to Fourth Respondents' strike-out application*The grounds of the Second to Fourth Respondents strike-out application*

100. As I have noted, the Second to Fourth Respondents' application for a strike-out is based on three grounds, namely that the Amended Petition:
- (a) is scandalous, frivolous or vexatious,
 - (b) is an abuse of process of the Court, or
 - (c) has no prospect of success at trial.
101. The Second to Fourth Respondents' Summons relies on the Court's strike-out jurisdiction under GCR O.18, r.19(1) and the Court's inherent jurisdiction to strike out a winding up petition as an abuse of process.
102. I have quoted GCR O.18, r.19(1) above. The rule refers to and is drafted by reference to the striking out of a pleading but states that it also applies to a petition as if it were a pleading. It allows the Court to strike out a petition on four grounds: (a) that it discloses no reasonable cause of action or defence; (b) it is scandalous, frivolous or vexatious; (c) it may prejudice, embarrass or delay the fair trial of the action or (d) it is otherwise an abuse of the process of the court. GCR O.18, r.19(2) also states that no evidence is admissible on an application for a strike-out on the first ground ((a)).
103. The Petitioners argued that the Second to Fourth Respondents' formulation of the third ground in their Summons did not engage any of the grounds set out in GCR O.18, r.19(1), in particular GCR O.18, r.19(1)(a). They argued that the wording used by the Second to Fourth Respondents only engaged and was only appropriate to an application for summary judgment and therefore that the Second to Fourth Respondents could not be treated as having applied to strike-out under GCR O.18, r.19(1)(a) and must be taken to have accepted that the Amended Petition set out grounds which could, if the facts asserted and relied on were proved at trial, justify the making of a winding up order.

104. I reject this argument. The Second to Fourth Respondents' challenge to the Amended Petition was broadly based. They argued that the Amended Petition should be struck-out both because (a) even assuming that the averments and facts asserted in the Amended Petition were proved at trial the Petitioners had failed to establish a proper basis for a winding up order and (b) because the incontrovertible facts (established by the evidence legitimately filed and relied on by the Second to Fourth Respondents) showed that the allegations of a justifiable lack of confidence in the Company's current management could not succeed.
105. The case based on the first argument could be made both under GCR O.18, r.19(1)(a) and the Court's inherent jurisdiction. The Second to Fourth Respondents' Summons did not limit the no prospect of success at trial ground to a claim under GCR O.18, r.19(1)(a).
106. In the context of a winding up petition, the reference in GCR O.18, r.19(1)(a) to a failure (in a pleading) to disclose a reasonable cause of action can be read as covering a petition that is bound to fail because it fails to assert facts (grounds) which if proved could justify the making of a winding up order (see, for example, the discussion in the judgment of Hoffmann LJ, as he then was, in the Court of Appeal in *Saul Harrison* at 491, a case involving both an unfair prejudice and a winding up petition). A winding up petition on the just and equitable ground is not based on and does not need to establish a cause of action (see *Family Mart* at [51]). In my view the Second to Fourth Respondents' reference to the Amended Petition, having no prospect of success can properly be read as asserting that the Amended Petition was bound to fail for this reason (and it is clear that this was the Second to Fourth Respondents' case: see for example, [5.1] of the Second to Fourth Respondents' skeleton argument). The Second to Fourth Respondents' challenge to the Amended Petition included a claim that there was no basis on which the Court could find that the Petitioners had justifiably lost confidence in the Company's management even if the matters of fact set out in the Amended Petition were true (contrast this with the position in *Tianrui* at [21]) and in my view they were entitled to make that case.
107. In any event, a petition which is bound to fail is treated as an abuse of process and may be struck-out on that ground either under GCR O.18, r.19(1) (d) or the Court's inherent jurisdiction (see *RCB*).

The law governing strike-out applications

108. There is no dispute as to the law governing applications to strike-out winding up petitions on the just and equitable ground and the summaries of the relevant propositions of law and the cases given in particular by the Second to Fourth Respondents and the Petitioners are in my view right (the only serious issue between the parties on the law relates to the law applicable to a strike-out application in respect of a shareholder joined by reason of the petitioner's application for alternative relief which may affect that shareholder).
109. I note and would adopt the very helpful and clear summary of the applicable law set out by Mr Justice Doyle in *Aquapoint* at [10(5)]-[10(12)] and [11]-[13]).
110. The circumstances which make it just and equitable to wind up the company must exist at the time of the hearing of the petition. They should also have existed at the time the petition was presented since the petition must state the facts from which it may be concluded that such circumstances exist (see French, 4th ed., at [2.26]).
111. It is clear that the starting point is that the burden of proof is on the parties seeking to strike-out the petition and that “*the Court’s powers to strike out a petition in limine should only be sparingly used in clear cases and that the court had no jurisdiction to do rough and ready justice at an interlocutory stage*” (*Hollington On Shareholders’ Rights*, 10th ed. 2024 at [9.23]). In *Copeland & Craddock*, Bingham LJ, in declining to strike out a winding up petition, said this (at 300) (underlining added):

“It has been often and rightly said that the court’s jurisdiction to strike out a claim advanced by a plaintiff or a claimant or a petitioner is to be exercised very sparingly and only where the clearest grounds are shown for doing so. The reason for this practice is clear. Although a court may at a preliminary stage regard a claim as tenuous and having a negligible chance of success, the claimant is none the less entitled to the court’s adjudication on it on the merits unless it is a claim which the court is satisfied cannot succeed. In this case the judge clearly regarded the plaintiff’s claim to wind up this company as one which was unlikely to succeed, but he did not feel that the claim was so manifestly unarguable as to justify him in striking it out. Having heard [the respondent Counsel’s] very clear and well-presented argument, I share the judge’s view that this claim is unlikely to succeed. I am indeed persuaded that the case is very close to the borderline where striking out would be appropriate. But I am not quite persuaded that the claim is

unarguable whatever comes out relevant to the petition on discovery and in the course of oral evidence.”

112. The Petitioners’ case must be assessed by reference and is confined to the heads of complaint set out in the Amended Petition and while the Petitioners’ evidence may amplify these complaints they cannot rely on a new head not fairly covered by the Amended Petition (see Megarry J in *Fildes Bros* in the passage already quoted). As the Petitioners pointed out, CWR O.3, r.2(2)(d) states that it is necessary for a winding up petition to set out a “*concise statement of the grounds upon which the winding up order is sought*” and CWR O.3, r.2(4) gives the Court the power to order a petitioner to file and serve points of claim but in this case the Respondents have not sought such an order and an order for points of claim has not been made.
113. CWR O.3, r.2(2)(d) is to be read by reference to the relevant authorities which describe what a winding up petition must cover (see the discussion and authorities cited in French at [2.216-223] (I note the FSD Users Guide at C4.1 states that “*The petition should contain only a concise statement of the facts relied upon*” but I do not consider that this is intended to reflect a limitation on the petitioner’s obligation to provide sufficient particulars). The petition must state the facts from which it may be concluded that the alleged grounds exist. It must set out the material facts on which the petitioner relies and particulars of those facts which are sufficient to make clear the precise nature of the case made by the petitioner. It must contain all necessary allegations in a form which is sufficient to enable the Court to make the requisite findings and consider the appropriate order. A petition is treated as bound to fail if it does not allege any facts from which it may be concluded that at least one ground exists (and a petition which fails to allege sufficient to enable the Court to act is demurrable). As Megarry J said (at page 598) in *Fildes Bros* it is also important not just that the Court has sufficient to enable it to make the requisite findings of fact and inferences but that “*those who oppose the winding up should know, in time to prepare their case, what are the allegations that they have to meet.*”
114. When interpreting the petition for the purpose of a strike-out application the Court is entitled, consistent with these twin purpose of proper notice to the Company and those opposing the petition and sufficient particularity to enable the Court to make the requisite

findings, to consider what is fairly to be regarded as covered by the language used and within the different heads of complaint set out in the petition.

115. But the fact that points of claim have not been ordered does not relieve the petitioner of its obligation to provide sufficient particulars of the facts asserted and relied on. As David Richards LJ (as he then was) noted in the unfair prejudice case of *Re G&G Properties* [2019] EWCA Civ 2046 (being the appeal in *Re Bankside*):

“36. *In many of these cases, the only pleading was the petition. It was not generally the practice to have points of claim and points of defence in a contributory’s winding-up petition, but they became more common, though not universal, with the introduction of the remedy for unfair prejudice...*

37. *Where the petition is the only pleading, it follows that the petitioner’s case must be fully and properly pleaded in the petition, amplified by further information where appropriate. The rigour of that approach is less important where the court directs points of claim and points of defence.*”

116. As Peter Gibson J said in *Re a Company* (at page 81) (in a passage from his judgment quoted with approval by Justice Richards in *Madera*) (underlining added):

“The application to strike out, as appearing from the Notice of Motion, is made on the grounds that the petition discloses no reasonable cause of action, or is frivolous or vexatious or otherwise an abuse of the process of the Court, or ought to be struck out under s 125(2) of the Insolvency Act 1986. It is trite law that an application to strike out will fail unless it is plain and obvious that the petition will not succeed. If the Court, on a review of the material that has properly been put before it, finds that there are facts in dispute which are or may be material to a determination in the petitioners’ favour of the petition, then it must let the petition go to trial. On the other hand, if the facts which must be taken to be true or (where evidence is admissible) are established by evidence which is not disputed, lead the Court to the clear view that the petition is bound to fail, then it would be pointless to allow the petition to go to a hearing and thereby to protract the uncertainty that hangs over the company....The question I must determine is whether it is plain and obvious that the petitioners should go. If there is any reasonable doubt about that question, which might be resolved by oral evidence, then it would be quite wrong to deny the petitioners a full hearing of the petition.”

117. The hearing of the strike-out application is not the place for the resolution of disputed factual issues and the Court must normally assume that the facts asserted by the petitioner in the petition are true. As Smellie J said in *RCB* (at page 18), the Court ought not ordinarily to attempt to resolve factual issues, which should usually be left to the trial, by

means only of the available affidavit evidence and this was all the more so where the application to strike out rested on the basis that no cause of action was shown where GCR O.18, r.19(2) prohibits any evidence being adduced.

118. But where evidence is permissibly and properly before the Court, the Court is required to consider the evidence taken as a whole, assuming in favour of the petitioner any disputed questions of primary fact (see the extract from the judgment of Hoffmann LJ in *Saul Harrison* at 492, quoted above in the quotation from the judgment of Smellie J in *RCB* at page 19). Hoffmann LJ also said this (underlining added):

“I entirely accept that the court cannot ordinarily resolve disputes of fact on affidavit and I agree with Mr Purlé that the filing of an affidavit in reply by the applicant (as happened in this case) is usually a symptom of the existence of issues which can be resolved only at a trial. In this case, however, the primary facts concerning the company's history and financial performance are not in any serious dispute. The question is whether those facts could arguably support an inference that the directors had abused their powers.”

119. So *Saul Harrison* was a case in which the primary facts were not in serious dispute. This was also the position in *RCB* where Smellie J said this (underlining and emphasis added):

“In this case the important primary facts are undisputed. If on any reasonable examination of those facts, it is plain that they cannot sustain the charges raised in the petition, it must surely be wrong, as Mr. Mowschenson submitted, to allow the petition to proceed to trial, with the attendant adverse consequences for the company and all its shareholders in the meantime. This must be particularly so when the charges raise allegations of bad faith against the directors as the basis for petitioning to wind up on the grounds that it is just and equitable to do so.”

120. In *Saul Harrison* Hoffmann LJ also said (at page 492) that (underlining added):

“But I do not think that the petition can be allowed to proceed to trial simply in the hope that something may turn up ... I accept that the notoriously burdensome nature of s.459 proceedings does not lighten the burden on the respondent who applies to have the petition struck out. He must still satisfy the court that the petitioner's case is plainly and obviously unsustainable. But I think that the consequences for the company mean that a court should be willing to scrutinise with care the allegations in a s.459 petition and, if necessary, the evidence proposed to be adduced in support, in order to see whether the petitioner really does have an arguable case. This is particularly so when the petition rests on allegations of bad faith akin to fraud: see Sir George Jessel M.R. in Rica Gold Washing Co Ltd, Re (1879) 11 Ch.D. 36.”

121. In *Family Mart Moses JA* had said that “*There was and is no basis for consideration of these appeals other than on the basis that the facts asserted are true.*” The basis of the strike-out application is not explained (see [60]-[63]) but it appears that the shareholders seeking to strike-out the petition relied on the evidence adduced to disprove some of the facts averred in the petition. Mr Justice Kawaley had refused to assess the weight of the evidence when deciding the strike-out application and Moses JA agreed. But I do not take the learned Justice of Appeal to be seeking to lay down a rule, inconsistent with the approach followed by Smellie J and Hoffmann LJ, to the effect that where the strike-out is based on there being undisputed primary facts which show that the petition is clearly unsustainable and bound to fail, the Court may not scrutinise the evidence to decide whether there are indeed such undisputed facts.
122. The balance to be struck by the court on a strike-out application was held by Peter Gibson LJ in *Re Legal Costs Negotiators Ltd* [1999] B.C.C. 547 CA (Civ Div) at 551 to be (in the context of an unfair prejudice petition) as follows (underlining added):

*“The court on an application to strike out a s.459 petition can look at the realities of the case. It is entitled to take the pragmatic view that the petition should not be allowed to proceed where the likelihood of the trial judge exercising his discretion to grant the claimed relief is so remote that the case can be described as perfectly hopeless (see *Supreme Travels Ltd v Little Olympian Each-Ways Ltd* [1994] B.C.C. 947 at 955 and 957 per Lindsay J. and *Oriental Gas Co Ltd, Re* [1999] B.C.C. 237 at 245H where Ferris J. adopted what Lindsay J. said in posing the test whether it is plain and obvious that the relief claimed would never be granted).”*

123. Furthermore, as Smellie J noted in *RCB* at page 19, it is settled that the Court when exercising its inherent jurisdiction the Court should consider the evidence at large.

The law – winding up on the just and equitable ground

124. Once again, there is no dispute as to the applicable law and the position was accurately summarised by the parties.

The issues to be decided

125. In this case therefore (recognising that the burden of proof is on the Second to Fourth Respondents):

- (a). in relation to the Second to Fourth Respondents' challenge to the Amended Petition based on their case that the Amended Petition is bound to fail even if the facts and matters averred in it are proved at trial, the evidence adduced by the Second to Fourth Respondents (and the other parties) must be ignored and the Court must determine whether the Second to Fourth Respondents have established that the Petitioners' case, based solely on the Amended Petition, is plainly and obviously unsustainable (the *First Issue*).
- (b). in relation to the Second to Fourth Respondents' challenge to the Amended Petition based on their case that the Amended Petition is an abuse of process and bound to fail because the primary facts established by the evidence adduced on their Summons show that the Court would not conclude at trial that a winding up order was justified or appropriate, the Court must determine whether the Second to Fourth Respondents have established that the primary facts are undisputed and whether, if so, those undisputed primary facts cannot support an inference that the Petitioners have reasonably and justifiably lost confidence in the Company's management or that it otherwise follows from those facts that the Petitioners' case is manifestly unarguable and that it is plain and obvious that no winding up order would be made (or alternative relief granted) at trial (the *Second Issue*).

The First Issue

126. As I have noted, the Second to Fourth Respondents argue that the Amended Petition is flawed on its face and plainly and obviously unsustainable, even if the facts averred are proved at trial because:

- (a). there is no prospect of the Court at trial ordering that the Company be wound up on the petition of shareholders holding just 1.62 per cent of its shares on a fully

diluted basis when the petition was not supported by the other shareholders and the Company was successful and thriving.

- (b). the principal ground relied on in the Amended Petition (the loss of confidence in the board of the Company) is unsustainable because no allegations are made against the majority of the current board (so that it was impossible for there to have been an objective loss of confidence in the board as a whole) and because the pleaded allegations are historic and inconsequential and therefore insufficient to found and sustain a present lack of confidence in the current board.
- (c). the alternative ground (oppression) was also unsustainable because the Petitioners had not asserted and relied on any conduct by the Company and its management that was been directed at them.

127. In my view these challenges fail. The Second to Fourth Respondents have failed to establish that the Petitioners' case, based solely on the Amended Petition, is plainly and obviously unsustainable.

128. As regards the first challenge, I agree with the Petitioners that it cannot be said that their application for a winding up order (and alternative relief) was bound to fail and was clearly unsustainable because of the small size of their shareholding. This is so not only because all shareholders have standing and a statutory right to petition even if they only hold one share, but because this is a case where the Petitioners' primary (and legitimate) purpose is to obtain section 95(3) relief for their own benefit and not to wind up the Company. It seems to me that shareholders with only a small shareholding, in a case where they can make out the grounds for a winding up based on the misconduct of mismanagement and show that it would be wrong to require them to remain as members of the company, cannot be deprived of an alternative remedy merely by reason of the size of their shareholding. This reasoning is not changed by the fact that a substantial majority of the Company's (independent and small) shareholders have not come forward to support the Amended Petition or sought section 95(3) relief (they appear not to have expressed any view at present). This can be relied on by the Second to Fourth Respondents as evidence that there is no reasonable basis for the Petitioners' lack of

confidence in management (because it appears that management has retained the confidence of the other shareholders), and no doubt the attitude of other shareholders will be relevant at trial, but the lack of support from the other shareholders is insufficient of itself to show that the Petitioners' complaints are unsustainable. I note that it was held in *Bryanston Finance v De Vries (No 2)* [1976] Ch 63 that the fact that a petitioning member only held 62 of the company's 7,414,938 shares did not mean that the petition was bound to fail.

129. The second challenge seems to me to be more substantial. The Second to Fourth Respondents say that the Amended Petition now only complains about the conduct of two of the seven members of the current board (Mr Steckel and Mr Thieriot). It fails to make any complaint against Mr Chapman, Ms Slemmer, Mr Hilton or Mr McLoughlin, who together constitute a majority of the current board of the Company. In these circumstances there is no justification or reasonable basis for a loss of confidence in the current board.
130. Mr Valentin KC confirmed during the hearing (see the transcript for day 2 at pages 64-65) that the Petitioners' case as to why there was a proper basis for a loss of confidence in the current board was (a) by virtue of the fact that the board as a whole was resisting the Amended Petition which was evidence that the board was supporting Mr Steckel's position and (b) that Mr Steckel controls the board, and therefore the board is a creature of Mr Steckel. As regards the pleaded facts that support this averment and allegation in relation to the current directors who were appointed in March 2020, Mr Valentin KC said that the Petitioners relied on the facts set out in the Amended Petition, relating to the post-March 2020 events and actions complained of as well as what the Petitioners claimed to be the unjustifiable and possibly improper support for Mr Steckel evidenced by the allegedly inadequate work of the supposedly independent investigation committee and the current board's support for Mr Steckel and the other Respondents in defending the Amended Petition. Mr Valentin KC said that the Petitioners could not yet, at this stage, particularise in detail all of the conduct of the post-2020 directors which established that the Petitioners' complaints were justified because, since none of the Petitioners are on the board and the Company had refused to provide a full response with documents to these complaints (what Mr Valentin referred to as "*stonewalling*"), the Petitioners did not yet have access to all the relevant documents. But he submitted they had done enough to

formulate and set out in the Amended Petition a coherent set of complaints and had sufficiently identified the relevant factual basis for them to entitle them to have the Amended Petition tried and to resist the strike out applications.

131. There is a clear and general allegation that Mr Steckel “controls” the Company (through his position as a shareholder). It is said (see [34]) that he has “caused the Company” to operate without regard to the principles of proper corporate governance and so that the Company prefers his interests to those of the company and its other shareholders. The averment that Mr Steckel can cause and has caused the Company to act in accordance with his wishes brings with it and includes an assertion that Mr Steckel controls (and has *de facto* control of) the Company. The examples of action taken by the Company pursuant to Mr Steckel’s *de facto* control, set out in a-g of [34], cover the period 2017 to late 2022, but the averment of control in the first sentence of [34] is in the present tense and the clear inference from the whole of [34] is that the Petitioners assert that Mr Steckel is in control of the Company up to the date of the Amended Petition. This is reiterated and confirmed in [35a] where it is said that Mr Steckel took control of the Company via the Transaction and [in 35c] where Mr Steckel is said to be continuing to cause the Company to take improper action without regard to the principles of proper governance and with a view to preferring his interests at the expense of the interests of the Company and its other shareholders (including the Petitioners). These averments in the Amended Petition, fairly understood (having regard to what can reasonably be understood to be covered and what the Respondents can reasonably be treated as having been notified of), seem to me to amount to an allegation of a pattern of conduct by Mr Steckel, starting in 2016 but extending up to the time of the presentation of the petition (and its amendment by way of the Amended Petition), involving the existence and exercise of control of the board of the Company (in a manner that evidences misconduct as a director and shareholder and a lack of probity).
132. It is implicit in the averments in the Amended Petition that the current directors are alleged to have been under the *de facto* control of Mr Steckel.
133. The Amended Petition does not specifically allege that the current board has acted improperly in supporting the Respondents’ opposition to the Amended Petition but it

does explicitly challenge the reliability of the Company's investigation (put in inverted commas at [34b]) of the claims against AirTM. But I do not accept the Petitioners' argument that the current board's support for the Respondents' opposition to the Amended Petition can without more be treated as evidence of their being under the control of Mr Steckel (particularly where the board has appointed a litigation committee) or of misconduct by the current board. At best, such conduct can be said to be consistent with the Petitioners' allegation of control since support for the Respondents can indicate both a genuine independent decision by the current board that such support is required in the best interests of the Company and all its shareholders (as the evidence given by the current directors asserts) or a willingness to act in the interests of and as directed by Mr Steckel.

134. It is true that the amendments made to the petition removed the averment (that was in the previous version of [35e]) that the (current) board had acted in a manner that perpetrated the mismanagement of the Company and the averment (that was in the previous version of [34f]) that the current directors had demonstrated a lack of probity and acted in breach of duty by allowing Mr Steckel to gain *de facto* control of the Company. It is also true that Mr Steckel is averred to have exercised control through his position as a shareholder rather than as a director. However, for the reasons I have given, it seems to me that the Amended Petition should fairly be read as averring that the current board is implicated in the misconduct complained of, by allowing Mr Steckel (and possibly by acting as directed by Mr Steckel so as) to cause, and by causing, the Company to act as alleged and that Mr Steckel has exercised his powers and used his position as a shareholder to cause the board to act so as to benefit himself and his associates and to damage the Company and the interests of its other shareholders. Each of the actions and activities listed in [34a-f] involve allegations of (repeated and persistent) action by the directors for the benefit of (inter alios) Mr Steckel and to the prejudice of the Company and it is implicit that it is alleged that in so acting (for the improper benefit of Mr Steckel and to the prejudice of the Company) the directors themselves were acting improperly and with a lack of probity. In some cases, there is an explicit allegation of a breach of duty by Mr Steckel (and other former directors) qua director (for example, [34c] and [34g]). I do not consider that the amendments made to the petition prevent the interpretation. The amendments can be seen as being designed to highlight and focus the Amended Petition

on the conduct of Mr Steckel but that conduct involved causing the directors (the only corporate organ that can collectively act on behalf of the Company) to take action which is alleged to be damaging and prejudicial to the Company and therefore an allegation that those directors were behaving wrongfully.

135. I have, however, continued to be concerned about the generality and lack of detail in the allegations made in [34] regarding the post-Transaction, and allegedly continuing, exercise of control by Mr Steckel (and misconduct by the board acting under his control). While the Petitioners say that they are awaiting the results of the discovery process in these proceedings and in the US, as I have noted the authorities have repeatedly made it clear that a petition cannot be allowed to proceed in the absence of an averment of at least some facts from which the Court can infer that the grounds for an order exist. As Hoffmann LJ said in *Saul Harrison* “*Of course it is always possible that discovery and cross-examination may produce some written or oral confession that the board were indeed acting in bad faith. But I do not think that the petition can be allowed to proceed to trial simply in the hope that something may turn up.*” The petitioner cannot rely entirely on being able to aver and allege relevant facts following discovery. There must be some, and a sufficient, basis in the petition even before discovery to justify the Court permitting the petition to proceed.

136. The particular concern relates to whether the Amended Petition can be said to include an averment of facts relating to or evidencing Mr Steckel’s exercise of control, such as examples of Mr Steckel giving directions to particular directors or the board as a whole or of a decision being taken by the board because of and following an instruction from Mr Steckel. While the Amended Petition is light on this and I would have preferred to see more detail, I am satisfied, on balance, that what is said in the Amended Petition is sufficient and passes the relevant threshold. Specific instances are given of the Company (which must be understood as acting by its board) acting to give effect to Mr Steckel’s instructions (it is averred at [34c] that the Company acted at Mr Steckel’s instigation to alter the TBOL licence application and at [34f] that Mr Steckel procured the payment of his legal fees). It is also averred that Mr Steckel was allowed to act as the key decision maker (for example it is averred at [34b] that Mr Steckel caused – and therefore was allowed by the board to act on behalf of the Company – to waive breaches of IP licences

and debts owed by AirTM). The Amended Petition *also* often relies on the *effects* of the action complained of to assert that since these were demonstrably for the benefit *inter alia* of Mr Steckel and to the prejudice of the Company and other shareholders, the directors involved must have been doing Mr Steckel's bidding and acting as he directed. An allegation of *de facto* control based on the effects of board decision making and the acts of directors is obviously weaker than one based on examples of the directors taking and acting on instructions but it seems to me that it is legitimate for the Petitioners to rely on an inference as to the reason why the directors took certain action based on its effect and that the combination of specific examples and the general inference from effects results in there being a sufficient foundation for the allegation of *de facto* control (from which it can be inferred that Mr Steckel has *de facto* control and was and is able to have the directors implement and act in accordance with his wishes).

137. As regards the Transaction itself, it seems to me that the facts set out in, and what is said in, the Amended Petition are sufficient to support a finding that a loss of confidence in the Company's management was reasonable and justified. The allegation is that the majority of the board was doing Mr Steckel's bidding when approving the Transaction even though Mr Steckel recused himself from the board decision making process. The Amended Petition alleges (at [19]) that Mr Thieriot, Mr Parsa and Mr Watson were acting on Mr Steckel's instructions to facilitate the takeover and that a majority of the board had outside and in advance of board meetings (at [22]) agreed to support and approve the takeover, and that (at [21]) separate meetings had taken place outside the board for this purpose (at least between Mr Steckel, Mr Salinas and Mr Parsa).
138. I also reject the Second to Fourth Respondents' submission that the Amended Petition must be treated on its face as plainly unsustainable and bound to fail because it is, in substance, based exclusively on historic conduct which cannot found a complaint justifying a winding up order now. I accept that the petition was and that the Amended Petition remains heavily focussed on and gives great weight to the Transaction in 2016 and that this took place a long time ago (and that in the petition the complaints regarding the post-Transaction conduct were so general and briefly dealt with as to give the impression of being a makeweight). But the Amended Petition has to a sufficient extent given greater weight to this conduct and, as I have explained, can properly be understood

as not being confined to a complaint about past and now irrelevant conduct. It asserts and relies on a continuing pattern of conduct involving mismanagement for Mr Steckel's (and Mr Salinas') benefit starting with the Transaction but continuing to the date of the petition. The Transaction is given great emphasis because it is said to be the occasion on which Mr Steckel's plan to obtain control of the Company for his benefit was first evidenced, made manifest and implemented and that the subsequent pattern of conduct has been consistent with that plan.

139. The Amended Petition does set out a series of coherent complaints based on sufficient facts that evidence a continuing pattern of misconduct in the management of the Company which, if proved, could justify a loss of confidence in the Company's management. In my view, the Amended Petition, as it relates to the ground based on a justifiable loss of confidence in management, is not plainly and obviously unsustainable. This means that the Second to Fourth Respondents' challenge based on the first issue fails and that the Amended Petition must be allowed to proceed (subject to my decision on the second issue). The question then arises as to whether the same conclusion should be reached in relation to the Amended Petition's alternative ground, namely oppression and whether the Second to Fourth Respondents are right to say that the Amended Petition is unsustainable because it fails to assert or rely on any conduct directed at them. It seems to me that they are not. It is sufficient to aver (and then of course to prove) that the conduct complained of disregards the interests of a group or class of members of which the petitioners are part. The Amended Petition does so. It alleges, as I have explained, that Mr Steckel has exercised and continues to exercise control for the purpose of benefitting himself, in part as shareholder, to the prejudice, directly by an improper dilution and indirectly by damage to the Company, of all other shareholders including the Petitioners. As French points out (at [8.327]) "*Conduct of a Company's affairs in disregard of the interests of members of the company is oppressive to those members*" (underlining added) and as Buckley LJ said in *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042, at pages 1059-1060: "*oppression occurs when shareholders having a dominant power in the company .. exercise that power to procure that something is done or not done in the conduct of the company's affairs [which is] unfair or .. "burdensome, harsh and wrongful" to the other members of the company or some of them ..*" It is not necessary for the Petitioners to allege oppressive conduct which is directed solely at them.

The Second Issue – the primary facts

140. It seems to me that the core factual allegations made in the Amended Petition, which constitute the primary facts in issue which need to be proved at trial, can be summarised as follows:

- (a). by the first quarter of 2016 the Company was financially distressed and needed further funding.
- (b). at that time Mr Steckel, acting with Mr Thieriot, Mr Parsa and Mr Watson as directors of the Company failed to take proper steps to remedy the Company's financial problems including by failing to conserve cash flow and by failing to pursue all reasonable third party interest in making further investment.
- (c). Mr Steckel (and Mr Salinas) wished to obtain control of the Company without paying a proper price for the shares needed to acquire such control and then to run the Company for their benefit (and the benefit of those who supported them). They obtained the support of other directors sufficient to control a majority of the board for this purpose. They acted together to create the conditions in which the Company needed to resort to an emergency rescue financing and arranged for the financing proposal from Mr Steckel via Holdings (the Transaction) to be approved and entered into (and for other proposals to be rejected).
- (d). the funding (and the Transaction generally) was not on arm's length commercial terms and involved a penal rate of interest and the Warrant allowed Mr Steckel (and Mr Salinas) to acquire shares at less than a fair and proper price (and subsequently Mr Steckel was improperly allowed to set-off the penal interest accrued against the exercise price under the Warrant).
- (e). the Transaction (including the issue of the Warrant and the subsequent issue of shares to Mr Steckel) was not properly authorised by the Company's shareholders (the resolution purportedly passed at the February 2017 EGM was invalid) and also

resulted in a breach of the IRA entered into by the Company with the Series A preference shareholders and the Company's articles. The offer contained in the Series B Term Sheet did not remedy the breach.

- (f). pursuant to the Participation Agreement Mr Chen (through the Fifth Respondent) was given a share of the (improper) benefits of the Transaction and Mr Steckel procured the agreement of the Company to this.
- (g). Mr Laggner was removed from the board in November 2017 to prevent him from scrutinising the activities of the board and questioning the implementation of the Transaction and its consequences.
- (h). as a result of the Transaction Mr Steckel obtained *de facto* control of the Company (through its board and his shareholding in circumstances where the other large shareholder was Mr Chen who after the Participation Agreement cooperated with him) and has since exercised such control (in the same manner).
- (i). since the Transaction to date Mr Steckel has exercised that control so as to cause the Company to act in a manner that promoted his interests (and those of his supporters) and damaged the interests of the Company (and its other shareholders) and the current board has facilitated this and participated in the required and related decision making without independently considering (as required by and in accordance with the proper principles of corporate governance) and protecting the interests of the Company (and its other shareholders) and without consulting with the other shareholders or obtaining shareholder approval (once again as required by and in accordance with the proper principles of corporate governance).
- (j). such action by the Company includes:
 - (i). the failure to comply with proper procedure when the Company's memorandum and articles were purportedly amended on 23 February 2017.
 - (ii). the failure to recover from AirTM, and the waiver of, sums owing by it to the Company as a result of its use of the Company's intellectual property and

other rights and pursuant to a licence or other agreement Mr Steckel and Mr Parsa had invested in Cloud Money Ventures LLC and had a conflict of interest and acted improperly by favouring their own interests over those of the Company and its other shareholders.

- (iii). the failure to ensure that the Company received a proper share in the UK digital banking business that was supposed to be established by and for the benefit of the Company and which eventually resulted in the establishment and the issue to the Company of only 9% of the shares in TBOL and the diversion of the Company's corporate opportunity. Mr Steckel (and Mr Watson) acted so as to divert to themselves this corporate opportunity at the expense of the Company.
- (iv). the issue of options and shares to Mr Steckel (and Mr Thieriot, Mr Parsa and Mr Watson, Mr Chen and Mr Kidd) in amounts to which they were not entitled and which they had not earned by their service to the Company, for the purpose in Mr Steckel's case of obtaining an improper financial benefit and in the case of the others, of rewarding them for their support of Mr Steckel, in each case at the expense of the interests of the other shareholders.
- (v). the failure to protect the interests of the Company in relation to the Company's participation in the Universal Protocol project by allowing another company to have access to customer funds. Mr Steckel (Mr Thieriot and Mr Kidd) acted to benefit themselves and Cred at the expense of the Company and without proper regard to the Company's interests.
- (vi). the improper payment of Mr Steckel's fees incurred by him in connection with the 2021 Petition in circumstances where he was not entitled to be reimbursed by the Company.
- (vii). the disposal of shares held by the Company in Ledger at a significant undervalue.

The Second Issue – have the Petitioners adduced sufficient evidence in support of the Amended Petition?

141. The evidence in support of the Amended Petition comprises the facts deposed to by Mr Laggner in his affidavits and the contemporaneous documents exhibited to those affidavits.
142. As I have noted, Mr Laggner significantly supplemented his evidence in Laggner 3 and Laggner 4 and exhibited a substantial volume of contemporaneous documents to these affidavits.
143. Much of Mr Laggner's evidence involves an account of his understanding of events based on his own extensive and direct knowledge (from his lengthy and extensive involvement with the Company including his service as a director) as well as various conversations he has had with former directors and employees of the Company (for example, his evidence is that he was told by former employees of the Company that Mr Parsa had been using the Company's technology and employees to build AirTM and that Mr Watson had said that it was his impression that the Company's intellectual property had been stolen).
144. But he (and the Petitioners) are also able to rely on at least some evidence in the form of contemporaneous documents to indicate that:
 - (a). as regards the Transaction, in the absence of creditor pressure the Company had more time and greater room for manoeuvre than the Respondents have suggested allowing for a continued review of alternative financing proposals; to suggest that there were alternative sources of funding and that the White Knight proposal was capable of being implemented or at least merited further consideration (if there was time to do so); that the Company was treated shortly before the Transaction as having a substantial net value; that the rate of interest charged was very high, uncommercial and possibly penal; that the Warrant was originally linked to the RCA lending and designed only to be security for non-payment but that this was amended to favour Mr Steckel by allowing for its immediate exercise at a time that benefitted Mr Steckel and allowed him to use the penal rate of interest to acquire the Warrant shares.

- (b). Mr Steckel was regarded as being in control of the Company.
 - (c). other directors and Company insiders had serious concerns regarding Mr Steckel's conduct and integrity and that he had been accused of deceit, misconduct, mismanagement and acting for his own benefit and to the prejudice of the Company and its other shareholders. There were also allegations (after the Transaction including in 2020) of "*bad management and corporate governance*" and a "*packing*" of the board and (in 2022) that the Company's management was responsible for a "*lack of transparency regarding stock issuance and ownership that is truly egregious*" (see Mr Parsa's email of 2 March 2022).
 - (d). the level of options and shares issued to Mr Steckel (and others) was excessive and unjustifiable as being beyond fair compensation for their service.
 - (e). in relation to TBOL, that originally the Company's management intended to obtain a very valuable banking licence for the Company and its own benefit, that was seen as being very important for the Company (a "critically important milestone" is the term used in a document to shareholders in December 2016) but that in the end the Company only obtained a small shareholding with the other directors including Mr Steckel obtaining for themselves very valuable interests, and there were concerns that the value of the licence had been "given away") and that the Company had not at least been given "*some upside in the bank license*" (see Mr Parsa's email in March 2022).
145. It is obviously important to be careful not to give too much weight to individual emails and particular comments made at particular times and in a particular context, when the email and documentary record is incomplete. Furthermore, I note that both Mr Parsa and Mr Brooke have sought to explain their emails and earlier views in evidence in these proceedings. However, recognising those limitations, it seems to me that the documents adduced in evidence by Mr Laggner can properly be treated as providing evidence in support of, and as lending some weight and credibility, to the complaints made in the Amended Petition (in particular the claim in the Amended Petition that the course of

misconduct of Mr Steckel, supported, permitted or acquiesced in by the current board justifies a loss of confidence in management sufficient to merit the making of a winding up order).

146. It seems to me that the facts deposed to by Mr Laggner in his affidavits and the contemporaneous documents are sufficient to support the Amended Petition at this stage. The Petitioners are (to use Justice Kawaley's phrase in *CTrip*) able to point to primary facts which might be established at trial from which the requisite inference can be drawn. Mr Laggner's evidence deals with matters of which he had a close personal involvement and personal knowledge. He has been a major player in the Company and heavily involved in its fund raising and management. It seems to me that his evidence cannot be ignored or given so little weight that the Court can conclude that it does not provide evidence of the primary facts. His evidence does not provide a complete and comprehensive picture but in my view it sufficiently covers the main primary facts. His evidence is also extensively challenged and his motives for petitioning have been questioned. But these are issues to be dealt with by cross-examination at trial.

The Second Issue – have the Second to Fourth Respondents put in evidence primary and unchallenged facts that rebut the complaints in the Amended Petition or allow the Court to conclude that the Petitioners' case is manifestly unarguable and that it is plain and obvious that no winding up order would be made (or alternative relief granted) at trial?

147. The Second to Fourth Respondents have adduced a substantial volume of evidence from the key players in the case. That evidence is detailed and supported by a large number of documents. Because of the heavy reliance placed on this body of evidence by the Second to Fourth Respondents, I have reviewed it carefully and taken the trouble to summarise (and I have set out above) the key points made by the various deponents (while this has taken up a good deal of space and made this judgment longer than I would have liked it seemed to me to be important to set out the facts and matters covered in this evidence).
148. This body of evidence has challenged and put in issue, as my summaries above make clear, virtually all of the primary facts on which the Amended Petition is based as well as giving secondary evidence as to the Petitioners' credibility and motive. It clearly represents a cogent and powerful response to the Amended Petition and the Petitioners' evidence in support and may well be sufficient to justify the dismissal of the Amended

Petition after the trial. But I have concluded that it cannot be said that the Second to Fourth Respondents' evidence deposes to facts which can be treated as unchallenged and which establish that the Petitioners' case is manifestly unarguable and that it is plain and obvious that no winding up order would be made (or alternative relief granted) at trial.

149. The Second to Fourth Respondents submit that the evidence they have adduced (the contemporaneous documentary record and the unchallenged affidavit evidence) established facts which show that the factual basis of and the complaints made in the Amended Petition (particularly as they relate to the current board) are wrong and without foundation. I have set out in detail at [61] above what the Second to Fourth Respondents say on this and what facts they assert to be clearly and indisputably established by their evidence (as it relates to the current board). This was so even though they accepted that the Court must not conduct a mini-trial, resolve disputed issues of fact or make credibility findings at the strike-out stage (while they said that their evidence *reliably illustrated* how the pleaded allegations were incapable of being established at trial their case was that the Amended Petition should be dismissed as an abuse of process because the undisputed facts established by their evidence showed it was bound to fail).
150. In my view it is clear that all the facts asserted by the Second to Fourth Respondents are disputed and that the Court would need to resolve clear factual disputes on the affidavit evidence in order to hold that the Second to Fourth Respondents' factual case was established. This, as the Second to Fourth Respondents accept, is impermissible on a strike-out application. A review of the summary at [61] reveals that the Second to Fourth Respondents have only set out the facts as they have claimed them to be. As my summary of the Petitioners' evidence makes clear, they have given evidence of the primary facts which they assert and rely on in support of the Amended Petition and the Second to Fourth Respondents' evidence contradicts the Petitioners' factual claims in all material respects. The primary facts are in dispute. As the huge volume of evidence filed on the strike-out application demonstrates, there are a large number of issues and different accounts covered in the evidence and a vast volume of documents filed which cover a large territory, which need to be reviewed and assessed in order to make a factual finding and reach a conclusion as to the primary facts. This makes this a case which is unsuitable for a strike-out.

151. I have noted and taken into account the Second to Fourth Respondents' evidence that many of the complaints made by the Petitioners have been investigated by the Company's litigation committee and considered to be without foundation. I accept that the results of a properly and independently conducted review would lend considerable weight to the Second to Fourth Respondents' case and response to these allegations but the reliability of the investigation (at least in relation to AirTM) has been challenged and put in issue by the Petitioners albeit without direct evidence and based at best on inference and more importantly at this stage without the Court having evidence of the nature scope and evidence considered by the litigation committee, the results cannot be treated as definitive and sufficient to establish the facts relied on by the Second to Fourth Respondents. The relevant facts remain and must be treated as remaining in dispute.
152. This is not a case like *RCB* and *Saul Harrison* where the factual background was within a relatively narrow compass and the Court had been able to decide that the primary facts were not in dispute and form a clear view at the strike-out stage that the petitioner's case was hopeless. This is a case, in my view, in which the factual issues in dispute are so various and substantial that they can only be resolved at a trial (this also distinguishes this case from *CTrip* where Mr Justice Kawaley was able to conclude at the strike-out stage that the use of a winding up petition to resist and undermine a takeover was clearly improper and unjustifiable, and the allegations of misconduct were clearly without foundation, so that the petition was obviously unsustainable).
153. This is not to say, as I have already mentioned, that I do not recognise the substantial force and cogency of the Second to Fourth Respondents' case. They have put in evidence from a large number of important witnesses that provides an alternative account of the events related in the Amended Petition which is well supported by documents and cogent and suggests that the Transaction involved legitimate rescue finance on reasonable commercial terms in light of the Company's financial position and that the other grounds of complaint about management's conduct relate to *bona fide* business decisions taken by an independent and properly advised board for commercial reasons otherwise than at Mr Steckel's direction. The denials of acting as directed by Mr Steckel and of his exercising any influence over them by Mr Thieriot and the former directors (as well as

Mr Chen's evidence as to his independence and standing as a businessman) are powerful. But the Second to Fourth Respondents' problem at this stage is that some significant parts of their evidence is contradicted and put in doubt by contemporaneous documents and they are only able to dispute and put in issue the factual basis for the Petitioners' case and the Court is unable to resolve those disputes and make findings of fact in the face of the contradictory affidavit (and some documentary) evidence adduced by the Petitioners without the benefit of cross-examination and a trial. But this does mean that the Petitioners need to recognise that they remain subject to a substantial costs risk if they press ahead and ultimately fail to establish their case at trial. No doubt this is a matter they have already carefully considered and is one for them and their legal advisers.

The impact of the 2021 Petition

154. I have considered the Second to Fourth Respondents' arguments based on the 2021 Petition but I do not consider that the differences between the facts relied on and the nature of the complaints made in the 2021 Petition and the Amended Petition can be treated as seriously undermining the Petitioners' case or to show that the Amended Petition was presented for an improper purpose.
155. The fact that the Petitioners have previously presented a petition which was at least broadly based on the same related complaints as those contained in the Amended Petition does, as the Petitioners' submitted, at least show that there has been a continual course of complaint and that they have mounted a challenge for a long time. This assists them in resisting the Second to Fourth Respondents' argument that the Amended Petition is an abuse or vexatious because the Petitioners are only now complaining about events that took place a long time ago, in 2016-17.
156. Nor does the fact that the Amended Petition is the second winding up petition presented by the Petitioners indicate that the Amended Petition is vexatious and improper. I do find it curious that the 2021 Petition was withdrawn and a settlement reached on terms that allowed for the presentation of a further winding up petition on similar grounds but clearly the settlement terms did allow for another petition to be presented (otherwise an application to restrain the presentation or continuation of the Amended Petition on the

basis that it was presented in breach of the settlement agreement would have been made). This must be taken to be a decision made by the respondents to the 2021 Petition. Furthermore, as the Petitioners also pointed out, the settlement terms were confidential and the Court is unable to draw adverse inferences against the Petitioners based on the withdrawal of the 2021 Petition.

Mr Laggner's position

157. It is clear that Mr Laggner has standing to petition as the registered holder of shares in the Company and is entitled to rely on conduct that occurred before he became a member (see French at [8.305]). I agree with the Second to Fourth Respondents that in order for that conduct to be relevant and given serious weight there must be a sufficient nexus between that conduct and the continuing conduct complained of. The link in this case existed because the conduct occurring prior to the date when Mr Laggner became a member was properly relevant to the claim that Mr Steckel (acting so as to cause the board to implement his wishes or where the board participated and acquiesced in the course which Mr Steckel had set so as to satisfy his wishes and do his bidding) had since the Transaction taken control of the Company (and the board) and that there had been a consistent pattern and history of misconduct. I do not consider that Mr Laggner's rights under the SPTVA of 26 June 2016 with Mr Minor gave him standing to petition (from the date on which Mr Minor's obligation to transfer became unconditional on 21 July 2016) but the fact that he may well have had a right to specific performance from 21 July 2016 is a relevant factor when considering his interest in complaining about conduct that occurred before he became a member.

158. I accept that previous acquiescence to conduct complained of in a petition is a relevant factor to be taking into account (see *Re Lowes Park Pty Ltd* where the conduct complained of had continued for 28 years, cited at [8.147] of French) but I do not consider that I can, despite Mr Brooke's evidence and the documents he exhibited, make a finding at this stage that Mr Laggner abandoned his opposition to the Transaction and approved it. His evidence is clear that his agreement to the board minutes only constituted an acknowledgement that the majority of the board had voted in favour of the Transaction and that when assenting to the subsequent resolutions in June and August 2016 he was not, and cannot fairly be understood as having withdrawn his opposition. It seems to me

that a proper assessment of Mr Laggner's actions and their significance for and impact on his claim for relief in the Amended Petition must await the trial when the factual disputes can be tested under cross-examination and the full picture will emerge.

159. I also do not consider that the fact Mr Laggner has sold 40,000 shares on the secondary market at a substantial profit of itself or with other factors disentitles him from petitioning. This is a fact relevant to the availability of alternative remedies, which I discuss below, and to the valuation of the shares, but it does not mean that he should be regarded as having accepted or given up his right to complain about the conduct relied on in the Amended Petition.

The adequacy of the alternative relief available to the Petitioners

160. I have carefully considered the Second to Fourth Respondents' submissions on this issue and what they say about the alternative remedies that were and remain available to the Petitioners. However, I have concluded that it would be wrong at this stage to strike-out the Amended Petition on this basis.
161. I note the summary of the law in Mr Justice Parker's judgment in *Circumference* and in the judgment of the Court of Appeal in *Tianrui*, in particular the analysis of the approach to be taken by the Court on a strike-out application in the judgment of Martin JA at [37] (quoted above).
162. Both Parker J (at [59]) and Martin JA noted the danger in pre-judging the outcome of the petition before the full facts had been established (although Parker J rightly also emphasised that the Court was required to ensure that the winding-up jurisdiction was not being improperly used). It seems to me that Martin JA was pointing out that this is a particular concern when it comes to an assessment of whether a petitioner is to be treated as having acted unreasonably in seeking a winding-up order rather than pursuing other remedies. In my view, where there is a substantial dispute as to the primary facts, including as to the facts that are relevant to a determination as to whether alternative relief could and should have been pursued, the Court should be very slow to reach a conclusion on this issue prior to trial. As Martin JA said a petitioner "*is entitled to have*

the circumstances investigated in the context of a winding-up petition ... and if it succeeds in establishing its complaints, it is entitled under the statutory scheme to have the court consider at the end of the investigation whether the appropriate remedy is winding up or another [of those] ... set out in s.95(3) of the Law. The suggestion that [the petitioner] need not have all the contents of the petition determined upon evidence because it is obvious that a derivative action, or some other combination of actions, will provide substantial justice to [it] is untenable in circumstances where the range of facts, and inferences from fact, to which the petition gives rise have not been determined.”

163. In my view, in this case, the Court is not able safely to conclude, based on the undisputed evidence adduced to date and without the fuller investigation that will only be possible at trial, that the Petitioners’ case that they have acted reasonably in not pursuing alternative remedies is plainly unsustainable.
164. I accept that it appears that it was open to the Petitioners (or at least those who were shareholders at the relevant time) to bring claims against the Company for breach of the Series A IRA or the articles and derivative claims against the relevant directors or claims for declaratory relief in respect of the alleged breaches of duty by the directors as the Second to Fourth Respondents had suggested and as is summarised at [59] above. Furthermore, I also accept that the burden on a petitioner to justify a failure to act at the time of the alleged misconduct becomes greater when the misconduct has taken place over a long period of time, as in this case, so that it can be said that the petitioner had ample and multiple opportunities to take action to remedy the matters complained of.
165. But the Amended Petition alleges persistent and wide-ranging misconduct relating to a variety of episodes of mismanagement which it is said fundamentally undermined the Petitioners’ confidence in and trust of the board and caused them to conclude that they could no longer safely remain as members of the Company, and to decide to terminate their relationship with the Company (or to bring the Company’s to an end). In such circumstances, as was said in *Tianrui*, it is at least *prima facie* not unreasonable for a petitioner to conclude that piecemeal and separate proceedings will not resolve their issues and to prefer the comprehensive and final resolution that section 95(3) relief or a winding up order will provide. In any event, a finding that the failure to bring other

proceedings was unreasonable is highly fact specific and in my view the relevant facts have yet to be determined to enable the Court to form a view on the issue.

166. The allegations in the Amended Petition do not, if proved, relate just to disagreements and disputes regarding commercial and business decisions (where minority shareholders must accept the decisions of the *bona fide* majority). The allegations raise a more fundamental complaint of persistent misconduct which represents a visible departure from ordinary business decision making and the standards of proper governance and fair dealing which shareholders are entitled to expect and have observed.
167. The Second to Fourth Respondents have suggested that the Petitioners have the option to sell their shares in the market (an option already exercised by Mr Laggner in respect of some of his shares) and that this represents an alternative which it would be reasonable for the Petitioners to take. But there is no evidence before me as to the depth or liquidity of the secondary market for the Company's shares in order to be able at this stage to judge whether a sale by the Petitioners of all their shares at a fair price was ever or is a realistic possibility.

Otherwise scandalous, frivolous or vexatious

168. As is clear from my summary of their submissions above, the Second to Fourth Respondents mounted a full frontal challenge to the Petitioners' *bona fides* and argued that the Amended Petition represented an improper attempt to pressurise them (and the Company) into buying them out now that the Company was in a financial position to do so. It was a form of greenmail (my word – "*shakedown*" was the Second to Fourth Respondents' word). Mr Laggner in particular but the other Petitioners as well had previously gone along with and never made serious complaints about the conduct and actions which they were now saying were seriously improper and evidenced a lack of probity. The *volte face* demonstrated that the second petition was made for an improper purpose such that the Amended Petition should be struck out as plainly frivolous or vexatious.

169. It seems to me that these allegations can only be made out at and after the trial. They are clearly contradicted by the Petitioners and, as I have found, the Amended Petition does set out facts and a case which are capable of justifying the making of a winding up order and the granting of section 95(3) relief. It is not plain and obvious, based on the facts averred in the Amended Petition, or the undisputed facts established by the evidence adduced by the Second to Fourth Respondents, that the Amended Petition has been presented and is being proceeded with for the improper and collateral purposes that the Second to Fourth Respondents have alleged. The application for a strike-out under this head must also be dismissed.

Discussion and decision: the Fifth Respondent's strike-out application

Two issues

170. Two issues arise in relation to the Fifth Respondent's strike-out application. First, should the Petitioners' claim for relief (a buy-out order) against the Fifth Respondent be struck-out? Secondly, should the Fifth Respondent be removed as a party?

Should the Petitioners' claim for a buy-out against the Fifth Respondent be struck-out?

171. The Petitioners accepted the Fifth Respondent's submission that when considering whether a claim in a winding up petition for a buy-out order and other relief against shareholders or other third parties was properly made and sustainable, the English case law dealing with such claims in unfair prejudice petitions under section 994-996 of the UK Companies Act 2006 were relevant and could be relied on. While the jurisdictions relating to the unfair prejudice remedy and winding up on the just and equitable ground have some procedural and substantive differences, it seems to me that there is a substantial and sufficient overlap in a case where the winding up petition is based on misconduct (whether that is conduct by management which is said to constitute a lack of probity justifying a loss of confidence or conduct by other shareholders or by management constituting oppression) so that having regard to the unfair prejudice jurisprudence dealing with when a buy-out order will be made against shareholders or other non-parties is appropriate (although it is necessary for the Court to remain focussed on the purpose and scope of the winding up jurisdiction).

172. In *Re Bankside* Sir Nicholas Warren (whose decision on other issues was overturned by the Court of Appeal) considered the judgment of Sales J in *F&C Alternative Investments* and said this (underlining added):

“23. *Beyond the narrow class of agency, the judge held that the test is whether the respondent:*

“is so connected to the unfairly prejudicial conduct in question that it would be just, in the context of the statutory regime contained in ss.994 to 996, to grant a remedy against that [respondent] in relation to that conduct. The standard of justice to be applied reflects the requirement of fair commercial dealing inherent in the statutory regime. This is to state the test at a high level of abstraction. In practice, everything will depend upon the facts of a particular case and the court’s assessment whether what was done involved unfairness in which the relevant [respondent] was sufficiently implicated to warrant relief being granted against him.”

24. *In addition HH Judge Pelling QC, at [12], made these observations with which I agree:*

“However, the relief sought must be proportionate to the unfairly prejudicial conduct of which the petitioner complains ... It is for the petitioner to specify the relief that he, she or it seeks and in my judgment in an appropriate case a respondent is entitled to seek to strike out the relief claimed as being excessive, providing that the respondent can show that the likelihood of a trial judge exercising his discretion to grant the relief claimed is so remote that the case can be described as perfectly hopeless.”

25. *Moreover, it is, as the judge said at [19], the duty of the petitioner to plead the remedy sought and if it is plain and obvious that the remedy sought will not be granted, then the petitioner is at obvious risk of having the claim struck out. It is for the petitioner to specify the relief that he seeks and a respondent is entitled to seek to strike out the relief claimed as being excessive, if he can show that the likelihood of a trial judge exercising his discretion to grant the relief claimed (that is to say, against the relevant respondent) is so remote that the case can be described as perfectly hopeless. As Marcus Smith J pointed out in *VB Football Assets v Blackpool Football Club (Properties) Ltd (formerly Segesta Ltd) [2017] EWHC 2767 (Ch)*, at [425(iii)–(iv)]:*

“... the fact that a petitioner advocates one course, does not make it fair or appropriate. One aspect of fairness that must be borne in mind is that the remedy must be proportionate to the unfair prejudice found. In the case of relatively modest unfair prejudice, a buyout order may be disproportionate”

173. The unfair prejudice cases establish that in appropriate cases the Court may make an order against members, former members and even a person who has never been a member or director of the company. This has been permitted in relation to third parties who have knowingly received or improperly assisted in the wrongful diversion of assets from the company or, more generally, where the non-member was implicated in the unfairly prejudicial conduct or stood to benefit from it, even though they are not alleged to be the principal perpetrators of the unfair conduct. Nevertheless, the petition must make allegations against the respondent of involvement in the unfairly prejudicial conduct or, if the person is included in the petition solely for the purposes of remedy, the remedy sought must be one which is not manifestly excessive in relation to the respondent's involvement in the company. The non-member, non-director respondent must have been connected with the unfairly prejudicial conduct in a way which would make it just to grant a remedy against him or it or that person must have been directly or indirectly conducting the affairs of the company in an unfairly prejudicial manner. The Court has also been held to have jurisdiction to make a person against whom no relief is sought a respondent. However, in the exercise of its discretion the Court will be careful not to add or to maintain as a respondent a party against whom the chances of the Court making of an order for relief are remote or upon whom any order for relief which the Court might make would have no material effect.
174. It seems to me that, similarly, in the case of a winding up petition which seeks relief against a shareholder, that shareholder is entitled to have the claim for relief against it struck-out if he/she can show that it is hopeless and plainly unsustainable in the sense that the likelihood of a trial judge exercising his/her discretion to grant the relief claimed is so remote that the case can be described as perfectly hopeless.
175. It also seems to me that the test for relief against a shareholder (or third party) applied in unfair prejudice petition cases also applies in a case where the winding up petition is based on the petitioners' allegation of misconduct. The question for the Court must then be whether it is just in the circumstances to grant relief against the shareholder (or third party) concerned and in deciding that issue the connection of the shareholder (or third party) to that misconduct must be key. It seems to me that participation in or facilitation

of or the knowing receipt of the benefits derived from the misconduct will usually need to be alleged.

176. The Amended Petition only deals with the position of the Fifth Respondent very briefly. At [7(c)] it is averred that the Fifth Respondent “*has participated in and/or benefitted [sic] from the conduct complained of because as a result of the [Transaction] and the [Participation Agreement] [which is referred to at [33]] it now owns 14.75% of the shares in the Company on a fully diluted basis.*” (underlining added). It is implicitly alleged in [33] that the Fifth Respondent took advantage of the extortionate rate of interest payable under the RCA (it is said that it deployed the interest accrued under the RCA to pay the exercise price under the Warrant). In [34d] the allegation is repeated that Mr Chen was able to acquire shares using the extortionate interest and in [35d] it is averred that “*the Steckel Transaction and Mr Steckel’s other conduct pleaded in [the] Amended Petition has also benefitted [sic] Mr Chen (whose interest in the Company is now held by [the Fifth Respondent] to the detriment and prejudice of the Petitioners.*” Paragraph 1 of the prayer for relief then goes on to seek an order under section 95(3)(d) of the Act for the purchase of the Petitioners’ shares by Mr Steckel and the other Respondents for fair value and “*making all necessary adjustments to the composition of the Company’s shareholdings to take into account the disproportionate number of shares that were acquired by Mr Steckel and Mr Chen’s companies as a result of the [Transaction] and all other necessary adjustments to achieve a fair valuation.*”
177. There is therefore, as the Fifth Respondent pointed out, no allegation that the Fifth Respondent conspired or acted with Mr Steckel in relation to entry into the Transaction or his alleged exercise of control and misconduct. There is no averment that the Fifth Respondent knew about this misconduct or the identification of relevant facts which the Fifth Respondent is alleged to have known from which it should have known or concluded that Mr Steckel was acting improperly or that it was benefitting from such misconduct and wrongdoing. The reference to the Fifth Respondent participating in the conduct complained of is limited (by the use of “*because of*”) to the benefit derived from the Transaction, namely the receipt of shares paid for using the allegedly extortionate interest.

178. It seems to me that this is insufficient to sustain a claim for a buy-out order against the Fifth Respondent and it is not enough for the Petitioners, based on the averments and particulars set out in the Amended Petition, to say that the Court can only reach a considered view of the Fifth Respondent's conduct after the trial, when the full facts will emerge and Mr Chen and others can be cross-examined. The allegations made in the Amended Petition are insufficient to justify a buy-out against the Fifth Respondent. The Amended Petition does not allege conduct which can be characterised as improper in relation to the Petitioners or which the Court can treat as being open to criticism such that a buy-out order would be a just and proportionate response to such conduct. It is not alleged that the Fifth Respondent caused, joined in with or facilitated Mr Steckel's (and the related) misconduct or that the benefits were received when the Fifth Respondent knew about or was on notice of the alleged misconduct. It is said, using my words, that the Fifth Respondent took advantage of the extortionate rate of interest and it might be said that it was self-evident that an annual interest rate of 24% was improper, and that this is a fact from which sufficient knowledge or notice can be inferred. But it seems to me that the Amended Petition should have been explicit about what the Petitioners allege as to Mr Chen's and the Fifth Respondent's state of knowledge and awareness, why their conduct was sufficient to justify a buy-out order and what facts are relied on for this purpose. The Amended Petition's treatment of this aspect is far too thin and limited. The Fifth Respondent's role in the account of the alleged misconduct in the Amended Petition is only indirect and peripheral.

179. Accordingly, in my view the Petitioners' claim, based on the facts asserted in the Amended Petition, for a buy-out order against the Fifth Respondent is plainly unsustainable as the likelihood of the Court exercising its discretion to grant the relief claimed is so remote that the case can be described as hopeless. That claim must therefore be struck out.

Should the Fifth Respondent be removed as a party to the Amended Petition.

180. In the Judgment, I decided that the Fifth Respondent should be joined to enable it to respond to the allegations made against it and for the purpose of opposing the Petitioners' application for a buy-out order (see [63]).

181. In my view, despite the striking out of the Petitioners' claim for a buy-out order against the Fifth Respondent, it should remain a party since it may, as a large shareholder in the Company, be affected by the relief that the Court ultimately decides to order and should be bound by the decisions reached by the Court on the issues raised in the Amended Petition (it is also possible that it will need to give discovery). It should not be forgotten that there is also other relief sought in [4] and 5] of the prayer to the Amended Petition. The Fifth Respondent need not be actively involved in the proceedings and it will be a matter for it as to whether it wishes to respond further to matters raised by the Petitioners.
182. Like the Respondents, I remain unclear as to what the Petitioners mean when they say in the prayer that they seek orders "*making all necessary adjustments to the composition of the Company's shareholdings to take into account the disproportionate number of shares that were acquired by Mr Steckel and Mr Chen's companies as a result of the [Transaction] and all other necessary adjustments to achieve a fair valuation.*" However, as the Fifth Respondent pointed out in a short note on this point filed with its corrections to the draft of this judgment, the request that the Court makes the adjustments referred to only relates to the determination and assessment of the fair value to be paid to the Petitioners for their shares by any Respondent who is ordered to purchase those shares. Since the claim for a buy-out against the Fifth Respondent has been struck-out, this part of the prayer for relief will no longer apply to or affect the Fifth Respondent.



The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
25 April 2024