Neutral Citation Number: [2023] EWHC 1029 (Ch)

Case No: CR-2021-000495

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (CHD)

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

Date: 3 May 2023

Before :

ICCJ Greenwood

- -

Between :

JOHN SENESCHALL	**Petitioner**
- and -	
(1) TRISANT FOODS LIMITED (In Liquidation) **(2) MARKET FRESH LIMITED** **(3) LYNNE JONES** **(4) DAVID MARSHALL** **(5) DAVID McCORMICK**	**Respondents**

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- -

Mr Daniel Northall and Ms Sophie Cashell (instructed by Armstrong Teasdale Limited Solicitors) for the Petitioner
Professor Mark Watson-Gandy (instructed by Tees Solicitors) for the 2nd and 4th Respondents
Ms Morwenna Macro and Mr Matthew Tonnard (instructed by Ellisons Solicitors) for the 3rd Respondent
Ms Katherine Hallett (instructed by RWK Goodman) for the 5th Respondent

Hearing dates: 8-11, 15-18 and 22 November 2022

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JUDGMENT

This judgment (circulated in draft form on 4 April 2023) was handed down remotely at 11.30am on 3 May 2023 by circulation to the parties or their representatives by e-mail.

ICC Judge Greenwood:

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[A] Introduction

1. This is my judgment following the trial of proceedings commenced by Mr John Seneschall ("**Mr Seneschall**") on 17 March 2021, by means of an Unfair Prejudice Petition seeking relief under s.994 of the Companies Act 2006. Mr Seneschall's claims concern the business and affairs of a company, the 1st Respondent, Trisant Foods Limited ("**the Company**") which was incorporated on 12 February 2018, and went into insolvent compulsory liquidation on 9 November 2021 (after the proceedings had begun) on the petition of an unpaid creditor presented on 24 June 2021. Mr Seneschall was represented by Mr Daniel Northall and Ms Sophie Cashell of Counsel.

2. Central to the dispute was Mr Seneschall's allegation that he has been the victim of a plan, concealed from him, as a result of which, by means of various steps deliberately taken during the course of 2019 and 2020, control of the Company's

business was, over time, wrongfully seized by the 2nd to 5th Respondents, or some of them.

3. The Company's business was in food production and packaging, with an emphasis on baby food; it operated from a factory in South Wales, at Llantrisant, Rhondda Cynon Taf ("**the Factory**") and was founded jointly by Mr Seneschall and the 3rd Respondent, Ms Lynne Jones ("**Ms Jones**"). Of the 100 Ordinary Shares issued on incorporation, Mr Seneschall held 75, and Ms Jones held 25; they were also, at that time, its sole appointed directors. Ms Jones was represented by Ms Morwenna Macro and Mr Matthew Tonnard of Counsel.

4. Mr Seneschall alleged that the Respondents' plan, conceived and beginning in June 2019 "*at the latest*" (albeit without the involvement of Ms Jones until "*November 2019 at the latest*") culminated ultimately in his effective exclusion from any meaningful participation in the Company's affairs, such that on 13 July 2020, and although nominally he continued subsequently in office as a director, he was "*suspended on full pay pending an investigation*" into "*allegations of gross misconduct*" and on 7 September 2020, he was "*dismissed without notice*" - a result, he says, of a "*predetermined decision*" following a "*sham*" investigation based on "*confected*" allegations.

5. In addition to unfair prejudice, albeit on substantially similar grounds, Mr Seneschall alleged (by virtue of amendments permitted by ICC Judge Burton on 31 August 2022, on an application not opposed by the Respondents) an unlawful means conspiracy - the "**Control Conspiracy**" - in respect of which he claimed damages, and of which a subsequent "**Exclusion Conspiracy**", in

which Ms Jones was said to have participated, was alleged to be a component part, or "*subset*", albeit one capable of independent existence.

6. Market Fresh Limited ("**Market Fresh**"), the 2nd Respondent, was an investor in the Company, and also a shareholder. It counterclaimed. Its case was that its investment, lost as a result of the Company's insolvent collapse, was made in consequence of Mr Seneschall's deceit and subsequent breach of warranty; that amongst other things, in response to a due diligence enquiry made in June 2019, before it invested, Mr Seneschall told Market Fresh that the Company had "*not stopped payment of its debts, become unable to pay its debts as they fall due or … otherwise become insolvent*", which was not true. Indeed, despite having invested a substantial sum over a significant period, part of the case advanced by Market Fresh and its ultimate owner, the 4th Respondent, Mr David Marshall ("**Mr Marshall**") was that the Company was at all times insolvent and valueless, so that Mr Seneschall's unfair prejudice claim necessarily fails *in limine*. Market Fresh and Mr Marshall were represented by Professor Mark Watson-Gandy of Counsel.

7. Mr Seneschall denied the counterclaim on various grounds, both as a matter of substance and that in any event, Market Fresh was fully aware of the Company's financial state and circumstances, which were openly discussed before it agreed to invest. In the event however that the counterclaim succeeded against him, he claimed a contribution against Ms Jones, that she should pay one half of any sum for which he is liable, because she too was responsible for the responses to Market Fresh, and the later warranty. Ms Jones defended that claim.

8. The 5th Respondent, Mr David McCormick ("**Mr McCormick**") was neither a shareholder in the Company, whether directly or indirectly, nor an investor. His involvement was in two capacities: first, he was Market Fresh's titular "Managing Director" (although never formally appointed to the office) and second, in respect of the Company, it was accepted on his behalf by Ms Katherine Hallett of Counsel, who represented him, that by virtue of his involvement in its affairs, certainly between 7 August 2019 and 20 January 2021, he owed the usual duties of a director.

9. Accordingly, in respect of the Respondents' alleged plans, Mr Seneschall's case was that Mr Marshall was the "*chief-decision maker*"; that Mr McCormick conceived and orchestrated those plans as Mr Marshall's "*right hand man*"; and that from November 2019, Ms Jones aligned her interests with those of Market Fresh, Mr Marshall and Mr McCormick, and participated in their plans.

10. Mr Seneschall's claims were denied. In essence, and although their defences (reflecting their different roles and duties) were not in every respect the same, the Respondents' case was that Mr Seneschall was not the innocent victim of a conspiracy, but was instead, a financially irresponsible and indeed dishonest director, unjustifiably resentful of others' legitimate involvement. Their case was that acts said by Mr Seneschall to comprise the wrongful seizure of control ought properly to be characterised as lawful and commercially rational steps designed to bring financial stability and transparency to the Company's affairs, to protect Market Fresh's investment and the value of its shareholding, and to promote the best interests of the Company.

11. This was a case with a particularly rich documentary record. The chronological bundle comprised over 6,500 pages of documents generated in a comparatively short period, many of them informally and most of them contemporaneously with the events to which they related. In addition, I heard oral evidence from:

i) Mr Seneschall.

ii) Mr Seneschall's wife, Mrs Sally Seneschall ("**Mrs Seneschall**"): until about 6 November 2019, Mrs Seneschall also worked for the Company, assisting where she could, both in its administration generally and in particular, although she was not formally qualified in a financial or accounting discipline, by keeping a record of expenditure and indebtedness; she gave evidence in support of her husband's case.

iii) Mr Andrew Williams ("**Mr Williams**"): a chartered accountant introduced to Mr Seneschall and Ms Jones by Mr Brian Roberts, a Relationship Manager at "Business Wales" in July 2018; soon afterwards, Mr Williams agreed to become the Company's "Finance Director" (a role in which he was employed to work part-time, for about one day a week) and agreed that his practice, Hareled Consultancy Limited, would provide various accountancy services. He was appointed as a director of the Company on 1 November 2018, alongside Mr Seneschall and Ms Jones; subsequently, he was appointed as the Company Secretary. As I describe further below, his involvement in the business ended on 14 November 2019 (as did that of his practice) when he resigned his various positions, "*with immediate effect*". Mr Williams also gave evidence in support of Mr Seneschall's case.

iv) Mr Mats Malmstrom ("**Mr Malmström**): until 30 April 2022 the Operational and Commercial Director of a baby food company, Muru Baby Oy, one of the Company's customers. Mr Malmstrom also gave evidence in support of Mr Seneschall's case.

v) Ms Jane Stobie ("**Ms Stobie**"): a former employer of Ms Jones, she is Mr Seneschall's current business partner. She too gave evidence in support of Mr Seneschall's case.

vi) Mr Marshall.

vii) Ms Eileen McKendry-Gray ("**Ms McKendry-Gray**"): a consultant solicitor who provided "*outsourced in-house legal services*" to NeverWhatIf Group Limited ("**NWIG**"), amongst others. NWIG is the parent company of Market Fresh; 90% of its issued shares are held by Mr Marshall, 10% by Ms Nicola Marshall. Ms McKendry-Gray gave evidence for Market Fresh and Mr Marshall.

viii) Mr William Farrell ("**Mr Farrell**"): Assistant Finance Manager at NWIG. Mr Farrell gave evidence for Market Fresh and Mr Marshall.

ix) Ms Jones.

x) Mr McCormick.

12. I deal below at paragraphs 107-113 with my approach to the witness evidence in relation to contentious issues.

13. By virtue of the Order of Chief ICC Judge Briggs made on 16 August 2021, the trial before me was limited to "*determining issues relating to liability for the*

claim, counterclaim and additional claim", and if appropriate, the principles to be applied to any share valuation (a share purchase order being one of the remedies sought under s.994). I should add that although the Company, before its liquidation, served Points of Defence jointly with the other Respondents in March 2021 (and furthermore, made a counterclaim) it was not represented at the trial, by which time the other Respondents were separately represented, as I have described, and had each (Market Fresh and Mr Marshall jointly) served, on 22 September 2022, Amended Points of Defence in response to Mr Seneschall's Amended Petition ("**the A/P**").

14. Accordingly, subject to that direction, the purpose of the trial was to determine:

i) Mr Seneschall's case that the affairs of the Company have been conducted in a manner unfairly prejudicial to his interests as a member, and that he is therefore entitled to relief under s.994 of the Companies Act 2006;

ii) Mr Seneschall's case that he is entitled to relief as the victim of an unlawful means conspiracy;

iii) Market Fresh's counterclaim in deceit and breach of warranty;

iv) if necessary, Mr Seneschall's claim against Ms Jones for a contribution.

15. Possibly because of the nature of the proceedings, or because of the scale of the documentary record, or perhaps because of the short time between the substantial amendments permitted on 22 August 2022 and the trial, the case generated a very large number of issues, but very little common ground. Mr Seneschall's List of Issues, agreed only by Ms Macro for Ms Jones, and even

then, only "*in part*", comprised 70 separate issues, each divided into various sub-issues, but was nonetheless described in its opening paragraph as "*a high level summary, not exhaustive*".

[B] <u>An Outline of the Background</u>

16. Predominantly, Mr Seneschall's working background was in advertising. However, after selling his advertising business in 2010, he began to provide management consultancy, marketing and business strategy services to former clients. As a result, he became involved with a company called Babease Limited which was a new business venture for the production of baby foods. In 2015, Babease engaged Arc Foods Limited ("**Arc Foods**") to manufacture its products. Ms Jones was Arc Foods' Operations Manager. In March 2016, Brecon Foods Limited ("**Brecon**") was incorporated and became part of the "Babease Group". It acquired the business of Arc Foods, and retained Ms Jones in her established position as Operations Manager. In April 2016, both Mr Seneschall and Ms Jones were appointed as directors of Brecon, and in about September 2016, Mr McCormick was also engaged, as its "commercial director".

17. Subsequently however, in 2017, Mr Seneschall was accused of embezzlement, was suspended and disciplined. I have no particulars or evidence of that accusation (and should record that Mr Seneschall's evidence was that he settled the allegations and was compensated in damages) but in the event, in August 2017, Mr Seneschall resigned as a director of Brecon, sold his shares and left the business, as did Ms Jones, who had supported Mr Seneschall in his defence

of the disciplinary proceedings; in December 2017, Mr McCormick was made redundant.

18. Against that background, Mr Seneschall and Ms Jones agreed to start the business that in time became that of the Company. In late 2017, they identified the premises that became its factory and for assistance they approached "Business Wales", where they met a Relationship Manager, Mr Brian Roberts, who helped produce some initial business forecasts. In July 2018, Mr Roberts introduced them to Mr Williams. On 24 July 2018, the Company entered into a 10 year lease of the Factory, including office premises, with Beckerly Holdings UK Limited.

19. Essentially, reflecting their professional experience and expertise, Mr Seneschall was responsible for securing funding and for managing and marketing the Company's business, and Ms Jones was responsible for setting up and managing the Factory and its operation. On 11 July 2018, because the Factory was in Wales, and Mr and Mrs Seneschall lived in London, Mr Seneschall leased a flat not far from the Factory ("**the Flat**") with 6 months' rent being paid in advance from the Company's bank account. Mr and Mrs Seneschall generally stayed at the Flat for 4 or 5 nights a week, from Sunday evening to Thursday evening. The Flat was treated as a Company flat and was, from time to time made available to others visiting the Factory for business purposes.

20. As a new venture, or "start-up", the Company required substantial borrowing and investment; in particular, but not exclusively, to meet the initial capital and other costs associated with refashioning, equipping and making the Factory

operational, so that it could begin to generate revenue - a "*key milestone*", in the language of Mr Northall, although one not in fact reached until December 2019. In the meantime, and indeed subsequently, the business required continuing support in order to meet its overheads and other ordinary costs, such as the payment of rent, rates, utilities and wages, in addition to the costs of dealing with potential customers and the development of their products.

21. In those circumstances, in addition to £50,000 lent personally to the Company by Mr Seneschall and by his brother and mother between June 2018 and April 2019, Mr Seneschall negotiated two loans for the Company, both of which, but particularly the second, featured significantly in the case.

    i) The first, referred to as "**the Alfandari Loan**", was for £150,000, made on 28 June 2018 with Alfandari Private Equities Limited ("**Alfandari**"). Under that agreement, the Company was to make (until the end of 2021) 42 monthly payments to Alfandari of £6,574.80, comprising repayment of the principal debt, and interest. As security, Alfandari was given a debenture over the Company's assets, and a charge on the home of Mr Seneschall's mother.

    ii) The second, referred to as "**the Nucleus Loan**", was for £300,000, made with Nucleus Property Finance Limited ("**Nucleus**") on 7 September 2018, for a fixed 12 month term, at the end of which (on 7 September 2019) the Company was to pay the single sum of £337,715.65. In the event of a failure to make payment on 7 September 2019, it was to be charged default interest in the sum of about £17,000 per month. Repayment of the Nucleus Loan was guaranteed by Mr Seneschall, and

was secured by a fixed and floating charge over the Company's assets, as well as by a second charge on Mr Seneschall's home in London, co-owned with Mrs Seneschall. Because of their contingent liability in respect of the Nucleus Loan, it was extremely important to the Seneschalls to ensure its repayment by the Company, or on its behalf; its repayment was a significant source of concern to them.

22. Mr Seneschall's evidence was that from around October 2018, and although he had expected the initial funding of £500,000 to "*take the business through to around March 2019, with the bulk … being spent on the development of the Factory*", he and Ms Jones realised that they would have to find outside investment, "*to not only run the business, but also to build it to the specification* [they] *wanted*". That investment was provided by Market Fresh.

23. Market Fresh is engaged in the development and sale of food products to supermarkets. Its business was started by Mr Marshall in 2005. Since 2016, it has been a wholly owned subsidiary of NWIG, the shares of which, as said above, are held, as to 90%, by Mr Marshall.

24. In 2016, Mr Marshall expanded his business interests into commercial property ventures, and as a result, having less time to devote to the business of Market Fresh, appointed a "*Managing Director*" to conduct its day to day business. From about the end of July 2018, that role was filled by Mr McCormick.

25. After having both left Brecon, Mr McCormick and Mr Seneschall continued to be in contact, and in the latter part of 2018, Mr McCormick asked Mr Seneschall whether the Company might be interested in developing and producing Market

Fresh's "*Pasta Ping*" microwavable products, and a range of cooking sauces called "*Little Sauce Pot*".

26. On 3 January 2019, Mr McCormick visited the Factory with a colleague, Ms Alexa Christodoulides, and during their meeting, Mr Seneschall asked Mr McCormick whether Mr Marshall ("*who sounded like someone who could be interested in a new venture*") might consider making an investment.

27. After the meeting, on the same day, Mr Seneschall emailed Mr McCormick to thank him for his visit, and to say that whilst "*Clearly there is a lot more work that needs to be done ..... I am sure that together we can develop a range of products that capture the imagination of both the retailers and the consumer, bringing convenience, quality and flavour to supermarket shelves over the course of the next few months*."

28. Mr McCormick seems to have been similarly enthusiastic. In his reply, on 7 January 2019, he said that it was "*great to see the site again and progress that has been made*", and that "*We obviously had a few objectives for the day, but neither of us thought we would be in a position to be seriously talking about being able to produce the plain PastaPiing* [sic] *lines. This was really exciting and could be a real game changer for us*."

29. In the event, Mr Marshall was sufficiently interested to meet Mr Seneschall (and Mr McCormick) on 15 January 2019 at the Rail House Café, in Victoria, London, and subsequently, on 31 January 2019, to visit the Factory itself, where again he met Mr Seneschall, and for the first time, Ms Jones.

30. As at the close of business on 7 February 2019, the Company's bank account was £3,084.47 in credit. In cross-examination, Mr Seneschall was asked about the financial state of the Company at that point: "*Q. Truth is you had raised £500,000 and you had burnt through it all by December 2018? A. That is not true Q. Maybe I am ungenerous. Perhaps if we look at* [the bank statements]. *You are quite right, by February 2019 out of the £500,000 you had raised, you have £3,000 left? … A. We had burnt through the 500,000 that I had initially put in, yes.*" The Company had exhausted its initial funding. In his evidence, Mr Williams said that at about that time, he had given advice about insolvency: "… *that to comply with insolvency law, we had to be confident that we could either trade out of the Company's losses, or find investment* …."

31. Also on 7 February 2019, Mr Seneschall wrote to Mr Marshall, essentially proposing an investment in the business of £800,000 in return for a 17.5% shareholding in two parts but comprising a single transaction, being 10% for £400,000 to be completed by the end of March 2019, and 7.5%, also for £400,000 (because "*we will be in production by then*" - making the business more valuable) to be completed by the end of August 2019.

32. Mr Marshall replied on 17 March 2019, rejecting that proposal, and suggesting instead, "*Subject to successful acquisition of my Irish asset (expected to complete mid-May)*", the acquisition of "*10% for £300k (should be mid end may)*" and "*10% for £400k or 7.5% for £300k by end August*"; he also set out various considerations for a shareholders' agreement, including that all major decisions be unanimously agreed.

33. Mr Seneschall's case was that this proposal (defined in the A/P as "**the March Proposal**") comprised an offer that was accepted on 18 March 2019, by email, by the Company, himself and Ms Jones, and that it therefore became contractually binding. That case was denied by Market Fresh and Mr Marshall. My detailed consideration of the March Proposal is at paragraphs 182-192 below.

34. On 18 April 2019, Mr Seneschall sent Mr Marshall a draft shareholders' agreement prepared by the Company's lawyers, Darwin Gray. He said that there was "*no mad hurry on this*" but proposed that it be tied up "*in good time for everyone's peace of mind*". In addition, Mr Seneschall offered Mr Marshall a further 10% of the Company's equity "*in the next month or so*", a "3rd tranche", to take Market Fresh's shareholding to 30% by the end of August 2019, for an additional £350,000, such that if accepted, the total investment sum would be £1,050,000.

35. On 30 April 2019, no written or formal investment or shareholders' agreement having yet been made, Market Fresh made its first payment to the Company, of £30,000. As at that date, the Company's bank account was overdrawn by £29,689.74; the payment cleared the overdraft. The next payment, of £35,000, made almost two weeks later on 10 May 2019, again merely reduced the overdraft to £194.17. It was common ground that the Company was struggling financially. As Mr Northall explained in Closing, further substantial payments were made by the Company to its builder, TPS 360 (£25,200 on 17 May 2019 and £10,000 on 28 May 2019); for business rates and rent (£4,208 on 15 May 2019 and £10,000 on 21 May 2019); to Ultimate Asset Finance for the

Thimonnier pouch filling machine (£4,085.86 on 22 May 2019); and for May salaries (of around £20,000 on 28 May 2019), such that the payments received from Market Fresh were "*just about keeping the Company bank account at zero*".

36. By the end of May 2019, £290,000 had been paid by Market Fresh, although no shares had been either issued or transferred to it.

37. In the meantime, on 14 May 2019, another meeting took place, between Mr Seneschall, Mr Marshall and Mr McCormick. I deal in detail with the events of that meeting below.

38. Market Fresh had, by about that time, in order to fund its investment, or part of its investment in the Company (whether in the short term or otherwise) applied to Barclays Bank ("**Barclays**") for a loan. For that purpose it made a presentation to Barclays ("**the Barclays Presentation**") on about 12 June 2019, including apparently by reference to a "*Business Plan*" (a copy of which was in evidence, dated "*May 2019*", but in respect of which I was told the metadata revealed the last modification to have been by Mr McCormick on 12 June 2019). It is likely that the intention to borrow from Barclays was discussed on 14 May 2019, as was Mr Seneschall's recent offer of another 10% shareholding in return for £350,000.

39. That Business Plan stated that Market Fresh sought a facility of £850,000 "*to help create a co-owned UK production facility*", and a "*Deal Structure*" described as, "*Market Fresh pay for and provide the equipment to get the factory operational in return for an initial stake of 30%. John and Lynne are*

then contractually reducing to minority shareholders with Market Fresh taking full control within 3-5 years."

40. I shall deal below in greater detail with that document, but Mr Seneschall's case was that it reflected the existence, already by that time, of the Control Conspiracy, and of a "*settled intention to treat the Company as a subsidiary*" of Market Fresh. However, for present purposes, the point is that the variety of borrowing sought by Market Fresh was, ultimately at any rate, under the Government's Enterprise Finance Guarantee scheme ("**the EFG Scheme**"). Apparently in order to meet the requirements of that Scheme, Barclays told Market Fresh (by email sent on 24 July 2019 by Ms Jo Rassell of Barclays ("**Ms Rassell**")) that "*the ownership by the parent company* [this being a reference to Market Fresh] *needs to be more than 50% at the outset - Therefore this structure needs to be achieved to meet the terms of the scheme*". Mr Marshall replied to Ms Rassell later that day, "*It might be possible for me to acquire 50% shareholding so I will revert on that within 24 hours*."

41. Shortly afterwards, at about end of July 2019, Mr Seneschall was told by Mr Marshall that Barclays required Market Fresh to be the Company's majority shareholder. On 2 August 2019, a meeting took place in Soho, London, between Mr Seneschall, Mr Marshall and Mr McCormick. As I explain below, at that meeting, an agreement in principle was reached regarding the acquisition by Market Fresh of a 50.1% shareholding in the Company.

42. It was Mr Seneschall's case that at about the same time, he made another contract with Market Fresh: the "**Redemption Agreement**". Although its terms, and the date and circumstances of its alleged formation were somewhat elusive,

it was pleaded (albeit not until the amendments permitted on 22 August 2022) as being "… *a condition of Market Fresh's investment in Trisant that the Nucleus Loan would be redeemed by 31 March 2020, at the latest, in return for which Market Fresh would acquire 10% of the Petitioner's own shares in Trisant*".

43. The parties to the alleged Redemption Agreement were therefore said to be, at least, Market Fresh and Mr Seneschall. Its existence was pleaded to have been "*evidenced*" by various stated matters. Although allegedly breached by Market Fresh, there was no discrete claim for damages or any other contractual remedy in respect of the Redemption Agreement. Its existence was denied by the Respondents, and I deal with it in detail below at paragraphs 193-278 (the final paragraph of which contains a summary of my conclusions).

44. The pleaded reference to 31 March 2020 followed from what was referred to as the "*roll-over agreement*", being, on Mr Seneschall's case, an agreement subsequently reached, at about the end of August 2019, to extend the date of payment under the binding Redemption Agreement to 31 March 2020 (and so to "*roll-over*" the Nucleus Loan, and forbear reliance on his contractual entitlement under the Redemption Agreement to earlier payment in time to pay Nucleus on 7 September 2019).

45. The alleged Redemption Agreement was of particular importance to Mr Seneschall's case, and indeed, in substance, of particular importance to Mr and Mrs Seneschall personally, since it was said to have comprised a contractual obligation owed directly by Market Fresh - in any event, and regardless of the Company's financial state - to relieve Mr Seneschall of his own personal

financial burden in respect of the Nucleus Loan, including of course by means of the charge given over his family home, to which Nucleus might have had recourse in the event of the Company's failure to pay.

46. Whatever the character of the March Proposal, it was common ground that on 7 August 2019, Mr Seneschall, Ms Jones, Market Fresh and the Company (but not Mr McCormick) executed the "Investment and Shareholders' Agreement" ("**the ISHA**"), a contract in writing. Its terms were negotiated by, or with the involvement of lawyers - Darwin Gray, the Company's solicitors, and Ms McKendry-Gray. Although the parties agreed that the ISHA was a binding contract, they disagreed about its meaning and effect.

47. Amongst other things, the ISHA recited, under the heading "BACKGROUND", that "*(A) Market Fresh has agreed to invest in the Company on the terms set out in this agreement. Market Fresh has already paid over £497,000 to the Company … (B) The parties have agreed to enter into this agreement as a deed for the purpose of regulating the exercise of their rights in relation to the Company and for the purpose of making certain commitments as set out in this agreement*."

48. The sum of £497,000 had been paid in various parts, at various times, on and since 30 April 2019, and there was a dispute about the character of that aggregate payment, which Market Fresh argued was a "loan", and Mr Seneschall said was part of the agreed price paid in return for shares under the (disputed) March Proposal. The particular relevance of that issue was that if the payment was not a loan, and was not pre-contractual (in other words, if it was paid pursuant to a contractual obligation under the March Proposal, as argued

by Mr Northall) then to that extent, Market Fresh cannot succeed on its counterclaim, which depends upon having first made an investment in return for shares by means of the (fraudulently induced) ISHA made on 7 August 2019, but not before.

49. I shall deal in greater detail below (at paragraphs 164-175) with the terms and meaning of the ISHA, but of particular importance to Mr Seneschall's case was Clause 6, which provided, under the heading "PROMOTION OF THE COMPANY'S BUSINESS", that "*6.1 The Company shall apply the proceeds of the Investors' subscription for the Subscription Shares and Market Fresh's subscription for the Option Shares in furtherance of the business of the Company.*" This provision was relied on by Mr Seneschall in support of his case that as a matter of contractual stipulation between the parties, the application and use of the proceeds of the investment made by Market Fresh "*fell within the Company's discretion, acting through its board*", an agreement which he said was subsequently breached by Market Fresh as an incident of its wrongful seizure of control (and in particular, "*financial control*") of the business, including by making payments on condition of their use for specific purposes, and in particular, for payment of specific debts.

50. In advance of the ISHA, on 11 June 2019, the Company was sent (by Ms McKendry-Gray, in correspondence with Ms Siobhan Williams of Darwin Gray, "**Ms Williams**") a "*basic*" due diligence questionnaire. On 25 June 2019, it responded. Its response included the following:

> "*3.3 Please confirm that:*

3.3.1 no receiver or administrative receiver has been appointed in respect of the whole or any part of the assets or undertaking of the Company;

Confirmed

3.3.2 no step has been taken by the Company or by any other person to appoint an administrator in respect of the Company;

Confirmed

3.3.3 no administration order has been made in relation to the Company and no petition has been presented for any such order;

Confirmed

3.3.4 no steps have been taken with a view to winding up the Company and no winding up order has been made in relation to the Company;

Confirmed

3.3.5 the Company has not stopped payment of its debts, become unable to pay its debts as they fall due or has otherwise become insolvent;

Confirmed

3.3.6 no judgment, order or award has been made and is outstanding or unsatisfied against the Company and no distress, execution or other process has been levied on any part of its assets or undertaking; and

Confirmed

3.3.7 the Company is not aware of any circumstances that have arisen which entitle or have entitled any person to appoint any person or commence any proceedings for or obtain any order of a type mentioned in any part of paragraph 3.3.

Confirmed"

51. Market Fresh alleged that the Company's response to Question 3.3.5 was deliberately false (it pleaded that "*In fact* [the Company] *is and was at all material times cashflow and balance sheet insolvent*") and comprised a fraudulent misrepresentation, which induced Market Fresh to enter into the ISHA, and caused the total loss of its eventual investment. Ms Jones' case was that the response was "*driven entirely*" by Mr Seneschall, whom she trusted, and that she took no active part in the process.

52. Under Clause 5 of the ISHA, under the heading "WARRANTIES", amongst other things, it was stated that Mr Seneschall, Ms Jones and the Company, "*warrant to Market Fresh that immediately prior to*" 7 August 2019:

> "*(e) no indebtedness of the Company is due and payable and no Encumbrance over the Company's assets is enforceable for any reason and the Company has not received notice from any of its creditors requiring payment of such indebtedness or indicating that any such Encumbrance will be enforced;*
>
> *(k) all outgoings in respect of the Property and rent, insurance and service charge payments have been made on the relevant due date …*".

53. In addition to the due diligence response referred to above at paragraph 50, the warranties at Clause 5(e) and (k) formed the basis of the Market Fresh counterclaim, it being pleaded that it "*would not have invested in* [the Company] *had the Petitioner … not given the Warranties*", which were also deliberately false. I deal with the counterclaim in detail at paragraphs 486-526 below.

54. Pursuant to the terms of the ISHA:

i) on 7 August 2019, 142 ordinary shares in the Company were allotted to Market Fresh, which was therefore, from that time - but not before - a member of the Company; as a result of that allotment, it held 15.1% of the issued capital;

ii) also on 7 August 2019, Mr Marshall was appointed as a *de jure* director of the Company (Clause 8 of the ISHA having provided for each shareholder to appoint one person as a "*Shareholder Director*", and Market Fresh having nominated Mr Marshall);

iii) Mr Williams resigned as a *de jure* director, but was appointed as "*finance director*"; and,

iv) Mr McCormick became the "*sales director*".

55. Although Mr McCormick was not at that time an appointed office holder, it was accepted on his behalf by Ms Hallett, realistically it seemed to me, that whether as a *de facto* director, or Mr Marshall's alternate, or indeed, from 26 August 2020 (when he was formally appointed) a *de jure* director, he was at all material times until his resignation on 20 January 2021, subject to the usual duties of a director owed to his company; his case was not that he was not subject to such

duties - it was that he was not in breach of them; similarly, on behalf of Ms Jones, there was no dispute that as a *de jure* director, she too was subject to those duties, as of course was Mr Marshall, from the date of his appointment on 7 August 2019.

56. By about the middle of August 2019, it had been agreed that Market Fresh would invest £1.1 million in return for the additional 30.1% shareholding which it said it required, and which had been agreed on about 2 August 2019. Subsequently, on 22 August 2019, Barclays confirmed approval of an EFG Scheme loan to Market Fresh. Mr Seneschall was told, and was delighted and relieved. His reaction (in an email to Mr McCormick) was that it was "*excellent. Big sigh of relief*". In the same email, he set out "*a whole series of payments we need to make over the next few days to get things back on an even keel*", payments which were "*over due or due*" and also "*of course*" the Nucleus Loan "*on or before 7th September!!!!!*".

57. Unfortunately however, albeit unknown at that point to Mr Seneschall, the sum agreed to be lent by Barclays was £450,000, and therefore far less than the sum which had been sought, £850,000. As a result, Market Fresh was unable, or unwilling, to invest a sufficient sum, sufficiently quickly, to meet the imminent Nucleus Loan repayment obligation in September.

58. On 23 August 2019, Mr Marshall and Mr Seneschall spoke, and Mr Seneschall was told that payment to Nucleus in September would not be possible. He was undoubtedly unhappy about that, but in those circumstances, agreed to "roll-over" the Nucleus Loan, or by some means to refinance the Company's borrowing. On 30 August 2019, Mr McCormick emailed Ms McKendry-Gray,

Mr Marshall and others. He described, as having been "*verbally agreed*" a payment of £1.8 million in return for a 50.1% shareholding. Amongst other things, he said, "*Finally, the Nucleus loan will be rolled over as I outlined yesterday, but it was discussed during the meeting that we will look to take John's liability away by the 31st March 2020 once factory is up and running and circumstances permit*." In the event, but not until Friday 10 July 2020, the Nucleus Loan was eventually repaid, and was, together with the Alfandari Loan, replaced by "**the Reward Loan**", provided by Reward Capital ("**Reward**") again secured on Mr and Mrs Seneschall's house. Mr Seneschall was suspended, as I have said, on Monday 13 July 2020, and part of his case was that he was allowed to provide security for the Reward Loan in favour of the Company in ignorance of the fact that the decision to suspend him had already been taken pursuant to the Respondents' plan, by one means or another, to end his participation in the business.

59. On 7 October 2019, a further written agreement was made (between the same parties as made the ISHA) entitled "*Heads of Terms*" ("**the HoTs**"). By that time, Market Fresh had acquired 166 shares (17.2% of those in issue) in return for payment of £581,000, having invested a further £84,000 since 7 August 2019, by means of four separate payments, of £28,000, £17,500, £10,500 and £28,000. Although headed "*Subject to Contract*", the HoTs were treated by the parties as having been contractually binding. As part of the document's heading, it was said to concern a "*Proposed investment of £1,100,000 in the capital of* [the Company] *by Market Fresh* ...".

60. Again, there were issues regarding the meaning and effect of the HoTs, which I shall deal with below in greater detail, at paragraphs 176-181, but two aspects merit immediate reference.

i) First, as a result of its terms, Market Fresh was to become (and on 7 October 2019, in fact became) the holder of a further 989 shares, being 1,155 in total, representing 50.1% of those in issue. It thus became the Company's majority shareholder, able as such to pass ordinary resolutions. Materially, since that date, the parties' shareholdings have not altered: of the remaining 49.9% in issue, Mr Seneschall holds 34.9%, and Ms Jones, 15%. Mr Northall submitted, and I agree, that the HoTs were "*merely transactional*", and did not vary the basis on which the Company's affairs were to be conducted, as (or at least, insofar as) set out in the ISHA.

ii) However, second, by virtue of the HoTs, Market Fresh was under no immediate contractual obligation to pay <u>any</u> further sum/s, but only (if at all) to pay the outstanding balance of £1.8 million (£1,219,000) by 31 March 2020, in tranches and on "*interim call-dates*" to be negotiated and agreed, and to the extent of its <u>failure</u> by that date to have paid for them, to <u>return</u> the shares - there was, in other words, a contractually stipulated consequence of its failure to pay.

61. Against that background, as I have said, Mr Seneschall's case was that from June 2019, the Respondents, including Ms Jones from no later than 19 November 2019, sought by determined stages, according to their settled intention to treat the Company as a *de facto* subsidiary of Market Fresh, to

obtain overall control of its business, in particular, financial control, and that by about the end of 2019, they had substantially succeeded in doing so.

62. Allegedly, their chosen means - said to have been both unfair and unlawful - included making unjustified requests for financial information; demanding without right, access to the Company's bank account; imposing a dual signatory requirement in respect of any significant payments from that account - one signatory being a member of NWIG's accounting department; and of central importance to Mr Seneschall's case, what was described as "*drip-feeding*" the Market Fresh investment.

63. By "*drip-feeding*" it was meant that the payment of sums was less than the amount of the whole sum said to have been promised, in amounts specifically calculated by Market Fresh without the negotiated or freely given "agreement" of the Company, but instead, by reference to the particular immediate financial requirements of the Company, in order to pay its imminently due debts, but no more.

64. That approach, said Mr Seneschall, caused delay in the completion of the Factory's refurbishment, and in necessary consequence, caused wasted expenditure and loss of business.

65. Central to Mr Seneschall's case was that had the promised investment been made by Market Fresh in accordance with its obligations - by which essentially he meant in very much larger sums, and much sooner - and had the Company been permitted to run the business itself, using that whole investment, rather than having its affairs wrongfully controlled in this manner by an outsider, it

would have been a success (and his shares would have been valuable, or even more valuable).

66. The alleged wrongfulness was therefore said to have a dual aspect – a failure in respect of the amount of the individual sums paid (not enough, not quickly enough) and in respect of their use (which was specified).

67. In Closing, Mr Northall relied on the evidence of Mr Williams, to emphasise the significance of the point:

> "*the Company became insolvent because the investment was made too late and in too piecemeal a fashion. The extensive delays to the factory becoming operational and to the Tetra Recart line being installed meant that the majority of Market Fresh's investment was swallowed up by overheads and general running costs, e.g. rent, utilities and salaries and not by building the elements of the business which would produce revenue (organising product trials, marketing to new customers, commissioning the second Tetra Pak line)*"; and
>
> "*Had either the original £700,000 been paid in a timely manner, or the subsequent £1.1 million, the Company would undoubtedly have been able to get the factory up and running at full capacity and to thereby be in a position to earn revenue*."

68. It was not denied that Market Fresh invested sums in specific amounts, calculated by reference to specific financial needs. Furthermore, on the occasion of each payment after 7 October 2019, Market Fresh sent the Company an "Exercise Notice", by which it "purchased" the number of shares corresponding

to the amount of the payment made. Nor was there any real doubt that this approach was intensely disliked by Mr Seneschall, and that he complained about it. For example, he wrote to Mr Williams, on 4 November 2019, "*I am very upset by their behaviour, as you said yesterday, they are giving us money in return for shares. It is shares Lynne and myself own so effectively they are telling us when and how we can spend our money on, a bit like getting paid by employer who then tells you, you have to spend your money as they see fit not as you do.*"

69. Neither do I doubt that Mr Seneschall otherwise resented the extent of Market Fresh's involvement: in his view, it comprised unwarranted interference in the Company's affairs; in that of the Respondents, it was nothing more than good commercial sense, given also Mr Seneschall's mismanagement of financial matters. As examples:

i) On 25 October 2019, Mr Farrell emailed Mr Seneschall and Ms Jones, and said, "*Please can you arrange for me to have a login and access to the Trisant Foods online banking. We also need to set up a dual sign off for payments (I'm not sure what your current process is), a person from Trisant and a person from Market Fresh*."

ii) Later on the same day, Mr Seneschall replied, "*No!!*", although Ms Jones' response was more conciliatory - "*We are in the situation where John, Me and Market Fresh are all in this business together. We have an absolute mountain to climb in order for this business to be the success that we all know it can be. Surely we all have to start singing from the same hymn sheet. John, if Market Fresh need access, authorise the bank*

to give them the access. If they need the payroll details, send them. We have absolutely nothing to hide. As far as I am concerned this is taking up too much of my time, whilst trying to finish building the factory."

iii) On the same day, Mr Seneschall left a recorded message on Mr McCormick's telephone. He said, "*Hiya. I think we need to have a chat. I think this has gone far enough. We've had conversations about "We don't want to run the business." Will asking for the bank account and access to it. No, absolutely f****** not. At the moment, we're … this is crazy … Dave … I don't give a f*** about how he runs other businesses. This is our business. It's a partnership. You are not taking responsibility for running everything. This is crazy David. You know … I might as well f****** pack up and go home. if that's what Dave wants, fine, he can pay me £6m my shares and I'll walk away. I'm very happy to do that, as I know is Lynne. this is madness. You've said right from the start "no we don't want this then we don't want that" and now we want details of your payroll, we want access to your bank account … Ok, well Dave can f****** pay the money in today. can pay my loan off on my house which I'm having to flip because some f****r's taken me to court and I will walk away. I'm serious, this is just crazy time. please give me a ring. I'm f****d off beyond belief*."

iv) Both bank access and the appointment of a second signatory were subsequently agreed (at a Board Meeting on 5 November 2019, attended by Mr Seneschall, Ms Jones and Mr McCormick) and organised, but

plainly, Mr Seneschall was, initially at any rate, opposed to these steps and resentful of them.

70. Moreover, the Company's financial condition was still frequently, if not invariably stressed. For example, on 1 October 2019, it was overdrawn in the sum of £8,902.78 and by 22 October 2019, overdrawn in the sum £67,948.28. During that period, several direct debits were refused.

71. It was plain that as a result of all these circumstances (in the case of Mr and Mrs Seneschall, exacerbated by the particular fact of their significant personal financial exposure in respect of the Nucleus Loan, due in the first instance to be repaid on 7 September 2019) that as 2019 drew to an end, personal relationships were severely strained; the working atmosphere at the Company deteriorated, and became troubled and problematic, possibly, over time, to the point of irreversible breakdown. Again, as illustrations:

i) On 4 November 2019, after a meeting between Mr Seneschall, Mr McCormick and Ms Jones, there was evidence about Mr Seneschall having either (on his case) merely "*left*" the office or (on that of the Respondents) having "*stormed out*" and either (on his case) muttering the word "c****" under his breath, having made sure first to close the door, or on their case, calling them "c****" before doing so. Ultimately, the precise point at which the word was spoken in relation to Mr Seneschall's passage through the doorway, quite how loudly, and in which direction, seemed to me (in the context of the broader case) a matter of some insignificance, albeit one on which some energy was

expended. Of more importance was that it evidenced the breakdown of personal and professional relations.

ii) On 14 November 2019, following an incident with Ms Emma Tucker, one of the Company's employees ("**Ms Tucker**") Mr Williams resigned as finance director and company secretary, "*with immediate effect*", saying in an email to Ms Williams of Darwin Gray (sent to Mr Seneschall, to give him "*some ammo if things need "reviewing" in due course*") that "*Decisions resulting in preferring certain creditors over others are being taken by individuals employed by the investor's holding company and most recently those same individuals have demanded signatory authority on the Company's bank account using the threat of suspension of any further investment, which has been piecemeal at best and usually relating only to those preferred creditors anyway*." As to the incident itself, again there was some dispute about how serious it was, and to what extent Mr Williams had spoken aggressively to Ms Tucker. Ms Jones wrote on 14 November to Mr McCormick and Mr Seneschall, that Ms Tucker had been "*very upset*", and that she herself was "*absolutely furious*" (Ms Tucker having been a member of her team – "*… as such, if anyone has a problem with it, I suggest they take it up with me!*"). She said , "*My recommendation is that, as we now have Will and the Market Fresh accounting team on board, Sally internally, and as Andrew is on an invoice basis and not employed by the company, we no longer retain his services*." In the event, because Mr Williams resigned, that step was not necessary.

iii) Mr Williams' evidence was that he had a Company email account and that after his resignation he deleted the emails on that account because he was asked to do so by Mr Seneschall (although at least some survived); Mr Seneschall denied any memory of having made the request. It is plain that Mr Seneschall and Mr Williams wrote and spoke candidly about the business, and that broadly, they held a similar view about the role of Market Fresh. It is not unlikely that the deleted emails included communications that Mr Seneschall preferred not to allow Mr McCormick and Market Fresh to read.

iv) One example of this: on 13 November 2019, Mr Seneschall wrote to Mr Williams, "*As for* [Market Fresh]*, I'll be stitching them up over the next few weeks too!!*" Curiously, although much was made of this email, as I shall describe, there was no evidence from Mr Seneschall explaining what was meant by the words which he used, or whether he ever attempted to act as he then planned. It is reasonable to infer that whether merely commercially or otherwise, Mr Seneschall was considering some act or acts that were to his advantage but not that of Market Fresh; in any event, the email does not reflect the existence of a harmonious partnership of contented shareholders. Ms Hallett suggested that the meaning of this email was that Mr Seneschall was intending to force Market Fresh, in effect, to discharge the Nucleus Loan by allowing default interest to accrue and thus jeopardise the viability of the business in which it had invested significantly, forcing it to invest even more to protect the value of its already sizeable investment. I deal with that issue below.

v) On about 6 December 2019, Mrs Seneschall resigned her position, prompted by immediate reasons of ill health, and having not worked since 11 November 2019, the suggestion being that her condition was caused by or connected with what she described as the "*really toxic*" atmosphere at the Company, attributed by Mrs Seneschall to the behaviour of Ms Jones in particular (one theme of Mr Seneschall's case being that Ms Jones was a "*bully*").

72. In that context, as I have said, and from about that time, at about the end of 2019, Mr Seneschall's allegation was that Ms Jones became a participant in the Conspiracy against him, and that it evolved to comprise his complete exclusion from the Company's affairs, rather than merely the seizure of control.

73. Three communications were important as heralds of this final chapter.

74. First, on 8 November 2019, Mr McCormick sent a WhatsApp message to Mr Marshall, "*Hi is that Mr Dave Marshall? This is David McCormick I manage one of your businesses....Really important time for a proposed transition on the Trisant business and want you up to speed.*"

75. Second, on the following day, 9 November, he wrote again, asking for a short conversation, because "*I want you up to speed on Trisant and a course of action I/we are planning for the business*."

76. Third, also on 9 November 2019, and of particular significance, Mr McCormick wrote to Mr Marshall and the NWIG accounts team, and said that he had:

> "… *spoken to Dave* [Mr Marshall] *today to bring him up to speed and discussed the details below. As John* [Mr Seneschall] *continues to show*

very little grasp of reality and remains a hindrance, I would like to push ahead with a final few steps to gain full control of Trisant. Those steps are

1. Bring an end to the services of Andrew Williams I Company Secretary and Accounting Consultant

2. Terminate the role of Sally Seneschall.

3. Reduce/end Johns involvement within the business were possible, especially around finance.

4. Give notice on the 'company' flat.

There are tensions on site at the moment because of John and Sally, which is distracting Lynne from the primary and critical objective of getting the site through its audits. She is 100% in support of the plan, but we need to keep her focused and minimise the stress being created by John. She is also concerned about John's lack of understanding."

77. This was referred to by Mr Northall as the Respondents' "**4-step plan**" - in effect, a clear written statement of their incipient conspiracy. The Respondents, on the other hand, amongst other things, relied on the terms of the email as evidence of their genuine and justifiable assessment of Mr Seneschall's abilities and impact, and of the disturbed state of personal relations at that time.

78. In the event, as already explained, on 14 November 2019, a few days later, not in consequence of any act of the Respondents, Mr Williams resigned as finance director and company secretary, "*with immediate effect*". Moreover, as again I have mentioned, on 6 December 2019, Mrs Seneschall also resigned her

position, having not worked since 11 November 2019, prompted by reasons of ill health.

79. Mr Seneschall's case was that between January and July 2020 (when he was suspended) and subsequently, the Respondents discussed, progressed and ultimately achieved the third step of their plan, and that as a result, he was wrongfully and entirely excluded from any meaningful participation in the conduct of the business.

80. In respect of that case, I set out and discuss the detailed evidence below at paragraphs 353 onwards, and summarise my principal findings at paragraphs 454. The outline is as follows.

81. On 11 February 2020, Mr McCormick texted Mr Marshall and said, "*Flat sorted and line drawn under*." This was a reference to the fact that Mr Seneschall had been told, by Mr Farrell, on 7 February 2020, that the Company was not in a position to pay rent on the Flat in respect of November and December 2019, as a result of which, the lease was terminated, and the Flat no longer available to Mr Seneschall as a place to stay, not far from the Factory, an eventuality prefaced in Mr McCormick's 9 November 2019 email.

82. It was of course at about this time that the Covid Pandemic began, and circumstances changed. In that context, on 3 April 2020, Mr Seneschall was furloughed. His case was that although Ms Jones was also ("*ostensibly*") furloughed, correspondence and discussions between Ms Jones and Mr McCormick concerning matters of significance to the Company's Board were continued between them *via* personal email accounts and WhatsApp, from which he was deliberately excluded.

83. On about 29 May 2020, Mr Seneschall's furlough was extended. Once more however, on 1 June 2020, circumstances changed, because Ms Tucker brought an employment claim against the Company and Ms Jones. Her allegation, although ultimately withdrawn, was of "*bullying*" because of her vegan beliefs. Subsequently, it was alleged that Mr Seneschall had been instrumental in causing Ms Tucker to bring her claim, and colluding with her in its progress. Be that as it may, on 11 June 2020, Mr Seneschall spoke to Ms Rue Harries ("**Ms Harries**") and discussed Ms Tucker's allegations. Ms Harries was a Human Resources Consultant, who provided HR services to Market Fresh and NWIG.

84. Ms Harries' notes of that conversation recorded: "[Mr Seneschall] *stated that there is a long-standing issue with* [Ms Jones'] *conduct*" and that he had provided a history, and the names of individuals who he said would corroborate that allegation. They further recorded, "*John — wants Lynne removed.*" He subsequently sent a list of potential witnesses, saying "*There are many more I could add to the list including from potential customers, but would rather hold off on this group for now if possible. I think the above gives you a broad sweep of individuals*." Whether or not he was colluding with Ms Tucker, he was without any doubt very keen to have these complaints raised against Ms Jones. Ms Harries' notes recorded that she asked Mr Seneschall whether his relationship with Ms Jones was "*retrievable*", and he replied that he, "… *does not see it no because she is a saboteur.*"

85. Ms Jones' case was that having been told that Mr Seneschall was gathering evidence against her, she responded by doing likewise against him; in other

words, that she had only "*moved against*" Mr Seneschall in reaction to his steps to remove her.

86. On 23 June 2020, Mr McCormick asked Ms Harries whether they might "*in any way … push back*?" Later that day he wrote again, explaining "*When I say push back I mean turn the tables on* [Mr Seneschall] *in effect making similar accusations about his behaviour*." Also on the same day, he wrote to Ms Jones, and asked whether she would "*put together a list of John's misdemeanours?*" to which she replied, "*Your* [sic] *probably going to regret asking me I am off on one*".

87. Manifestly, relations between Mr Seneschall and Ms Jones were, by this time, extremely poor, or worse; each wanted, or seems to have wanted the dismissal of the other; both were actively marshalling allegations and evidence; in the circumstances, it might reasonably be thought that some change of management was almost inevitable.

88. On 27 June 2020, Ms Jones' husband was admitted to hospital, with serious breathing difficulties; the details are unimportant to this litigation, but he was, it transpired, very seriously unwell. On 28 June, he was operated on.

89. On 29 June 2020, amongst other things, Ms Harries wrote to Mr McCormick regarding the allegations against Mr Seneschall, "*next steps are to determine if* [Mr Seneschall] *is being suspended today or tomorrow*", to which Mr McCormick replied that he and Mr Marshall would agree upon timing.

90. On 1 July 2020, Ms Jones was suspended, on the basis of the allegations discussed with Mr Seneschall on 11 June 2020. The Respondents' case was that

despite her husband's serious condition, she was suspended because Mr Seneschall had insisted on that step. Mr Seneschall's case was that this was merely part of a "*byzantine arrangement*" designed to persuade or assure him that his position within the business was secure, and that his and Ms Tucker's allegations against Ms Jones were being treated seriously, whereas the true position was quite the opposite.

91. On Monday 6 July 2020, Ms Jones spoke to Ms Harries to discuss the allegations made against her, and on the same day, Ms Harries wrote to Mr Marshall and Mr McCormick saying that she "*had a very good and in depth conversation with* [Ms Jones] *to unpick the allegations made against her and can confirm that* [her] *suspension has been lifted with immediate effect*." There was a dispute between the parties about whether, from that time, her "*suspension*" was artificially prolonged in order to give a false impression to Mr Seneschall that the investigation into her conduct was continuing, or whether she stayed away from work (on "*compassionate leave*", in effect) because of her husband's illness.

92. On Friday 10 July 2020, the Reward Loan (of £667,000) was drawn down (at 4.05pm). On the same day, at 5.28pm, Mr McCormick wrote to Mr Marshall that, "*I will be delivering Lynnes reinstatement & Johns suspension on Monday first thing* …" Ms Jones' evidence was that she did not consent to the Reward Loan, which was executed without her agreement or involvement.

93. On Monday 13 July, at 10.05am, Mr McCormick telephoned Mr Seneschall to suspend him; the suspension letter was sent shortly afterwards. On the same day, Ms Jones' suspension was lifted.

94. Following his suspension, and an investigation conducted by Ms Harries, including at a meeting with Mr Seneschall on 22 July 2020, a hearing took place on 28 August 2020 (attended by Mr Seneschall, Ms Harries and chaired by Ms Karen Fleming, the Sales Director at NWIG, "**Ms Fleming**") continued on 3 September 2020 (with the same participants) and on 7 September 2020, Mr Seneschall was summarily dismissed for gross misconduct. Mr Seneschall appealed against his dismissal, and on 1 October 2020 his appeal was rejected, following a hearing conducted by Mr Marshall on 29 September 2020 (albeit the grounds on which the decision was upheld were more limited, and more specifically focussed on his conduct in respect of Ms Tucker, Ms Jones and the alleged due diligence misrepresentations).

95. In respect of these events, Mr Seneschall's case was that:

i) his suspension (and later dismissal) was unjustified, based on confected and/or stale allegations, and effected not in good faith, but as the final element of the plan set out in Mr McCormick's 9 November 2019 email, to bring about his exclusion from the business.

ii) the fact of his imminent suspension was in effect concealed from him in order that without knowing of that fact, he would, as he did, agree to guarantee and secure repayment of the Reward Loan (supporting lending to a business in which his participation was to be significantly, and wrongfully curtailed).

iii) the fact of Ms Jones' reinstatement, and of the termination of her suspension (and thus the fact of his own complaints against Ms Jones having been dismissed, and of his efforts to bring about her removal

having failed) was similarly concealed from him, for the same reason, that he would, without knowing of those facts, agree to guarantee and secure repayment of the Reward Loan.

96. Against that, broadly reflecting what they said about his conduct and impact on the business, the Respondents' case was that Mr Seneschall was lawfully suspended and dismissed, for good reason. Having said that, the Respondents' cases were not in every respect the same. In particular, Ms Jones' case was that she was neutral as between Market Fresh/Mr Marshall and Mr Seneschall, at least until the point of her discovery that he was himself making serious allegations against her and (she maintained wrongfully) determinedly pursuing her removal from the business.

97. As to Mr McCormick, his evidence was that by about August 2020, he was, "*for want of a better word "broken"*", and that "*this period of time was undoubtedly the worst experience of* [his] *life*", which he described as "*managing the fallout from the financial deception and constant lies of Mr Seneschall, the animosity and vindictiveness Mr Seneschall developed towards Ms Jones*", combined with "*the fear for my job because I had introduced Mr Marshall (who would lose £1.8m) to Mr Seneschall. I was the middleman on everything* …". In addition he said that Mr Marshall was "*a nightmare to work for, in getting any answers*" (and indeed, the documents frequently reflected that Mr McCormick and others had difficulty getting responses from Mr Marshall). Mr McCormick said that directly as a result of Mr Seneschall's behaviour, he was, he believed, taken "*to the edge of a nervous breakdown*". His case was that he acted in accordance with his duties (doing his utmost to obtain funds from Market Fresh for use in

the business), and that his central aim was to bring financial stability to the Company. In his evidence, he made no secret of having "*not wan*[ted]" Mr Seneschall "*anywhere near the finances*" (or indeed, of having found Mr Seneschall very difficult to work with) or having believed that Mr Seneschall would have been better deployed in a marketing role, but he denied having conspired either to seize control of the business from Mr Seneschall, or exclude him from it. In any event, his case was that he was not the decision maker in respect of either Mr Seneschall's suspension, or his subsequent dismissal – both being "*above his pay grade*".

98. The final part of the case concerned events following Mr Seneschall's suspension. It is important to bear in mind that notwithstanding the fact of his suspension, Mr Seneschall was still a shareholder, a *de jure* director and Board member, and also contractually entitled to certain rights of participation under the ISHA, which provided, by Clause 9: (i) that "*All decisions to be taken by the board of directors may not be passed unless there is a unanimous vote by the Shareholder Directors*", and (ii) for the reservation of particular categories of decision to the Board, including decisions about the Company's financing, and thus including decisions in respect of additional loans and borrowings.

99. That right and correlative restriction transpired to be important. Mr Seneschall alleged that despite being willing to attend and participate at Board Meetings (and making that willingness explicit in correspondence with the Company) the Respondents, as part of their continuing strategy, deliberately prevented him from doing so in any meaningful way, by failing to give him adequate notice of

meetings, and failing to give him sufficient information to make proper decisions.

100. The Respondents denied that allegation – their argument was that Mr Seneschall continued to enjoy active involvement in the Company's affairs (or at least, that they did not restrict the exercise of those rights) and furthermore, that it was his refusal to co-operate in the business that eventually caused the Company to go into liquidation – that he himself brought about its collapse. They said that Board Meetings were called but that Mr Seneschall refused to attend all but one at which he then abstained from voting.

101. In short, the Company continued to need financial support from Market Fresh, (or from elsewhere, but there were no other obviously available alternatives). The problem however was that by that stage, Market Fresh had exhausted its rights (and any obligations) under the ISHA; any further money paid to the Company would not therefore, in the absence of a further agreement, be in return for equity. However, any new agreement concerning the Company's financing - whether in return for shares or otherwise - was not only a matter for the Board, but for a unanimous decision of the Board – in other words, it required the involvement, and agreement, of the recently suspended Mr Seneschall.

102. In the circumstances, without the approval of the Company's Board, and not pursuant to any form of agreement, Market Fresh seems simply to have paid to the Company certain sums urgently required, but without any formal agreement of terms.

103. Essentially, Mr Seneschall (by then acting through solicitors) refused to agree that sums paid without his knowledge or approval ought to be formally recognised as loans, certainly not without the provision of financial information which he sought, although his solicitors did say that he might agree to a "*further small loan*" on condition that information be provided, and that it be "*only as much as is needed to get to the week following the proposed mediation date*."

104. That mediation was, it is apparent from the correspondence, arranged for 5 March 2021, and I should say that the Court was told and concludes nothing of the events at the mediation itself or about its outcome (beyond the obvious inference that if it happened, it was not successful). It would appear however that before 5 March 2021, on both sides of the dispute, steps were being taken to establish a more powerful bargaining position.

105. In any event, after 5 March 2021, the parties were effectively deadlocked; no further sums were paid by Market Fresh, and Mr Seneschall did not attend any Board Meetings. On 17 March 2021, Mr Seneschall began these proceedings.

106. On 24 June 2021, a winding up petition was presented by Johnsons Textiles, and on 9 November 2021, a winding up order was made. I was told by Professor Watson-Gandy that Market Fresh's losses exceed £2 million.

[C] <u>The Witnesses & the Assessment of their Oral Evidence</u>

107. There is now an extensive body of authority concerning the proper judicial approach to the determination of facts and the assessment of evidence, including in particular, the oral evidence of witnesses. Without repeating them in this judgment, comprehensive and helpful summaries of the principles were set out

by Stewart J. in Kimathi v The FCO [2018] EWHC 2066 (QB) at [96], and by Warby J. (as he then was) in R (Dutta) v General Medical Council [2020] EWHC 1974 (Admin) at [39] to [41].

108. In addition, I have borne in mind the much repeated observations of Leggatt J (as he then was) in Gestmin SGPS S.A. v Credit Suisse Limited [2013] EWHC 3560 (Comm) at [15] – [22] with regard to the unreliability of memory, and his caution to place limited, if any, weight on witnesses' recollections of what was said in meetings and conversations, but rather, where possible and appropriate, to base factual findings on inferences drawn from the documentary evidence and known or probable facts.

109. In addition to documentary evidence, it is necessary to test witness evidence against the inherent probabilities of the relevant situation, and considerations such as the consistency (or otherwise) of a particular witness's evidence with other evidence, the internal consistency of that evidence, and the consistency of that evidence with what the witness might have said on other occasions.

110. A common concern is that a witness seeking to recall events after a significant period of time is liable, in reconstructing those events in his or her own mind, to do so in a way that inaccurately recalls them in his or her own favour, and to exaggerate perceived advantages to his or her case, but without necessarily giving deliberately false evidence. That may be a particular concern where a witness feels strongly about an issue, or harbours a particular grievance, as did most in the present case. Those strong personal feelings can feed fuel to the undoubted truth, pithily summarised by Knowles J in A & D v B, C & E [2022] EWHC 3089 (Fam) at [49], that, "*Memory becomes fainter with every day that*

passes and the imagination becomes correspondingly more active. Thus, contemporary documents are always of the utmost importance".

111. Having said that (as was stressed by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645, at [88]) it is important to make findings by reference to all the evidence, both documentary and oral, placing such weight as the circumstances require on each.

112. In the present case, as I have said, there was a very great deal of contemporaneous documentation. Mr Northall submitted that those documents "*provided a consistent, credible and compelling narrative*" in support of Mr Seneschall's case, and that the "*oral testimony of the Respondents' witnesses would add nothing … but rather, would be an attempt by the Respondents to explain away the overwhelming contemporary evidence …*". Whether or not I accept that conclusion, I do agree that those documents were likely to provide - particularly where expressed in plain and unambiguous terms, as often they were - a more accurate and reliable record of events than the otherwise uncorroborated recollections of the witnesses some years after the event.

113. Turning then to the witnesses themselves.

114. Mr Seneschall: Mr Seneschall was a great enthusiast of the Company's business; I have no real doubt that he genuinely believed (as he still may) that properly capitalised, it would have prospered. As such, he was willing to guarantee and charge his own family home in support of its liabilities, and to allow members of his family, including his elderly mother, to support the Company, by means of unsecured lending and the provision of further security. He (and his family) were thus invested in the Company's future prosperity, both

emotionally and financially. That investment however, came at a considerable personal cost, because it meant that he was inevitably under great pressure to engineer the Company's survival and success.

115. In those circumstances of enthusiasm combined with pressing need, the evidence showed that Mr Seneschall was apt to elevate his hopes and expectations into certain agreement where none existed, and to exaggerate to others or even mislead them, in order to keep the business alive, and bring it to prosperity. Examples of these tendencies are as follows (others are found in my consideration of the evidence elsewhere in this judgment).

i) First, on 9 May 2019, in advance of the meeting on 14 May 2019, in Soho, London, between himself, Mr Marshall and Mr McCormick, Mr Seneschall sent an email to Mr Marshall attaching a business forecast and various associated supporting documents.

ii) He attached several customer timing plans and income expectations as a "*rough guide to income over the next six months based on the customers we've talked to so far and what their quantity requirements are*." He said, "*I have been very conservative in my income forecasts and I have excluded, for now, Market Fresh. I've also tried to give you a little more background to each customer, so you have a feel for the breadth and capabilities of the factory offer. On the Excel sheet the colours reflect where we are in the project, with the ones in red committed to production, the ones in the bluey grey very likely to come and the ones in green ones where we've had discussions and expect them to come but*

as yet nothing has been agreed. Again, I'm trying to be realistic and manage expectations."

iii) The Excel sheet showed, highlighted in red, 4 customers, Oggs (£5,000 *per* month from July, increasing over time, although the supporting document suggested merely "*ASAP*"), Baby Likes (to produce £7,000 *per* month from September), Rod & Ben (£14,000 *per* month from August) and Hodmedods (£12,000 *per* month from September). Highlighted in "*bluey grey*" were Kohinoor, Pascoes, Barts and Maru.

iv) In fact, as Mr Seneschall knew, and as recorded in the Company's "*Monthly management meeting notes*" from 16 April 2019, Baby Likes, Happy Pear and Little Freddies were described as "*Not at this time*", and there were no customers "*committed to production*", although I accept that to some extent discussions with customers were continuing, that Rod & Ben and Hodmedods had conducted product trials in January 2019, and that both Baby Likes and Alternative Foods/Oggs had conducted kitchen trials.

v) Nonetheless, in my judgment, this email and its contents were untrue and misleading. I do not accept Mr Seneschall's evidence that "*It was always a forecast, and forecasts have to be based on assumptions, and we hoped that the factory would be built before it was*." The email was clear: the forecast was "*conservative*" and certain customers were "*committed*". It cannot sensibly be read differently. Its purpose was reasonably plain: the Company was at an extremely delicate point, and urgently required significant investment; Mr Seneschall was himself personally under

considerable financial pressure; the purpose of this email was to persuade Market Fresh to make that investment.

vi) Second, I have referred above to the allegation of wrongful "*drip-feeding*". As to that, Mr Seneschall was cross-examined about an email sent by him on 20 April 2019, in which he said, "*As discussed, we don't need all the investment money in one lump, we are more than happy to structure a series of payments over a nine/ten week period, an outline of which is detailed below. It's not fixed in stone, but it hopefully gives you a feel for what we need, when.*" It was put to him that he had acquiesced in payment over time, in smaller parts. In response, he said, amongst other things, "*.. I did not say I wanted it all -- clearly I did not say I wanted it all in lump sum. There was an expectation, however, that we would get significant lumps through as Andrew Williams said this morning. A significant lump I do not consider to be £1500, which is where we arrived at.*" He also said, "*… I did not mind it coming in in tranches. As I said, it depends on the size of those tranches. 200,000 over the course effectively of one month here, given these are dated in late April means that if 200,000 is coming in, it means £50,000 a week really, does it not?*" But as I shall explain further below, the point is this: although it might have been reasonable and sensible to expect (and to pay) more, and sooner, that is simply not what had been agreed. On this and other occasions, Mr Seneschall's "*expectations*", perfectly reasonable though they might have been, exceeded the fact of what had been negotiated, and what had been negotiated failed to meet the demands of the business. As a result, there was a dangerous gap between

expectation and reality (which ultimately explains much of what went wrong in respect of the business).

vii) Third, on 8 October 2019, the day after the HoTs were made, Mr Seneschall wrote to Mr Rhys Morgan (at Richard Morgan & Co Ltd) in respect of rent overdue in respect of the Factory. He said, "*I apologise for not getting back to you yesterday but I was waiting on a few things to fall into place before I dropped you a line as I didn't want to give you any false information. So, yesterday the next round of financing was officially finalised and we are now expecting a 7 figure sum to be in our account very shortly, with payments to yourselves being made immediately. If you look on Companies House website you can see the details, dated yesterday and giving some indication of the money.*" That statement was not true – £1 million or more was not due to be paid into the Company's account "*very shortly*", as Mr Seneschall must or should have known; that was not the effect of the HoTs.

viii) Ms Hallett cross-examined Mr Seneschall on this email, and put it to him that it contained a lie. In response, he said, "*Cumulatively, the heads of terms agreed to 1.1 million for a further 30.1% of the shareholding. So what I am saying here is here, we are expecting cumulatively 1.1 million to be in our account, not necessarily in one lump sum."* And as to the expression, "*very shortly*", he said, "*It depends on your timescales. As our landlord who we had committed a ten-year lease to, actually six months is definitely a short period.*" I do not accept that explanation of the meaning of the words as they would probably have been understood

by Mr Morgan. Mr Seneschall may have been driven by circumstance, or he may even have believed that Market Fresh would pay more quickly than was strictly its obligation, but the statement was not true.

116. In addition, there were other issues on which I found it difficult to accept Mr Seneschall's evidence. He was a well prepared and fluent witness, with an apparently detailed and subtle memory of many events (for example, whether, very precisely, he closed the door before or after saying (or muttering) the word "c****" on 4 November 2019, as explained above at paragraph 71). Nonetheless, when examined about having asked Mr Williams to delete his emails after his resignation in November 2019 (a request recalled by Mr Williams himself), and specifically, his reason for making that request, he said, "*I actually do not remember asking him to, so again I cannot give you an answer to that*." It is difficult to accept that Mr Seneschall has forgotten entirely about a request of some importance, which had important consequences. I think it more likely that he made the request because he preferred those emails not to be seen by the Respondents.

117. Overall therefore, whilst I consider Mr Seneschall in many respects to have been doing his best to assist the Court, I do not entirely accept his account of certain events; as with each of the other protagonists, he had more or less reason to be entirely candid about particular aspects of the history. Again, I took as my principal guide the documentary record, the known and probable facts, and the inherent probabilities.

118. Mr Marshall: Mr Marshall's evidence was at times contradicted directly by the unambiguous effect of the documents, and at other times, was casual or even

internally contradictory. Ultimately, in my view, it was, in critical respects, influenced by a desire to protect his own commercial interests, and those of Market Fresh. I therefore treated the whole of his evidence with some caution. To give examples:

i) he said in cross-examination, that he did not pay "*much attention"* to the customer forecasts attached to Mr Seneschall's email sent on 9 May 2019 (or had not read them at all). By stark contrast, in his witness statement (made on 19 October 2022, less than one month before the trial) he analysed and referred to the email and attachment in some detail, and said that he had been "*intentionally misled*" by their content, which he had read and accepted at "*face value*".

ii) in his witness statement, he said that on about 11 June 2019, he had instructed that due diligence in respect of the Company be conducted by means of a formal questionnaire, to which "*Mr Seneschall responded confirming, among other things that* [the Company] *had not stopped paying its debts or become unable to pay debts as they fell due. From this, I understood that the advances from Market Fresh had allowed* [the Company] *to remain fully up to date with its liabilities so that we would not discover any unforeseen problems …*".

iii) However, in cross-examination, when asked about the due diligence response, he said that he could not recall having read it before the ISHA was executed. Similarly, he referred in his written evidence to the warranties included in the "*draft ISHA shown to me by Ms McKendry-Gray*", whereas in cross-examination he said that he had "*no specific*

recall" of having been taken through the document by Ms McKendry-Gray. Nonetheless, in his witness statement he said, "*On the basis of the answers to the due diligence and the warranties given I felt happy to complete the ISHA* …", and as stated, Market Fresh has advanced a case on that basis, in fraudulent misrepresentation, against Mr Seneschall.

iv) in respect of the decision to suspend Mr Seneschall, which was communicated to Mr Seneschall on 13 July 2020, Mr Marshall said in cross-examination that there would have been "*no basis of suspending Mr Seneschall until* [Ms Jones] *says push the button*" (by which he meant that there was no basis upon which to suspend him until a "*formal grievance*" had been raised, which did not happen until 13 July, when Ms Jones returned to work). However, he also accepted that the decision to suspend Mr Seneschall had already been taken before 10 July 2019, and indeed, that the earlier decision to suspend Ms Jones had been taken notwithstanding that no such formal grievance had been raised against her by Mr Seneschall. As mentioned above, the timing of communication of Mr Seneschall's suspension was important: Mr Marshall's evidence on this issue was, at best, confused, and in any event, unreliable.

119. It was plain that Mr Marshall was, generally, very busy dealing with a wide range of other interests, and (this was a common theme of the evidence) that it was often difficult to contact him, or to get from him a response or some direction or instruction, or a reaction to events. He himself, in cross-examination, explained the position as follows:

"*What you have to understand is that I have employee -- people who do deal with this stuff for me. ... I have 82 companies, 13 or so of them are trading entities. I receive hundreds of emails a day. I have a director that is full time to help me try and manage the workload. That is before back to back meetings. I am in at least six or seven different industries, and I am everywhere from a utility facility in the Caribbean through to listed plc in Vienna, through to hotels trading in Ireland and England, construction companies, food companies, internet companies. I just do not have the time to look at this stuff. I know yesterday I must have sounded like I did not read anything, but the reality of it is, I do not. I am absolutely snowed under. I am genuinely -- genuinely -- the busiest fool I know. I wish I had not let it get to the size it has got to sometimes but I genuinely am that busy*."

120. Nonetheless, whilst I accept that evidence as broadly true (it was reflected in the documents, which frequently showed his failure to respond to messages requesting a response, and sometimes recorded the frustration of those attempting to communicate with him) it does not demonstrate that Mr Marshall was ignorant of the Company's affairs, and of the events material to this dispute (if not in every respect their details).

121. Ms Jones: Ms Jones was a forthright witness (and was described by her own counsel as a forthright person) and in many respects I accepted her evidence, much of which was clear, direct and understandable. Moreover, although she was a shareholder and director, Ms Jones was not an investor in the Company, and not therefore subject to all of the same pressures that bore so heavily on Mr Seneschall and Market Fresh/Mr Marshall. As I have said, her principal

responsibility was in respect of the Company's operations, overseeing the conversion of the Factory, and in time, the conduct of production. There was a general consensus that she did that job well.

122. Moreover, my impression was that for most of 2019, certainly, Ms Jones was far less concerned about the identity of the person/s with overall financial control of the business, than she was about whether or not, more practically, she had access to enough money to finance the work required of her. A number of emails illustrated that point, and in my view reflected her genuine sense of frustration at that time. For example:

i) I referred above at paragraph 69 to Mr Farrell's email of 25 October 2019, asking for access to the bank account, and for the appointment of a second signatory. I referred also to Mr Seneschall's emphatic, initial response, and to Ms Jones' quite different response, including that "*As far as I am concerned this is taking up too much of my time, whilst trying to finish building the factory*." That email accurately reflected Ms Jones' views and her approach at that time.

ii) Similarly, on 14 November 2019, the day of Mr Williams' resignation (and on that topic) Ms Jones sent an email to Mr Seneschall and Mr McCormick, in which she said, "*Regarding spending money going forward. I am trying my best to get this factory up and running on shoe string. We are cutting deals and saving money on every angle. (Another 2 grand saved today doing a deal with Holchem. I have made my position very clear on this to you both. I do not care who handles the money or how you do it. But heaven help the next time I have money allocated and*

I can't buy a £77 probe. You'll be building the place yourselves!" Again, in my view, there was some truth in her statement that her real concern was with the conduct of management, rather than the identity of its controllers.

123. That however, as I shall come to explain, was not the whole story. In respect of at least some of the events of 2020, before, after and in connection with Mr Seneschall's eventual suspension and summary dismissal (and her own short suspension) I found Ms Jones' evidence to be less convincing. For example:

i) On 3 April 2020, at 8.59am, she received to her private email address, [REDACTED], a blank email, with the subject line, "*Test*", from Mr McCormick. She replied, "*All good*", at 9.21am. It is very difficult to resist the inference that this was an email exchange designed to test and establish a means of private communication between Ms Jones and Mr McCormick, but <u>not</u> Mr Seneschall; it came almost immediately after Mr Seneschall and Ms Jones had both been furloughed, and was used subsequently to discuss important matters concerning the business. Ms Jones' evidence in cross-examination, that she receives such test emails, "*all the time*", did very little to persuade me otherwise.

ii) Moreover, although I was not asked to determine the issue, I was told by Mr Northall that there remains an outstanding request for disclosure of emails sent or received from that address, in respect of which Ms Jones had for some time resisted giving any disclosure at all on grounds of irrelevance, and then on grounds that the account was that of her former husband to which she had no access. When disclosure was eventually

agreed and given, it comprised 11 emails, 34 fewer than already in the possession of Mr Seneschall's advisors from other sources of disclosure. Mr Northall described that outcome as "*wholly unsatisfactory*", and is correct that it does at least raise legitimate questions.

iii) In connection with the Company's bank account, in cross-examination, Ms Jones said that she did not have access until late January/early February 2020, so that "*John had full control of the payments and access to the bank*" (relevant to the issue of the Company's financial control). However, this was not correct. According to the bank account statements, on 17 December 2019, Ms Jones (successfully) tested her means of access, by crediting £2.50 to the Company's account and then withdrawing the same amount.

iv) On 6 July 2020, Ms Jones was interviewed by Ms Harries, in connection with the allegations against her of misconduct. As I have explained, Mr Seneschall's case was that the investigation of those allegations was not genuine, but was a façade designed to give the impression to Mr Seneschall that his complaints were being seriously considered, whilst at the same time, in fact, unknown to him, his own dismissal was imminent. In her cross-examination, Ms Jones was adamant that on 6 July 2020, she was shown written statements in support of the allegations against her, in order to test them, and to hear her response. However, it transpired that those statements had not yet been obtained, and were not obtained until the following month, August 2020.

124. Again therefore, in some respects I must treat Ms Jones' evidence with caution.

125. Mr McCormick: As a witness at the trial, Mr McCormick was notably wary. He was ultimately unhelpful. Very frequently he was, or said he was, unable to recall events and documents, including significant documents, or to explain what his own written words were intended to mean, or what were his thoughts when sending written communications, or receiving others. His inability, or unwillingness to venture any sort of recollection, was striking and implausible.

126. To take an example: Mr McCormick was cross- examined about an email which he wrote to Jodie Coyne ("**Ms Coyne**") (who was the Finance Director at NWIG), Mr Marshall and Mr Farrell, on 20 November 2019. In part, that email (important in the context of the alleged Exclusion Conspiracy) read: "*You may have also noted earlier, the plan is to look to suspend John from the board via 51% majority vote and I would like to do that as soon as possible. If we keep to this and then pay the Tetrapak deposit next week, we will be close to the point whereby we have 51% of the board with Lynne's support.*" The following exchange took place, not uncharacteristic of Mr McCormick's evidence generally:

> *Q. …. So that appears to propose a shareholders' resolution to suspend Mr. Seneschall from Trisant's board and it refers to "the plan". Can you help me with when that plan was formulated …?*
>
> *A. There was no plan.*
>
> *Q. Even though you call it the plan, there is no plan?*
>
> *A. It is just a word in that moment in time.*
>
> *Q. … so despite you saying -- despite you referring to it as "the plan" we should read that as the non-plan, the non-plan is to look to suspend John?*
>
> *A. No.*
>
> *Q. So it was a plan?*

A. No, there was no plan to suspend.

Q. So when you refer to it as "the plan" in your email what words would you like to use now instead of "the plan"?

A. It is in the context of the sentence -- you can use the word "plan" in any context ----

Q. You can if there is a plan, Mr. McCormick?

A. No -- there was not a grand plan.

Q. Okay, well, I am not talking about a grand plan, I am just talking about a common or garden plan here. Was there a normal plan?

A. Not that I am aware of, but it looks like it had been discussed.

Q. It looks like it had been discussed okay, so who was party to the discussion then, Mr. McCormick?

A. I do not know.

Q. You cannot remember?

A. No.

Q. So how do you know it was discussed?

A. I do not know.

Q. Unless you were talking to yourself. Were you talking to yourself, Mr. McCormick?

A. Obviously not, no.

Q. So who were you talking to?

A. Well, that email is forwarded to Jodie and Dave and Will.

Q. So it was the four of you who were party to the discussion?

A. I do not know. I do not recall the discussion."

Eventually during his cross-examination, the following exchange took place, with Mr Northall*:*

"Q. Why can you not remember any of this, Mr. McCormick? I have hesitated from asking this question so far, but you can remember literally nothing about all of the things that I am putting to you. Why can you not remember a single thing?

A. It was a long time ago.

Q. Is that it, passage of time? That is the only explanation for your – I was going to say amnesia, I will not say that word – your inability to recall things?

A. It was a long time ago and I cannot remember every conversation.

Q. You cannot remember any conversation so far in relation to this stuff. Why is that?

A. It was a long time ago."

127. In all the circumstances, as to the relevant facts, I derived very little positive assistance from Mr McCormick's evidence. In the event however, many of Mr McCormick's own documents were in evidence, and so I read and understood them according to the words used, their context and the inherent probabilities.

128. As to his reticence, it is not improbable that as Ms Hallett suggested, Mr McCormick was affected by his particular role, having acting for both the Company and Market Fresh (and thus Mr Marshall) and having a sense of responsibility for having been instrumental in Mr Marshall's involvement and consequent serious loss; as he put it, for having "*introduced a friend to* [his] *employer that was pouring money into the business*". My impression therefore was that he was most reluctant to give evidence that would damage Market Fresh's case. Inevitably, as a matter of ordinary rationality, where Mr McCormick failed to provide any explanation at all of documents supporting Mr Seneschall's case, as exemplified above, that failure tended to diminish his defence.

129. Mr Williams: Mr Williams was a straightforward witness; I took him to be doing his best to assist the Court.

130. Mrs Seneschall: Mrs Seneschall gave evidence of marginal importance; to a large extent her knowledge was derived from Mr Seneschall; no material reliance was placed on her evidence in Closing. Understandably, she was supportive of her husband's case, but I had no reason to think she was consciously not doing her best to assist the Court.

131. Ms McKendry-Gray: Ms McKendry-Gray expressed herself with care, and said she was unable, apparently, to recall her involvement in various matters of potential significance, for example, the work she was involved in conducting in parallel with the disciplinary proceedings taken against Mr Seneschall in June/July 2020, and whether she was involved in various conversations referred to in the documents. Although she was at times prone to arguing the case rather than giving evidence, again, I do not consider that she was consciously failing to assist the Court.

132. Mr Farrell: Mr Farrell was, at the time in question, a comparatively junior employee; his role was far from decisive. He is no longer employed at NWIG, and his recollection of events was at times demonstrably imprecise.

133. The other 2 witnesses, Ms Stobie and Mr Malmström, gave evidence comparatively briefly, and ultimately, of no material significance. No reliance was placed on their evidence in Closing.

[D] The Relevant Law

[D1] The Unfair Prejudice Claim

134. The Companies Act 2006, s.994(1) provides:

"*(1) A member of a company may apply to the court by petition for an order under this Part on the ground—*

(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

135. In respect of the relevant principles, there was no real disagreement between the parties.

136. The court's powers can only be invoked by a member of a company, and only in respect of the way in which the company's affairs are being or have been conducted, or in respect of an actual or proposed act or omission of the company: Re Kings Solutions Group Ltd [2022] BCC 529.

137. The conduct complained of must be both unfair and prejudicial; the components are distinct. As was said by Neill LJ in Re Saul D Harrison & Sons plc [1995] 1 BCLC 14, at 31c.

"*The conduct must be both prejudicial (in the sense of causing prejudice or harm to the relevant interest) and also unfairly so: conduct may be unfair without being prejudicial or prejudicial without being unfair and it is not sufficient if the conduct satisfies only one of these tests*…"

138. As to the requirement of "*prejudice*", the first point (of some importance in this case, because of the different varieties of harm allegedly suffered) is that it must be suffered by the petitioner in his capacity as a member; that is his relevant protected interest. Thus, for example, it has been held that a member's rights under a lease (Re JE Cade & Sons Ltd [1992] BCLC 213) or an employment contract (Re London School of Electronics Ltd [1986] Ch 178) were not rights enjoyed (or interests protected) as a member. Each case however depends on its own facts.

139. For example, in Gamlestaden Fastigeheter v Baltic Partners Ltd & Others [2008] 1 BCLC 468 (a decision concerning Article 141 of the Companies (Jersey) Law 1991, in terms substantively identical to those of s.994) it was held that harm suffered as a creditor of the company was capable for these purposes of comprising prejudice suffered as a member. In the Judgment of the Privy Council, at [33], it was said:

> "*If the company is a joint venture company and the joint venturers have arranged that one, or more, or all of them, shall provide working capital to the company by means of loans, it would, in their Lordships' opinion, be inconsistent with the purpose of these statutory provisions to limit the availability of the remedies they offer to cases where the value of the share or shares held by the applicant member would be enhanced by the grant of the relief sought. If the relief sought would, if granted, be of real, as opposed to merely nominal, value to an applicant joint venturer, such as Gamlestaden, in facilitating recovery of some part of its investment in the*

joint venture company, that should, in their Lordships' opinion, suffice to provide the requisite locus standi for the application to be made."

140. Furthermore, the harm suffered need not be strictly financial or "economic" at all; the requirement ought not to be too narrowly or technically understood, although prejudice must be real, rather than merely technical or trivial, and must be established objectively, not according to the subjective views of the petitioner. As was said in Re Coroin Ltd [2012] EWHC 2343, by David Richards J (as he then was):

"*Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. So, for example, removal from participation in the management of a company and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where the members have rights recognised in equity if not at law, to participate in that way. Similarly, damage to the financial position of a member in relation to a debt due to him from the company can in the appropriate circumstances amount to prejudice. The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section*."

141. Arising out of the prejudice requirement, was the Respondents' argument that the unfair prejudice claim failed *in limine* because the Company was at all times insolvent and valueless (subject to it being shown that Mr Seneschall's shares would have had a value but for the Respondents' wrongdoing, which was also denied): Re Tobian Properties Ltd, Maidment v Attwood [2013] 2 BCLC 567 at [11]. Whilst in principle, broadly, I accept that legal submission, I do so subject to the following:

i) in a given case, the outcome may depend on the character of the petitioner's (protected) interests as a member, and the nature of the prejudice suffered; as explained above, those interests may go beyond his strictly defined interests as a shareholder, as in Gamlestaden Fastigeheter, where the petitioner's interests as a creditor were treated as being, in principle, capable of comprising interests as a member; such interests might conceivably be harmed even where the company itself is insolvent, and its shares valueless.

ii) in any event, I agree with Mr Northall, that (i) the court has a discretion, if it orders a share purchase, to order a date of valuation which precedes insolvency (assuming that the Company was not insolvent and valueless at all times) if that best remedies the unfair prejudice: see for example Re Abbington Hotel Ltd [2012] 1 BCLC 410 at [123]; and (ii) further, that in the present case, it would be unsafe to find or assume, at this stage of the litigation, that the Company was at all times, for all purposes valueless, given that Market Fresh invested in it some £1.8 million (paid over a significant period) in return for its shareholding.

142. As to the element of unfairness, as was explained by Patten J at [60]-[61], delivering the Judgment of the Court of Appeal in Grace v Biagioli & Others [2005] EWCA Civ 1222, "*one can deduce the following principles*" from the speech of Lord Hoffmann in O'Neill v Phillips [1999]1 WLR 1092:

> "*(1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable;*
>
> *(2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, "consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith": see p.1099A; the conduct need not therefore be unlawful, but it must be inequitable;*
>
> *(3) Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles*

would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;

(4) To be unfair, the conduct complained of need not be such as would have justified the making of a winding-up order on just and equitable grounds as formerly required under s.210 of the Companies Act 1948;

(5) A useful test is always to ask whether the exercise of the power or rights in question would involve a breach of an agreement or understanding between the parties which it would be unfair to allow a member to ignore. Such agreements do not have to be contractually binding in order to found the equity;

(6) It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder."

143. In the present case there were fundamental issues about the extent and terms of the parties' agreements – including whether the March Proposal was contractual, whether there was a Redemption Agreement, what were the effects of the ISHA and the HoTs, and whether Mr Seneschall was entitled (in his

character as a member) to executive participation in the business (or there existed any restraint on the other parties' rights to diminish or end his participation). As to executive participation, there is no doubt that exclusion from management, in circumstances where the terms of the agreement between the parties entitled a member to participate, is capable of constituting unfairly prejudicial conduct. Even in the absence of an agreement, circumstances may exist which make it inequitable for the other member or members to insist on their strict legal rights so as to exclude the petitioner from management: see for example, Re Guidezone Ltd [2002] 2 BCLC 321.

144. Furthermore, I accept Mr Northall's submission that "*exclusion*" (or more accurately, unfair conduct in the nature of exclusion) is not limited to the termination of the petitioner's employment or office as director; circumstances will vary from case to case, and the question is not whether a petitioner has been "*excluded*", it is whether he has been unfairly prejudiced. It is not therefore an answer to the present case that Mr Seneschall was at all times a director officer, and still a member of the Company, and that there has been no attempt to deprive him of either status. For example, unfair prejudice may comprise matters such as:

i) excluding the petitioner from management decisions, or taking such decisions in secret and/or without informing him: Robertson, Petitioner (No.1) 2010 SLT 143.

ii) changing the locks, barring the petitioner's mobile telephone, withdrawing his company car, informing him that he can have no contact with customers, and commencing a disciplinary process in the

company's name: Re Phoenix Contracts (Leicester) Ltd [2010] EWHC 2375 (Ch) at [112]-[116].

iii) denying the petitioner access to the company's banking arrangements: Re Abbington Hotel Ltd [2012] 1 BCLC 410 from [91].

iv) failing to inform the petitioner of matters having a fundamental effect on the company.

145. Finally, if the affairs of the company are conducted with the agreement of the petitioner, or if he acquiesces in that conduct, he may be denied any right to complain about it: see Bateson v Bateson [2014] 1 BCLC 507. Similarly, conduct may not be unfair (or a court may refuse relief in respect of it) if caused by the petitioner's own conduct or warranted as a reaction to it: see Re London School of Electronics Ltd [1986] Ch 211 at 222B-C, and Gray v Braid Group (Holdings) Ltd [2015] CSOH 146 (where it was held not unfair to have removed a CEO dismissed for gross misconduct). Such issues arose in the present case because, for example, of Mr Seneschall's agreement at the Board Meeting held on 5 November 2019, to the authorisation of a second bank account signatory.

[D2] The Unlawful Means Conspiracy Claims

146. In respect of the conspiracy claims, there was one significant issue of law. Summarily stated however, it was agreed that the essential ingredients required to establish the tort of unlawful means conspiracy (see for example, Kuwait Oil Tanker v Al Bader [2000] 2 All ER (Comm) 271 at [108], and Racing Partnership Ltd v Sports Information Services Ltd [2020] EWCA Civ 1300 at [104]) are:

i) an agreement or "*combination*" between a given defendant and one or more others (although it is not necessary to show that all conspirators joined at the same time, see Huntley v Thornton [1957] 1 WLR 321 at 343) acting with mutuality of understanding and intention, albeit not necessarily pursuant to an agreement in the strict contractual sense (see Belmont Finance v Williams Furniture [1980 1 All ER 393 at 404) - a tacit agreement or combination will suffice;

ii) an intention to injure the claimant, although it is not necessary to show that such injury was the defendant's sole or predominant purpose: see Lonrho plc v Fayed [1992] 1 AC 448 at 464-466; harm may be the particular end sought by the defendants, or the means to their end, or, in relation to their intended end or gain, the inseparably linked "*obverse side of the coin*" – all will suffice (see OBG Ltd v Allan [2007] UKHL 21);

iii) unlawful acts carried out pursuant to the agreement or combination, as a means of injuring the claimant; and,

iv) loss or damage suffered by the claimant, resulting from concerted action: see Lonhro Ltd v Shell Petroleum Co Ltd (No.2) [1982] AC 173, at 188.

147. As to the third element, some further elaboration is necessary, first, as to the required variety or type of unlawfulness, and second, as to its relationship with the resultant damage – whether it is "*the means*" by which injury is inflicted: see JSC BTA Bank v Khrapunov [2018] UKSC 19 at [11].

148. First, as is stated in Civil Fraud by Thomas Grant KC and David Mumford KC (1st Edition) at 2-050, as to the nature of the unlawfulness, "*no clear statement of principle has yet emerged which might enable a free-standing analysis of whether a given act will count as an "unlawful act"*". For the purposes of the present dispute, certainly before this Court, it is enough to say as follows.

i) A breach of contract actionable by the claimant will suffice: see for example Aerostar Maintenance International Ltd v Wilson [2010] EWHC 2032 at [170]-[172], and Fiona Trust & Holding Corp v Privalov [2010] EWHC 3199 at [69]; that includes a breach by an employer of its implied duties of good faith and fidelity: see Reuse Collections Ltd v Sendall [2014] EWHC 3852.

ii) The tort of deceit actionable by the claimant will also suffice: Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] AC 435, at 462.

iii) Recent authority is to the effect that a breach of fiduciary duty is also capable of qualifying as a relevant act: see, as above, Aerostar Maintenance International Ltd at [170]-[172], Fiona Trust & Holding Corp at [69] and Novoship (UK) Ltd v Mikhaylyuk [2012] EWHC 3856 at [103].

iv) Although care is required where the unlawful act comprises a civil wrong not actionable by the claimant (for example, in the present case, a breach of fiduciary duty owed to the Company, not Mr Seneschall) that fact does not mean that the wrong will necessarily not qualify for the purposes of conspiracy: see Total Network SL v HMRC [2008] UKHL 19.

149. Second, as to the relationship of the unlawfulness with the resultant damage, it was said by the Supreme Court in JSC BTA Bank, [11]-[15]:

> "*11. Conspiracy being a tort of primary liability, the question what constitute unlawful means cannot depend on whether their use would give rise to a different cause of action independent of conspiracy. The real test is whether there is a just cause or excuse for combining to use unlawful means. That depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant. This was the position reached by the House of Lords in Revenue and Customs Comrs v Total Network SL [2008] AC 1174. The Appellate Committee held that a criminal offence could be a sufficient unlawful means for the purpose of the law of conspiracy, provided that it was objectively directed against the claimant, even if the predominant purpose was not to injure him.*
>
> *12. The facts of Total Network were that the Commissioners had sued Total for participating in a number of VAT frauds. They alleged an unlawful means conspiracy, the unlawful means consisting of the commission by some of the other conspirators of the common law offence of cheating the revenue. The question whether such a cause of action existed was considered on the assumption that there was no predominant intention to injure the Commissioners and that the commission of the offence gave rise to no cause of action at the suit of the Commissioners independently of the alleged conspiracy. In the result, the House declined to apply to unlawful means conspiracies the condition which it had held in OBG Ltd v Allan [2008] AC 1 to apply to the tort of intentionally harming the claimant by*

unlawful acts against third parties, namely that those acts should be actionable at the suit of the third party. They held that the means were unlawful for the purpose of founding an action in conspiracy, whether they were actionable or not.

13. The leading speech was delivered by Lord Walker, with whom Lord Scott, Lord Mance and Lord Neuberger agreed. Lord Hope, without agreeing so in terms, proposed an analysis of this point which was consistent with Lord Walker's. The first point to be derived from the speeches concerns intention. The distinction between cases where there is and cases where there is not a predominant intention to injure the claimant, is an inadequate tool for determining liability because it does not exhaust the possibilities. The emphasis in the authorities on cases in which the predominant purpose was to injure the claimant has diverted attention from the fact that both lawful means and unlawful means conspiracies are torts of intent. But the nature of the intent required differs as between the two. This is because a conspiracy may be directed against the claimant notwithstanding that its predominant purpose is not to injure him but to further some commercial objective of the defendant. This point had been made, some years earlier, by the Supreme Court of Canada in Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd [1983] 1 SCR 452 . After a careful analysis of the (mainly English) authorities, Estey J, delivering the judgment of the Court, concluded at pp 471-472 that:

> "*whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:*

(1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,

(2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

In situation (2) it is not necessary that the pre-dominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff."

Likewise, in Total Network , Lord Walker, at para 82, recognised the:

"*clear distinction between the requirement of predominant purpose under one variety of the tort of conspiracy and the lower requirement of intentional injury needed for the other variety."*

14. These two varieties of intention were to be contrasted with a situation in which the harm to the claimant was purely incidental because the unlawful means were not the means by which the defendant intended the harm to the claimant: see paras 93, 95. As an example of the latter situation, Lord Walker cited Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173 . The defendants in that case were alleged to have acted in breach of the statutory order imposing sanctions on Southern Rhodesia, but the order "was not the instrument for the intentional infliction of harm" (para 95). Lord Mance in Total Network (para 119) was, we think, making the same point, by reference to the example of a pizza delivery business which obtains more custom, to the detriment of its competitors, by instructing its drivers to ignore speed limits and jump red lights. Addressing the character of the unlawfulness required, Lord Walker derived from the authorities the proposition that

> "*unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts (whether or not they include conduct lower on the scale of blameworthiness) provided that they are indeed the means by which harm is intentionally inflicted on the claimant (rather than being merely incidental to it).*" *(para 93, and cf para 95)*

He concluded, at paras 94-95:

> "*From these and other authorities I derive a general assumption, too obvious to need discussion, that criminal conduct engaged in by conspirators as a means of inflicting harm on the claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort … In my opinion your Lordships should clarify the law by holding that criminal conduct (at common law or by statute) can constitute unlawful means, provided that it is indeed the means (what Lord Nicholls of Birkenhead in OBG Ltd v Allen [2008] AC 1 , para 159 called 'instrumentality') of intentionally inflicting harm."*

Lord Hope arrived at the same conclusion, at paras 43 and 44, where addressing the facts of the case before him, he observed that although there was no predominant intention to injure the Commissioners, "the means used by the conspirators were directed at the claimants themselves":

> "*a conspiracy is tortious if an intention of the conspirators was to harm the claimant by using unlawful means to persuade him to act to his own detriment, even if those means were not in themselves tortious."*

15. The reasoning in Total Network leaves open the question how far the same considerations apply to non-criminal acts, such as breaches of civil statutory duties, or torts actionable at the suit of third parties, or breaches of contract or fiduciary duty. These are liable to raise more complex problems. Compliance with the criminal law is a universal obligation. By comparison, legal duties in tort or equity will commonly and contractual duties will always be specific to particular relationships. The character of these relationships may vary widely from

case to case. They do not lend themselves so readily to the formulation of a general rule. Breaches of civil statutory duties give rise to yet other difficulties. Their relevance may depend on the purpose of the relevant statutory provision, which may or may not be consistent with its deployment as an element in the tort of conspiracy. For present purposes it is unnecessary to say anything more about unlawful means of these kinds."

150. Accordingly, the unlawful acts must "*indeed be the means*" or instrument of inflicting harm on the claimant (rather than incidental or collateral to the damage caused) and the loss suffered must have been caused by those unlawful acts.

[D3] <u>"Justification" as a Defence to Conspiracy</u>

151. Finally, as mentioned, in respect of the law, there was one point of particular dispute between the parties. As to that, Ms Macro submitted (and I understood the other Respondents to adopt her submission) that <u>even if</u> the elements of the tort of unlawful means conspiracy are established, there is a self-standing, independent defence of "justification". In support, she referred to paragraph [11] of Lord Sumption's Judgment in <u>JSC BTA Bank</u> set out above, and the decision of the Court of Appeal in <u>Meretz Investments NV v ACP Ltd</u> [2008] Ch 244, *per* Toulson LJ at [170]-[174] where he said, amongst other things, "*I would support Arden LJ's view at [127] that it is a defence to an action for conspiracy to injure by unlawful means if the defendant not only acted to protect his own interests, but did so in the belief that he had a lawful right to act as he did*". She also referred to the judgment of Arden LJ in that case, at [142], where

she said, "*In the circumstances, it is not necessary to inquire whether there was justification for any interference with Britel's rights under the leaseback option. I note that Lord Nicholls specifically contemplates that a defence of justification may be available (OBG at [193]). Had it been necessary to do so, I agree with the judge's analysis of the Edwin Hill case and his conclusion that the defence would have been available in the circumstances of this case.*"

152. I reject the submission that "justification" constitutes an independent defence to the tort of unlawful means conspiracy if it is otherwise established, for the following reasons.

153. First, I find no support for that proposition in JSC BTA Bank. At [10], Lord Sumption said:

> "*What is it that makes the conspiracy actionable as such? To say that a predominant purpose of injuring the claimant in the one case and the use of unlawful means in the other supply the element of unlawfulness required to make a conspiracy tortious simply restates the proposition in other words. A more useful concept is the absence of just cause or excuse, which was invoked by Bowen LJ in Mogul Steamship Co Ltd v McGregor, Gow & Co (1889) 23 QBD 598 , 614, by Viscount Cave LC in Sorrell v Smith [1925] AC 700 , 711–712, and by Viscount Simon LC with the support of his colleagues in Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] AC 435 , 441–444 (cf Viscount Maugham at pp 448, 449–450, Lord Wright at pp 469–470, and Lord Porter at p 492). A person has a right to advance his own interests by lawful means even if the foreseeable consequence is to damage the interests of others. The existence of that right*

affords a just cause or excuse. Where, on the other hand, he seeks to advance his interests by unlawful means he has no such right. The position is the same where the means used are lawful but the predominant intention of the defendant was to injure the claimant rather than to further some legitimate interest of his own. This is because in that case it cannot be an answer to say that he was simply exercising a legal right. He had no interest recognised by the law in exercising his legal right for the predominant purpose not of advancing his own interests but of injuring the claimant. In either case, there is no just cause or excuse for the combination."

154. It was in the following paragraph, in this context therefore, that he continued, in [11], "*Conspiracy being a tort of primary liability, the question what constitute unlawful means cannot depend on whether their use would give rise to a different cause of action independent of conspiracy. The real test is whether there is a just cause or excuse for combining to use unlawful means. That depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant*."

155. In my judgment, Lord Sumption was referring to an "*absence of just cause or excuse*" in order to explain or identify the essence of that which makes a conspiracy (of either variety) actionable. As he said, in the context of unlawful means conspiracy, it is the element of unlawfulness that prevents a person from saying that he has a right to damage the interests of others; that element deprives him of a just cause or excuse, as does a predominant intention to injure in cases of lawful means conspiracy. So when he continued his discussion of qualifying unlawful means, by saying that the "*real test is whether there is a just cause or*

excuse for combining to use unlawful means", which "… *depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant*", it seems to me that he was using or proposing the use of the underlying concept or rationale to assist in defining the content and limits of the required "unlawful means" element. He was not suggesting that a defendant against whom the tort had otherwise been established could defend himself by reference to an alleged "justification" – indeed, if anything (as perhaps one would expect as a matter of principle) it seems to me that Lord Sumption's explanation was to the opposite effect entirely.

156. Second, the comments made by Toulson LJ in Meretz Investments NV at [170-[174] were not about a defence of "justification" as such, but about intention – acting to protect an interest, in the absence of knowledge of unlawfulness.

157. Connected with that, third, my attention was drawn to Racing Partnership Ltd v Sports Information Services Ltd [2020] EWCA Civ 1300, at [138], where Arnold LJ said, of Toulson LJ's comments in Meretz Investments NV, "*I note the following points about this passage. First, it is explicitly obiter. Secondly, the reference to Arden LJ's judgment is to a passage dealing with inducing breach of contract, not conspiracy. Thirdly, Toulson LJ is not addressing knowledge, but intention. Fourthly, neither British Industrial Plastics v Ferguson nor Belmont v Williams is referred to*."

158. Fourth, as therefore noted in Racing Partnership Ltd v Sports Information Services Ltd, Arden LJ's comments regarding "justification" at [142] of Meretz Investments NV were not made in connection with the tort of unlawful means conspiracy.

159. Fifth, even in the context of lawful means conspiracy, as is stated in Civil Fraud (see above at paragraph 148) at 2-110, I agree that it "*might be thought … difficult to find support for*" such a doctrine "*as a matter of principle*", and that the "*better view is that there is no separate defence of justification, but that whether concerted action is "justified" is simply the obverse of whether its predominant purpose is to injure the claimant*", in which case "*a defendant … cannot show a just cause or excuse for his conduct* …". Similarly, in the context of unlawful means conspiracy, I accept that if the grounds of "justification" render the allegedly unlawful act lawful (for example, their effect is that directors acted in accordance with their duties, not in breach) then the tort will not be proven.

160. Finally, it follows therefore that I agree with the conclusion of HHJ Russen QC in Palmer Birch (a partnership) v Lloyd and another [2018] EWHC 2316 (TCC) at [183]-[193] that justification cannot be raised as a separate defence to unlawful means conspiracy – any such arguments will (and must) as I have said, be contained within the prior analysis of whether unlawful means have been established.

[E] The Parties' Agreements and Alleged Agreements: the Framework of the Dispute

161. Essentially, the unfair prejudice claim and the unlawful means conspiracy claim both require Mr Seneschall (by virtue of the element of "*unfairness*" in the one, and "*unlawful means*" in the other) to establish some breach of the terms on which it was agreed, or the parties were obliged, to conduct themselves and the Company's affairs.

162. As to those terms, and in particular, as to the terms of the Market Fresh investment, it was common ground that at least two binding contracts were certainly made, both in writing: first, the ISHA, made on 7 August 2019 and second, the HoTs, entered into on 7 October 2019. The existence of two other agreements was hotly disputed: first, the March Proposal, and second, the Redemption Agreement.

163. I shall deal in turn with each of these agreements, and explain certain consequences of their terms, as I interpret them.

[E1] The Terms of the ISHA

164. It was common ground that the terms of the ISHA were negotiated by or with the involvement of legal advisors: Darwin Gray, the Company's solicitors, and for Market Fresh, Ms McKendry-Gray.

165. Amongst other things, the ISHA provided as follows:

i) Under the heading "BACKGROUND", it recited that "*(A) Market Fresh has agreed to invest in the Company on the terms set out in this agreement. Market Fresh has already paid over £497,000 to the Company … (B) The parties have agreed to enter into this agreement as a deed for the purpose of regulating the exercise of their rights in relation to the Company and for the purpose of making certain commitments as set out in this agreement.*"

ii) Clause 2, under the heading "SUBSCRIPTION" provided, "*2.1 JS, LJ and Market Fresh apply for the allotment and issue to them of the number of Subscription Shares set out against their name in clause 2.3.*

…. 2.2 The Founder shall subscribe for the Subscription Shares at the Founder Price and Market Fresh shall subscribe for Subscription Shares at the Premium Price." The reference to "*JS*" was a reference to Mr Seneschall; "*LJ*" to Ms Jones.

iii) "*The Founders*" were defined as Mr Seneschall and Ms Jones; the "*Founder Price*", as the sum of £1 per Subscription Share; "*Subscription Shares*", as the 842 new ordinary shares of £1.00 each in the capital of the Company to be subscribed by Mr Seneschall, Ms Jones and Market Fresh pursuant to Clause 3; and the "*Premium Price*", as the sum of £3,500 "*per Subscription Share or First Option Share as the case may be*".

iv) Clause 2.3 provided that "*The Investors*" (that is to say, together, Mr Seneschall, Ms Jones and Market Fresh) "*apply for the allotment of the Subscription Shares and Market Fresh shall have the option to apply for the allotment of the Option Shares as follows*:

Shareholder	***Shares***	***Total Subscription Monies***
JS	*500 ordinary shares of £1.00 each*	*£500.00*
LJ	*200 ordinary shares of £1.00 each*	*£200.00*
Market Fresh	*• Subscription Shares: 142 ordinary shares of £1.00 each* *• First Option Shares: 58 ordinary shares of £1.00 each* *• such Additional Option Shares as subsequently agreed between the Parties in accordance with clause 4.3*	*• £497,000 for the Subscription Shares* *• £203,000 in aggregate for the First Option Shares* *• such amount as agreed between the parties for Additional Option Shares in accordance with clause 4.3"*

v) Clause 2.4 stated, "*Completion of the allotment of Subscription Shares shall take place on the Completion Date*." The "*Completion Date*" was defined as 7 August 2019. Clause 3.2(b)(ii) provided that on the Completion Date, the Company "*shall ... issue and allot the Subscription Shares to Market Fresh credited as fully paid*."

vi) Clause 2.5 stated, "*The Company warrants to the Investors that it is entitled to allot the Subscription Shares to the Investors on the terms of this agreement and without the consent of any other person*."

vii) The "*Option Shares*" were defined as "*the new ordinary shares of £1.00 each in the capital of the company subscribed for by Market Fresh pursuant to clause 4 including the First Option Shares*"; "*the First Option Shares*" were defined as "*the 58 ordinary shares of £1.00 each in the Company"*; and the "*Additional Option Shares*" were defined as "*such additional Option Shares as Market Fresh may purchase in accordance with clause 4.3*".

viii) Under the heading "OPTION TO ACQUIRE SHARES", Clause 4 provided, amongst other things, as follows.

"*4.1 In consideration of the payment of £1.00 by Market Fresh to the Company... the Company grants to Market Fresh an option to subscribe for and be allotted, credited as fully paid, the First Option Shares at the Premium Price and Additional Option Shares at a price to be agreed between the Parties*.

4.2 The Option [being the option granted by Clause 4] *may be exercised in whole or in part on any one or more occasions at any time during the period commencing on* [7 August 2019] *and ending at 5:00pm (London time) on 30 September 2019 (Option Period) in respect of the First Option Shares.*

4.3 In respect of the Additional Option Shares, the option shall be exercisable on the parties reaching agreement on:

(a) the number of Additional Option Shares to be purchased;

(b) the price of the Additional Option Shares;

(c) the longstop date by which the Additional Option Shares must be exercised;

(d) any other terms relating to the Additional Option Shares as the parties may agree.

4.4 In the event that either:

(a) the parties cannot agree terms for the Additional Option Shares; or

(b) Market Fresh determines in its discretion that it does not wish to purchase Additional Option Shares;

the option in respect of the Additional Option Shares shall lapse on either party giving written notice to the other"

ix) Under Clause 5, "WARRANTIES", amongst other things, it was stated that, Mr Seneschall, Ms Jones and the Company, "*warrant to Market Fresh that immediately prior to*" 7 August 2019:

"*(a) the Founders are the sole legal and beneficial owners of the entire share capital of the Company; …*

(e) no indebtedness of the Company is due and payable and no Encumbrance over the Company's assets is enforceable for any reason and the Company has not received notice from any of its creditors requiring payment of such indebtedness or indicating that any such Encumbrance will be enforced;

(k) all outgoings in respect of the Property and rent, insurance and service charge payments have been made on the relevant due date …".

x) In addition to the due diligence response referred to above, the warranties at Clause 5(e) and (k) formed the basis of the Market Fresh counterclaim, it being pleaded that it "*would not have invested in* [the Company] *had the Petitioner … not given the Warranties*".

xi) Clause 6 provided, under the heading "PROMOTION OF THE COMPANY'S BUSINESS", that: "*6.1 The Company shall apply the proceeds of the Investors' subscription for the Subscription Shares and Market Fresh's subscription for the Option Shares in furtherance of the business of the Company.*"

xii) Clause 8 provided for the entitlement of each shareholder to appoint one person as a statutory director (a "*Shareholder Director*") of the

Company, and that with immediate effect Mr Williams was to become the finance director of the company and Mr McCormick the sales director, although neither would thereby become a statutory director unless appointed as a Shareholder Director.

xiii) Clause 9 provided that "*9.1 All decisions to be taken by the board of directors may not be passed unless there is a unanimous vote by the Shareholder Directors*", and at 9.3, provided for the reservation of particular categories of decision to the board of directors, precluding the right of any one director to take such decisions unilaterally (or indeed, in combination with other but not all other directors). Those categories included decisions about the Company's financing, including in respect of additional loans and borrowings – as mentioned, a point that came subsequently to be significant, after Mr Seneschall's dismissal as an employee, but at a time when he continued to be an office holder director.

xiv) Clause 11, under the heading "ACCOUNTS AND INFORMATION RIGHTS" provided, amongst other things, for the Company (and for Mr Seneschall and Ms Jones as "*Founders*" to cause the Company) to provide Market Fresh with: "*11.2 (a) .... such information and, upon reasonable notice, access to such senior personnel and the premises of the Company as it may reasonably require to monitor its investment; (b) provide members of the Market Fresh finance team with read-only access to such of the Company's systems (including SAGE) That may be reasonably required from time to time; and (c) direct the Company's*

financial director to provide information directly to Market Fresh as and when reasonably required by Market Fresh."

xv) Clause 11.3 provided that, without limiting Clause 11.2, amongst other things, Market Fresh was to be provided, "*within three weeks of the end of each month*" with "*a profit and loss account, balance sheet and cash flow statement for the Company on a monthly and year-to-date basis together with a breakdown identifying and explaining variances from the Annual Budget and the prior year figures, together with a rolling cash flow, profit and capital expenditure forecast for the next six months*."

xvi) Market Fresh relied on Clause 11 to justify requests for information that Mr Seneschall said were made or demanded as part of the conspiracy to seize control of the Company's affairs and business.

xvii) Finally, Clause 21 provided that "*21.1 This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous arrangements, understandings or agreements between them relating to its subject matter. 21.2 Each party acknowledges that in entering into this agreement, it does not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty that is not set out in this agreement.*"

xviii) Clause 21 was significant in two respects: first, to avoid the effect of Clause 21.2, a claim in pre-contractual misrepresentation - such as that made by Market Fresh - had to be framed in fraud, as in the event it was (although not in the Company's original letter before action); and

second, it meant that Mr Seneschall had to explain how the existence of the Redemption Agreement was consistent with the entire agreement provision at Clause 21.2.

[E2] The ISHA: Meaning and Effect

166. The ISHA contained a number of provisions with important consequences for the case.

167. First, although Clause 4 referred to an "*option*" to acquire the Additional Option Shares (being any such shares in addition to the 200 combined Subscription and First Option Shares) that option was, in my judgment, devoid of any real substance, because it depended on the prior agreement of all material terms – the number of shares, their price, any other terms, and the period of the option.

168. Further, by Clause 4.4, also in respect of Additional Option Shares, the "*option*" was in substance terminable on notice by either Market Fresh or the Company, at any time (whether because, for any reason, they "*cannot agree terms*" or for example, Market Fresh simply decided not to purchase any more shares).

169. Thus, after the ISHA had been entered into, beyond the sum of £497,000 already paid (and which was, by the ISHA, to be treated as payment for the shares to be issued) the Company was not contractually entitled (at all) to any further payment or investment from Market Fresh, whatever Mr Seneschall and Ms Jones might have hoped, intended or anticipated; at most, Market Fresh had the benefit of an option in respect of the First Option Shares. This is important because of Mr Seneschall's complaint that the further investment made after 7 August 2019, was wrongfully "drip-fed" to the Company, damaging its business. On the terms of the ISHA at any rate, negotiated by the parties' legal

advisors, or with their assistance, Market Fresh was under no obligation to do otherwise.

170. Second, as stated above, Mr Northall relied on Clause 6.1 as meaning that it was for the Company to apply the proceeds of the Market Fresh investment, and that the use of its resources was a matter for it alone, acting by its Board, and was not a matter for Market Fresh. This was important because it was part of the foundation of Mr Seneschall's case that Market Fresh acted in breach of contract in specifying, as it did, that further (post 7 August 2019) tranches of its investment were to be used for particular identified ends, being the payment of particular creditors – in other words, it was part of the foundation of the allegation that "drip-feeding" was wrongful.

171. In my judgment however, that is not the true meaning of Clause 6.1. That Clause had a quite different purpose, which was to ensure that the Company did not misuse the investment, or use it for some purpose outside that of its business; it was, in other words, a limitation on the Company's freedom to act, not on that of Market Fresh, for whose benefit and assurance it was agreed and included.

172. It follows, when taken with the absence of any obligation to invest any further sum at all, that Market Fresh was not, by the terms of the ISHA, prevented from investing only on the basis that its investment would be used for particular purposes, or from seeking to attach some additional condition/s to its investment; in other words, to specify a particular purpose was not in breach of this contract, which was silent on the point. Moreover, Clause 4.3 explicitly contemplated the negotiation of "*any other terms relating to the Additional Option Shares as the parties may agree*": Market Fresh was free to seek

whatever terms it thought to be in its own best interests, including that the investment be for specific ends.

173. Third, Market Fresh had extensive rights of access to information, and indeed, to both personnel and the premises, in order to monitor its investment. However, whilst that means that it had, by virtue of the ISHA, no more extensive rights (for example, to further and more actively involve itself in the Company's financial affairs) that is not to say that to request such involvement was a breach of contract: although to do so was not justified by the contract (Market Fresh had no entitlement) neither was it contractually precluded.

174. Part of Mr Seneschall's case was that at all material times it was the intention of Market Fresh to "*take control*" of the Company's affairs and to "*operate it as a de facto subsidiary*", but that nonetheless it took no steps to "*legitimise or authorise its proposed influence*" through the terms of the ISHA - instead acting in "*wilful disregard*" of those terms, or "*recklessly as to their existence*", not caring about their meaning and effect. Leaving aside for a moment what exactly is meant by "*taking control*" and "*operating the Company as a de facto subsidiary*", I do not agree that a course of conduct is necessarily rendered unfair (*a fortiori* unlawful) by virtue only of being outside the scope of what was permitted or obligated by the ISHA, but without being in breach of any of its terms. That, for example, a request for information was not authorised by the ISHA does not necessarily mean that it was an act in breach of the ISHA; it may simply mean that the Company was entitled to refuse to comply. Not to refuse may, of course, be a breach of a director's duty to the Company, but that is a different matter.

175. Fourth, I agree with Mr Seneschall's case that he was, by virtue of Clause 9, entitled to be a director, and to participate fully in board meetings, and I agree that certain decisions were to be taken only at board level, and taken unanimously.

[E3] <u>The Terms of the HoTs</u>

176. The second undisputed written contract was comprised in the HoTs, entered into on 7 October 2019, again by Mr Seneschall, Ms Jones, the Company and Market Fresh, by which time Market Fresh had acquired 166 shares (17.2% of those in issue) in return for payment of £581,000.

177. Amongst other things, the HoTs provided as follows.

i) By Recital (A) that "*Under the terms of the* [ISHA] *MF agreed to invest the sum of £700,000 (**Original Investment Sum**) in the capital of the Company, in exchange for a 20% share of the equity in the Company (**Original Investment**)"*. Whilst not strictly accurate (given the purchase by Market Fresh of the option explained above) that statement was true to the extent that the ISHA had recorded the agreed price to be paid for first 20% shareholding.

ii) By Recital (D), that "*Further to recent discussions, these heads of terms set out the principal terms and conditions on which MF is willing to invest a further £1,100,000 in the capital of the Company for an additional 30.1% of the equity in the Company (**Further Investment**)*."

iii) By Clause 1.4, the "*Further Investment Sum and balance Original Investment Sum shall be made in any number of tranches … as shall be*

agreed between MF and the Company, provided that the full Further Investment Sum and the balance Original Investment sum (together ***Investment Sums****) are paid by 31st March 2020 (****Longstop Date****).*" And by Clause 1.5, that the "*parties shall negotiate interim call-dates for specified proportions of the Investment Sums …*"

iv) Clause 2 provided for the immediate allotment of all the shares in question (such as to constitute Market Fresh the majority shareholder), but that if "*by the Longstop Date any part of the Investment Sum is unpaid, MF shall immediately (on notice from the Company to do so) execute a stock transfer form to transfer to the Company such proportion of the Subscription Shares and/or the balance of the Original Investment Shares as are unpaid, for nil consideration*."

v) By Clause 2.2, Market Fresh was not entitled, in the meantime, "*to transfer, mortgage or otherwise encumber any of the Subscription Shares or the balance of the Original Investment Shares at any time prior to the Longstop Date*."

[E4] The HoTs: Meaning and Effect

178. Mr Northall made two submissions in particular.

i) First, that the HoTs imposed on Market Fresh an obligation to pay the balance of the investment by the end of March 2020, and that Market Fresh was not entitled to withhold any part of that balance. Accordingly, he argued, the Respondents were wrong to say that the agreement gave Market Fresh "*absolute discretion, not merely as to the timing and*

amount of further payment, but whether further payments were made at all" - an argument which he described as "*misconceived*".

ii) Second, further, that Clause 1.4 did not confer on Market Fresh "*a unilateral discretion*" as to the amount and timing of a payment, but that the dates and amounts of payment had to be negotiated and agreed between Market Fresh and the Company, acting by its Board. It follows, he argued, that Market Fresh could not, for example, withhold the balance of the agreed investment until 31 March 2020, unless that was an agreed outcome.

179. I do not entirely agree with those submissions. In my judgment:

i) whilst correct to say that there was an obligation to pay the whole sum by 31 March 2020 (if at all), the consequences of not doing so were contractually circumscribed, as therefore was the obligation itself, which was an obligation to pay the price or return the shares;

ii) whilst true to say that Market Fresh was to negotiate, and that payments were to be made by agreement, the manner of that negotiation was not agreed upon or provided for, and neither was Market Fresh under an obligation to agree to payment on any particular interim date or in any particular amount prior to 31 March 2020, so that although it did not expressly have, as such, a "*unilateral discretion*" in respect of the interim timing and amounts of payment, it did have the freedom to refuse (or fail) to agree interim payments, and/or to refuse to agree such payments other than on certain terms. In the absence of agreement, the obligation was to pay by the Longstop Date; in the absence of payment

by that date, it was to return the shares by then unpaid for; that is what the parties agreed.

180. Further, the HoTs comprised an agreement as contemplated by Clause 4.3 of the ISHA. I agree with Mr Northall that in the context, the further investment was otherwise made on the terms of the ISHA. I also note that the maximum payment agreed to be made to the Company under the HoTs was £1,800,000; that was the limit of Market Fresh's obligation; it follows that if, as at the date on which the Company became obliged to repay the Nucleus Loan (or its replacement, or any other debt) it did not have the ability to do so, and if, by then, Market Fresh had invested the <u>whole</u> promised sum in return for the shares allotted to it, no further sum from Market Fresh would fall to be paid under the terms of this agreement. I shall return to this point in connection with the disputed Redemption Agreement.

181. As mentioned above, the existence of two other contracts was in issue.

[E5] <u>The March Proposal</u>

182. Essentially, it was Mr Seneschall's case that Mr Marshall's email of 17 March 2019, in which he proposed, "*Subject to successful acquisition of my Irish asset (expected to complete mid-May)",* the acquisition of *"10% for £300k (should be mid end may)*" and "*10% for £400k or 7.5% for £300k by end August*", was a contractual offer which was accepted on 18 March 2019, by email, by the Company, himself and Ms Jones. Market Fresh and Mr Marshall dispute that: their case was that, amongst other things, the agreement was subject to contract, and in any event, subject to the sale of "*the Irish asset*", which was a reference

to a development site held by Mr Marshall through his property investment company.

183. In my judgment, contrary to Mr Seneschall's case, the March Proposal did not constitute or immediately give rise to a binding contract, for the following reasons.

184. First, the relevant exchange of emails (with a subject line, "*Further Thoughts?*") did not fix an agreement with the necessary degree of certainty.

i) Mr Marshall said, in his email of 17 March 2019, that "*Subject to successful acquisition of my Irish asset (expected to complete mid-May), I would like to put forward the following*" (at which point he set out a counter proposal to Mr Seneschall's earlier proposal regarding price and shareholding) which he followed by setting out three other "*considerations*" regarding terms to be agreed between shareholders, and proposing that "*Naturally we would also then pick up the role of sales division for the factory*". Plainly, significant aspects of the investment, and the future relationship between the parties, were yet to be discussed, or even properly explicated, let alone agreed.

ii) Mr Seneschall's response, by email of 18 March 2019, itself contained a counter proposal, not an "acceptance" – for example, he said that Market Fresh, on the proposed terms, "*would need an upfront payment of £100,000 asap either as part payment, or as a loan (straight or convertible), so we can order the pouch filling machine we need for Market Fresh (amongst others)*"; in response, it invited Mr Marshall's "*initial thoughts*", and said that once available from the Company's

solicitors, a revised shareholders' agreement would be sent, albeit anticipated to be "*very much in line*" with Mr Marshall's suggestions.

185. I do not therefore accept that in consequence of those emails (or later, when the first payment was made by Market Fresh, of £30,000 on 30 April 2019) a binding contract was created, although there was, on the other hand, from about that time, a working, commercial agreement between the parties regarding certain principal terms of the investment contract then being actively negotiated, including the share price. Consistent with that more fluid characterisation of the parties' agreement, those terms (even on Mr Seneschall's own pleaded case) were changed, by further agreement, over time, before the execution of the ISHA on 7 August 2019. I set out further the evidence in that regard at paragraphs 193-278 below, in respect of the alleged Redemption Agreement.

186. Second, during that subsequent period of negotiation, important terms were and continued to be neither certain nor agreed; there had been no due diligence, without which it is inherently unlikely that a final agreement would have been struck; and no shares were issued or transferred. Accordingly:

i) the contract was subject to satisfactory terms being agreed (and documented) in respect of shareholder protections (and those terms were being negotiated with the assistance of the parties' legal advisors). Although I acknowledge that Mr Seneschall's email of 18 April 2019, in which he said there was "*no mad rush*", was not necessarily the language of one who thinks that documentation or further agreement is essential, it was equally consistent with a belief that in due course an agreement would surely be possible;

ii) although not part of the discussion with Market Fresh, there was some uncertainty as between Mr Seneschall and Ms Jones about the source of the investment shares, and whether Market Fresh was to acquire shares by purchase from Mr Seneschall as well as directly, issued by the Company (and in this respect, there was some communication between Mr Seneschall and Ms Jones, but not Market Fresh);

iii) if shares were to be sold by Mr Seneschall, there was no agreement as to his use of the purchase price, or part of it (and if only part, the use of the rest).

187. Third, Mr Marshall's proposal was made "*Subject to successful acquisition of my Irish asset (expected to complete mid-May)*". There was a dispute between the parties about the significance and meaning of that statement, and whether, if it comprised a condition, it was subsequently waived, for example, when the investment payments began and/or Market Fresh first sought (in about May/June 2019) to borrow from Barclays.

188. There was scant evidence about the progress or ultimate fate of the proposed sale of property in Ireland. Mr Marshall said that it did not complete, and that he told Mr Seneschall that fact "*at some point*" (although he could not recall when); Mr Seneschall said that he was never told. In any event, payments began, and in due course the ISHA was executed, and shares were issued; on 22 August 2019, Barclays agreed to lend. Furthermore, Mr Marshall gave evidence to the effect that he would in any event, regardless of the Irish transaction, have agreed to invest (or would have proposed an investment of) £300,000 (the first tranche referred to in his email of 17 March 2019), although of course that more limited

transaction (£300,000 in return for a 10% shareholding) was never discussed or agreed.

189. In my judgment, the proposal made by Mr Marshall by email on 17 March 2019 was intended to be and was conditional on the sale of the Irish property. That seems to me the only sensible reading of his words. But having said that, at some later point, now obscure, but *ex hypothesi* no later than 7 August 2019, the condition was waived (and the ISHA came to govern the transaction). Logically however, payment before that date did not in itself entail waiver of the condition; prior payments were made in anticipation of a contract yet to be concluded, and were therefore necessarily consistent with the absence of a contract.

190. Fourth, the existence of the alleged contract is inconsistent with the terms of the ISHA. Had there been such a contract, Market Fresh would have been contractually entitled to a shareholding before entering the ISHA, and would have been beneficially entitled to the shares for which it had already paid, as well as being subject to a contractual obligation to pay a certain further outstanding sum in return for further shares. That is inconsistent with the ISHA because:

i) the language of the ISHA is prospective or present: the agreement was to invest on the terms set out in the ISHA (not on terms previously agreed); it was agreed that Market Fresh, by Clause 2.2, "*shall subscribe*" for Subscription Shares (rather than that it had previously done so); although some such shares had already been "*paid for*" (and receipt of that sum was acknowledged) they had not been issued or

allotted, and the Company's only members and beneficial owners as at 7 August 2019, were expressly warranted, by Clause 5(a), to be Mr Seneschall and Ms Jones;

ii) expressly, Market Fresh bought, for £1.00, an option to acquire a further 58 ordinary shares, the First Option Shares, for £203,000; but manifestly, by that provision, it was under no obligation to do so, and indeed, even its right to do so was agreed to expire on 30 September 2019 (rather than comprising an obligation to do so before the end of August 2019); I note that Mr Seneschall pleads, positively, at paragraph 26 of the A/P, that in the period between 7 August and 30 September 2019, "*Market Fresh exercised the option contained in clause 4 of the ISHA in part. It subscribed for 24 of the 58 First Option Shares (amounting to a further investment of £84,000 of the £203,000 still outstanding from the March 2019 Proposal, such that the total investment as at the end of September 2019 was £581,000 of the £700,000 agreed)*." (Emphasis added.) Although therefore the pleaded case makes reference to the "*£700,000 agreed*" (undoubtedly agreed as to the price), it is implicit in that pleading that Market Fresh was not fulfilling a binding contractual obligation to invest;

iii) on any view, even if there had been a prior contract on the terms of the March Proposal, the ISHA replaced it prospectively (as further underlined by Clause 21).

191. Finally, I note that in the A/P, neither at paragraph 15, which introduced the March Proposal, nor elsewhere, was the March Proposal said to have amounted

to a contract; indeed, the language of the defined term itself suggests that there was, at that point, no intention to advance such a case (which subsequently appeared for the first time in the Amended Points of Reply ("**the APoR**")).

192. My conclusion on this issue has four consequences.

i) First, the payments made by Market Fresh before 7 August 2019, were made in anticipation of an intended contract; it is unnecessary for present purposes to analyse their character in any further detail (or to conclude that they were merely "lent", as was Market Fresh's case, a characterisation that would I think require more than proof of mere payment and receipt); suffice to say, had the contract (the ISHA) not eventuated, Market Fresh would doubtless have had grounds (for example, in restitution) on which at least to argue for repayment.

ii) Second, connected with that, Market Fresh's counterclaim is not, to the extent of payments made before 7 August 2019, inevitably defeated. As it happens, as I explain below at paragraph 486 onwards, the counterclaim fails in any event, for other reasons.

iii) Third, prior to the ISHA, Market Fresh was not a member of the Company, or entitled to a shareholding, or the beneficial owner of any shares.

iv) Fourth, prior to the ISHA, regardless of what Mr Seneschall might have anticipated or wished for, there was no investment agreement with Market Fresh, and therefore no extant contractual terms available to be

broken, whether "unfairly" or "unlawfully", for the purposes of Mr Seneschall's case.

[E6] <u>The Redemption Agreement: the Allegation</u>

193. The second disputed contract was the Redemption Agreement, pleaded as comprising: "*… a condition of Market Fresh's investment in Trisant that the Nucleus Loan would be redeemed by 31 March 2020, at the latest, in return for which Market Fresh would acquire 10% of the Petitioner's own shares in Trisant*".

194. In the APoR, at paragraph 28, it was further described as "*an agreement collateral to*" the HoTs, and "*which did not form the subject matter of the ISHA*". Although in Closing, Mr Northall submitted that the Redemption Agreement was an enforceable contract, there was no separate claim to any contractual remedy for its breach.

195. Mr Seneschall's case was therefore that the Redemption Agreement was a separate and discrete oral contract, outside and beyond the terms and subject matter of both the ISHA and the HoTs, made by him with Market Fresh, by which Market Fresh promised, in any event (and regardless, presumably, of the required amount) to satisfy the Company's obligations to Nucleus by 31 March 2020, at the latest, in return for which it would acquire 10% of Mr Seneschall's own shares in the Company.

196. In Mr Northall's Closing (albeit not obviously pleaded) it was said that if the Redemption Agreement was not an enforceable contract, then in the alternative, there was "*an equitable restraint preventing the Respondents from disenfranchising the Petitioner at a time when the Company's success would*

affect his rights under the security, without also redeeming the Nucleus loan or otherwise releasing the Petitioner from his security".

197. That submission was based on Mr Seneschall's alleged reliance on Market Fresh's promise to release him from his security obligations when: (i) he agreed to roll-over the Nucleus Loan in August 2019; and (ii) he agreed to refinance the Loan through Reward in July 2020, rather than "*... simply demanding the satisfaction of his rights under the original Redemption Agreement*".

198. This additional argument, it seems to me, went to a different point, regarding exclusion rather than redemption. In other words, it was not an argument that Market Fresh was bound to effect redemption, as a separate or discrete obligation, but that it was bound not to exclude Mr Seneschall unless it effected redemption, and would be unfair to do so. Further, it depended on a number of elements, including that there was in fact a contractual Redemption Agreement which Mr Seneschall might have enforced, but chose not to, that being (as I understood it) the reliance that would make unconscionable Mr Seneschall's disenfranchisement. Given that the restraint was a suggested alternative to the contractual claim, there was therefore an internal contradiction within the submission.

199. As to the circumstances of its creation, in the A/P, at paragraph 34, the existence of the Redemption Agreement was pleaded to have been "*evidenced*" by various stated matters (rather than, as might ordinarily be expected, to have been made on a specific occasion between specific persons, in specific terms). The alleged matters of evidence were as follows.

i) First, that there was an "*oral agreement reached in June and July 2019*" between Mr Seneschall and Mr Marshall that Market Fresh would acquire a 30% shareholding in the Company in return for payment of £1.04 million, of which £340,000 would be to repay the Nucleus Loan, in return for which Mr Seneschall would "*sell to Market Fresh 10% of his own shares*".

ii) Second, the terms of the "*Investment Breakdown of 13 June 2019*".

iii) Third, the terms of the Barclays Presentation.

iv) Fourth, the representations made by Mr McCormick to Mr Seneschall, to persuade him to "*forbear redemption of the Nucleus Loan from 7 September 2019 until 31 March 2020 at the latest*".

v) Fifth, Mr McCormick's email to Mr Marshall of 30 August 2019.

vi) Sixth, "*Market Fresh's inability to achieve majority ownership of Trisant in the absence of the Redemption Agreement. Without purchasing 10% of the Petitioner's shares in Trisant in exchange for discharging the Nucleus Loan, the Petitioner would have remained as a majority shareholder in all cases*."

[E7] <u>The Redemption Agreement: Discussion</u>

200. In my judgment, there was no contractually binding, collateral Redemption Agreement (or therefore arising out of it, a connected "*equitable restraint*"); the submission was unarguable.

201. The material evidence and my findings are as follows.

202. Although I have held that the March Proposal did not comprise a contract, had it done so, it would have been a contract made without reference to the Nucleus Loan, or to Mr Seneschall's desire (and the Company's need) to redeem that Loan. The emails referred to above at paragraphs 182-184 make no reference to either Nucleus, or to the possibility of shares being sold directly by Mr Seneschall to Market Fresh (although I accept that there was a discussion between Mr Seneschall and Ms Jones about such an eventuality) or to payment to Mr Seneschall rather than the Company, or to the terms on which Mr Seneschall might then make payment to the Company or Nucleus. There was however an agreement in principle at that point, for the acquisition of a 20% shareholding in return for an investment of £700,000, to be paid in two tranches.

203. On 18 April 2019, Mr Seneschall sent Mr Marshall a draft shareholders agreement and in addition, offered Mr Marshall/Market Fresh a further 10% of the Company's equity "*in the next month or so*", to take Market Fresh's shareholding up to 30% by the end of August 2019, for an additional £350,000, such that the total investment sum would be £1,050,000.

204. As mentioned above, a meeting took place on 14 May 2019, in Soho, London, between Mr Seneschall, Mr Marshall and Mr McCormick. There were no notes of the meeting.

205. Mr Seneschall's pleaded case, supported by his witness statement, was that at that meeting he told Mr Marshall and Mr McCormick that the second (£400,000) tranche of the proposed investment was needed by the end of August 2019, "*to repay the Nucleus Loan*" and provide £60,000 of working capital (in

other words, that the first tranche, of £300,000, would be sufficient to bring the Factory to completion).

206. In Closing, Mr Northall submitted that at the meeting, there was discussion of the 18 April 2019 offer of a further 10% shareholding, "*all to come from Mr Seneschall's own stake, taking Market Fresh to 30% shareholder … Mr Seneschall to 50%, and Ms Jones to 20%*", and agreement that if Mr Marshall decided to acquire those additional shares, he would do so by means of the loan at that time being sought from Barclays. I pause to note that the 18 April email did not offer Mr Seneschall's own shares. It merely said, in relevant part: "*I will add at this point, Lynne and myself have discussed things at considerable length over the last several weeks and we would be happy to release more equity, an additional 10%, to you in the next month or so, based on a valuation of £350,000, if that is of interest, bringing your shareholding up to 30% by the end of August, given the already agreed to 10% for £400,000 by the end of that month.*" It seemed to me that the submission that the proposed 3rd tranche of investment would somehow be in return for Mr Seneschall's shares (reflecting presumably, that it would be for the purpose of paying the Nucleus Loan) was inconsistent with the pleading that the 2nd tranche of £400,000 would be enough for that purpose.

207. Be that as it may, in respect of the meeting on 14 May 2019, I consider it more probable than not:

i) that there was discussion of the 18 April offer; there is no reason why that offer, recently made and important to the Company in terms of funding, would not have been discussed.

ii) that Mr Marshall referred to the prospect of borrowing from Barclays, and said that Market Fresh needed to do so in order to make the desired investment; that he would have referred to Barclays is consistent with the production at about that time of the Barclays Presentation.

iii) that by 14 May 2019, Mr Seneschall must have known - and is likely to have said - that the cost of completing the Factory would be more than originally envisaged (since on any view, as he pleaded, "*it was clear by June 2019, that* [the Company] *would need another significant injection of cash to complete the building works and to have enough money to operate the business once the works were concluded*"); I do not consider that what was "*clear*" "*by June*", would not have been equally or at least reasonably clear by 14 May).

iv) that there was discussion about repayment of the Nucleus Loan - relatively imminent, and important both to the Company and Mr Seneschall - and about the need to make a further investment to allow repayment. In respect of that, it is probable that Mr Seneschall said (it being a matter of particular importance to him) that he would be willing to agree, as between himself and Ms Jones, a disproportionate (rather than *pari passu*) dilution of his shareholding; that possibility is reflected in the Barclays Presentation, which showed Market Fresh as holder of a 30% shareholding, Mr Seneschall as holder of a 50% shareholding, and Ms Jones as holder of a 20% shareholding (and therefore, of a greater part, relative to Mr Seneschall, than she held at the outset).

v) however, although the Barclays Presentation was consistent with the suggestion made by Mr Northall that the proposed borrowing was in order to buy that additional shareholding, it does not state or demonstrate that fact; on the contrary, borrowing was sought, in the sum of £850,000, to "*pay for and provide the equipment to get the factory operational in return for an initial stake of 30%*", described as the "*Deal Structure*".

vi) neither does the Presentation demonstrate that in order to acquire 30% (which was not the eventual transaction in any event) Market Fresh would have had to acquire shares directly from Mr Seneschall whether in return for payment to Nucleus or otherwise (any more than it had to do so in order to become the holder of a 50.1% shareholding); that capital structure, and the alteration of the position as between Mr Seneschall and Ms Jones, could have been achieved by other means, as in the event it was.

208. On 6 June 2019, Mr McCormick emailed Ms McKendry-Gray and Mr Marshall in respect of the shareholders' agreement then being negotiated. In that email, amongst other things, he said:

"*General terms agreed at a meeting on 14/05/19:*

• Dave M to invest £700,000

- £300,000 immediately. As mentioned above c.f270,000 has been paid already and I will share details once Jodie C has collated for me.

- £400,000 by end of August.

• For this investment Dave will have 20% share in the factory and become the 3rd member of the board.

• No board decisions to be made without Dave's input.

> • *Dave to have first refusal to buy out the factory as and when John Seneschall decides to sell.*
>
> • *Dave would like to introduce a potential additional partner alongside himself/Market Fresh in return for a further 10% stake.*
>
> • *I will take up the position of Sales Director for the business, and be Dave's representative on a day to day basis. That said, I will hold no voting rights and Board decisions specifically require Dave's input and vote*."

209. From that email, and in the circumstances, I conclude that as at 14 May 2019:

i) there was no agreement of any sort in respect a "3rd tranche" of shares but such was undoubtedly a possibility (indeed, the introduction of an additional partner for that purpose seems to have been contemplated) and had been discussed as affecting (in terms of consequent % shareholdings) Mr Seneschall but not Ms Jones.

ii) there was therefore and in any event no agreement about repayment of the Nucleus Loan, which even on Mr Seneschall's case, was to be connected with the 3rd tranche, yet to be agreed.

210. I agree however with Mr Northall that Mr Marshall did not positively "*decline*" the offer of an additional 10% shareholding at that point, and it was common ground that in fact, Market Fresh did thereafter apply to Barclays for a loan, and that the Presentation reflected that it was a 30% shareholder (as it might have thought or intended that it would become, in the event of being lent what it sought).

211. On 11 June 2019, Mr Seneschall made another request for money (£100,000 by the end of the month). Albeit by that time £290,000 had been paid, only £2,163.50 was in the Company's bank account at the close of the previous day. He also said, "*I am more than happy to put together a projected cash*

requirement for the next few weeks as last time so things aren't coming out of the blue." Later that day, Mr McCormick wrote to Mr Marshall, and said, amongst other things, "*Can you find 10 minutes acknowledge Johns email regarding progress please, and take him up on the offer of putting together the cash projection for the next few weeks. I would request this to the end of July, which is the time period agreed for the next phase of £400,000. Please cc me in the email in order for me to manage. For your own due diligence and on your behalf as a proactive investor, I am very keen for us to be involved in the accounting side of things, mainly in this start up phase to ensure we have the right checks in place against investment and proposed spend*."

212. On 13 June 2019, the promised cashflow projection was produced and sent by Mr Seneschall to Mr McCormick and Mr Marshall: "*As requested please find below a broad outline of where the next two tranches of money from Dave's investment will be spent. Clearly, these are broad areas and there needs to be flexibility with some of the sums, but it gives a very clear flavour of what we need, when*". Although the email assumed payment of the 3rd tranche, it had not by then actually been agreed.

213. Mr Seneschall's email set out further costs, beginning in the week commencing 17 June, and ending in the week commencing 5 August, of £335,000, plus £340,000 in respect of the Nucleus loan, plus others in respect of which "*I am sure there will be a greater level of clarity over the coming few weeks. We know for example we will need to pay TetraPak another significant lump sum, (£60,000 plus) but we don't know when for sure. There will be more required by builders etc. but this won't be required until end of August/early September*

as this is the basis of the deals done with the overall building contractors, TPS360". He also said that, "*By late July I expect to have some money coming into the business from customers, which will take some of the heat out of the equation and as yet haven't factored this in to my calculations as again I'm planning on not worst case but pessimistic scenarios*" – although, as I have said, that transpired not to be the case.

214. Accordingly, the total sum required was at least £675,000, plus other sums. The 2nd and 3rd tranches then under discussion amounted to £750,000 (£400,000 plus £350,000). It had therefore certainly by then become clear that the first 2 tranches were required for the completion of the Factory, and that payment of Nucleus would require more.

215. This information enabled Mr McCormick to create the "*Investment Breakdown*" document (as referred to by Mr Seneschall in his A/P as "*evidencing*" the Redemption Agreement) which he sent to Mr Marshall, saying that it "*totals the £700,000*". That document also enables further understanding of what was discussed on 14 May, because it included commitments under the heading "*Payments indicated as due: 14/05/19 (meeting in Soho Square, London)*" amounting to £300,000. It tabulated the contents of Mr Seneschall's email of earlier that day, and added £65,000 in respect of TetraPak (albeit included in the first £300,000) meaning that the total, excluding payment of Nucleus but in addition to the £300,000 understood to be due as at 14 May 2019, was indeed £700,000. Mr McCormick therefore at that stage appears to have understood that £700,000 would be enough (certainly was required) to complete the Factory (and - an issue dealt with below - to pay the whole TetraPak deposit) and knew

that it would not be enough to pay Nucleus. In any event, in my view, it does nothing to support the existence of the alleged Redemption Agreement.

216. On Monday 24 June 2019, Mr Seneschall emailed Mr Marshall (copying in Mr McCormick) and attached a revised list of cash requirements for the next few weeks totalling £338,000 (plus £340,000 to repay the Nucleus Loan), a list essentially the same as that sent on 13 June 2019.

217. Mr Seneschall reiterated that two investment tranches were needed, one to cover the building and the second one in early September 2019 to cover the loan re-payment: "*Effectively there are two tranches we need, one covers the building etc and the second one in early September is to cover the loan re-payment. Clearly, if you can't/don't want to take the option up on the additional 10% for £350,000 we need to make alternative arrangements to cover the loan repayment off (end August), there are several options open to us but I need a plan in place sooner rather than later*."

218. Mr Marshall accepted in cross examination that Mr Seneschall had presented him with a binary choice at this point: either to take the additional 10% for £350,000, or that Mr Seneschall would (or would have to) seek investment elsewhere. Again though, he appears to have maintained that £700,000 would meet the cost of building an operative Factory.

219. There must then have been direct communication between Mr Marshall and Mr Seneschall because a few hours later, on 24 June at 4:30pm, Mr McCormick wrote to Mr Marshall and said, "*Following our call, I took from it that having spoken to John, you have confirmed that the £350k due at the end of summer*

might not be possible. However if everything comes through with Barclays, this will bridge to that point when you should have the funds available."

220. The thought seems to have been to use the proposed loan to make the payments required in the immediate future, but that ultimately the investment would be funded from a different source, perhaps the sale of the property in Ireland. In any event, plainly, there was still no agreement regarding investment of a 3rd tranche, whether in respect of Mr Seneschall's own shares, or Nucleus, or otherwise.

221. On 2 July 2019, there was a further meeting between Mr Seneschall, Mr Marshall and Mr McCormick, in London. As I have said, there was an issue regarding the events and mood of that meeting. As to that, I do not accept, as was the evidence of Mr Marshall and Mr McCormick, that the meeting was notably acrimonious, or that it was at this meeting that Mr Seneschall revealed (a "*bombshell*") that even £700,000 would not be enough to make the Factory operational, or that Mr Marshall said that the Nucleus Loan would have to be refinanced by Mr Seneschall, or that it was "*because of the requirement for additional funds, and because the Irish asset hadn't sold*" that Market Fresh approached Barclays. As to that:

i) plainly, Market Fresh was already looking to Barclays by 2 July 2019; that fact was not caused by the need for "*additional funds*", but in order to pay the £700,000, or part of it (or to bridge until Market Fresh was otherwise able to invest).

ii) in addition, it was not until late August that the need to refinance the Nucleus Loan became a certainty and was raised with Mr Seneschall; as

at 2 July, and for some time after that, payment of Nucleus in September 2019 was thought at least to be a possibility.

iii) moreover, if the funding requirements had changed radically as a result of that meeting, the Investment Breakdown would have reflected that fact, which it did not.

222. Further, I accept Mr Seneschall's case that he took to that meeting an updated costs forecast with the Market Fresh "*Investment*" shown as £1,050,000 (although Mr Marshall denied having seen the forecast, and Mr McCormick said he could not recall). The forecast costs were substantially similar to those outlined by Mr Seneschall in previous emails, including that of 13 June 2019.

223. However, I do not accept Mr Northall's submission in Closing, that in "*early July 2019, Mr Seneschall made enquiries with possible lenders to arrange alternative financing to redeem the Nucleus Loan. Contrary to the assertions made by* [Mr McCormick's] *Counsel in cross-examination, this was not because Mr Marshall had rejected Mr Seneschall's offer for the additional 10% stake at the 2 July 2019 meeting , **but because Mr Seneschall was not entirely sure that he wanted to sell more shares to Market Fresh, particularly given how slowly Market Fresh had paid funds to date (only £359,981.80 of the agreed £700,000 having been paid as at this date)***." (Emphasis added.)

224. In my view, that is plainly wrong: Mr Seneschall started to look for alternative lenders in early July because, as he knew, the 3rd investment tranche had not been agreed and as a result he had no choice but to consider an alternative. He acted not because the offer had been declined, but because it had not been accepted; but the suggestion that Mr Seneschall had thought better of selling

more shares to Market Fresh is highly implausible. The email to Mr Williams from Mr Seneschall said to support the proposition said simply that "*I am looking at finding a way of dealing with the loan against our house without selling any more shares to Dave. As such I need to provide a couple of people with a set of management accounts, along with an income projection*."

225. On 24 July 2019, Ms Rassell emailed Ms Coyne (copying in Mr Marshall). She said that her "*credit team* [was] *supportive in relation to* [her] *initial report*" but asked for "*a schedule of investment of what the funds were being used for*"; her request was premised on the (incorrect) foundation that funds were being "*on-lent to purchase the assets via the subsidiary company*". She also said that having "*re-checked the EFG scheme*", and in order to meet its criteria, "*the ownership by the parent company needs to be more than 50% at the outset*". This seems to have been the point at which Mr Marshall discovered that Market Fresh would require majority ownership, rather than, for example, the 30% stake referred to in the Presentation.

226. Mr Marshall replied on the same day. He said, "*It might be possible for me to acquire 50% shareholding so I will revert on that within 24 hours*."

227. On 26 July 2019, Ms Rassell emailed Mr Marshall again. Amongst other things, she raised the possibility of achieving the same (borrowing) end by different means: "*… if Market Fresh could demonstrate a working capital need for itself - perhaps to pay upfront for product this would mean that the requirement stayed within Market Fresh or can any of the assets be purchased under the ownership of Market Fresh - this would remove the ownership complication?*

Alternatively given the delay are there staffing costs which would now be funded through Market Fresh - again showing a working capital need?"

228. These possibilities were not shared with Mr Seneschall, or the Company. However, I do not consider that to be a matter of any significance. Market Fresh was not under an obligation to share this information; it was not under an obligation to borrow on terms most advantageous to Mr Seneschall; and in turn, Mr Seneschall (and the Company) were not under an obligation to sell a majority stake to Market Fresh, or indeed, to accept its investment on any terms. Moreover, it was not dishonest of Mr Marshall to tell Mr Seneschall that Barclays required ownership of more than 50%. In order to borrow under the EFG Scheme, that is exactly what Barclays required.

229. On 26 July 2019, Ms McKendry-Gray emailed Ms Williams at Darwin Gray, said she had "*tweaked*" the terms of the document that became the ISHA, and also said, "*I understand more money is being asked for, for salaries, and I have discussed with our finance team that we really cannot/won't send any more cash now as we've got no written contract in place. I'm hoping we can at least obtain signatures today as we'll have to put a stop on the salaries being paid in the factory otherwise*."

230. On the same day, 26 July, Mr Marshall said, in an email to Mr McCormick and others at NWIG and Market Fresh, "*I agree we need to pay the salaries. We need goodwill and we have it at the moment. John needs to sell at least 40% to get himself clear anyway so 50.1% isn't a massive stretch. To regain strength all we have to say is we will not underwrite the builder and the whole thing will grind to a halt. If we don't I think the 50.1% will become very difficult*." I

understand those words of Mr Marshall to mean that without payment, without "*goodwill*", Mr Seneschall would be unlikely to agree to Market Fresh becoming the majority shareholder, in which case, Market Fresh would be unable to borrow from Barclays. His aim was not control of the Company *per se*, it was majority ownership in order to secure the borrowing which Market Fresh needed.

231. In his Closing, Mr Northall submitted that the email referred to above at paragraph 230, and "*Mr Marshall's reference to Mr Seneschall selling at least 40% to get himself clear could only be a reference to (a) Mr Seneschall diluting his own shareholding by a further 10% in addition to Mr Seneschall diluting his shares by 30% pari passu to LJ's 10% and (b) to get himself clear of the Nucleus Loan.*"

232. I do not agree with that submission. It is a mistaken attempt to introduce the force of logical inevitability into Mr Seneschall's case. The reference to a sale of "*at least 40%*" is likely to have been (like the reference to 50.1%) a reference to the shareholding to be acquired by Market Fresh, not a reference to Mr Seneschall's position in isolation. Mr Marshall's email was about whether Mr Seneschall would agree to Market Fresh becoming the majority shareholder (in order to raise the investment required, amongst other things, to pay Nucleus, as well as meeting the Company's many other expenses) not about whether Mr Seneschall would agree to any particular impact on his own position.

233. But in any event, even if it did require (and Mr Marshall knew that it would require) Mr Seneschall to suffer a greater dilution (because of the limits of Ms Jones' willingness to give up ownership) that fact does not demonstrate the

existence of the Redemption Agreement, as much as that Mr Seneschall had a particular personal reason (not shared by Ms Jones) to agree to the Market Fresh majority ownership proposal (which was yet to be made). Ultimately, Market Fresh was indifferent to the impact of its own shareholding on the position as between Mr Seneschall and Ms Jones; it was considering the position from its own perspective, and whether (taking account of the position of Mr Seneschall and Ms Jones) it could achieve its aim.

234. The suggestion that the Redemption Agreement was somehow logically necessary is demonstrated to be false by what happened subsequently:

i) Market Fresh acquired shares (pursuant to the HoTs) from the Company itself, not from Mr Seneschall, and was thereby comprised majority shareholder.

ii) whether those shares were acquired on terms regarding the Nucleus Loan is an issue logically independent of whether Market Fresh became the majority shareholder: it would have been and was perfectly possible to acquire a majority holding without accepting any variety of obligation in respect of the Nucleus Loan.

iii) whether the acquisition of those shares by Market Fresh had the same impact on Mr Seneschall and Ms Jones, diluting both to the same extent, was also an issue independent of whether Market Fresh acquired a majority – in fact, it was primarily an issue as between Mr Seneschall and Ms Jones (it being of no material concern to Market Fresh) and an issue in respect of which Mr Seneschall had a particular driving interest, which was to ensure that the investment would be: (a) forthcoming, and

(b) forthcoming in an amount sufficient to anticipate payment of the Nucleus Loan, in respect of which he was secondarily liable. In other words, Mr Seneschall had a powerful motive to agree to a dilution greater than Ms Jones, whilst at the same time, she had an unwillingness to be reduced *pari passu*, having only been a 25% shareholder in the first place.

235. Mr Seneschall's evidence was that at the end of July, whilst on holiday, he was telephoned by Mr Marshall and told that the availability of the loan from Barclays was contingent on Market Fresh owning 50.1% of the Company's shares. He said that he spoke to Ms Jones about that prospect in the week beginning Monday 29 July. His case was that the Redemption Agreement "*crystallised*" on Monday 29 July. However, that cannot be correct: at that time, there was plainly no agreement, of any sort, beyond an investment of £700,000 in return for a 20% shareholding (which I have held at that point to have been non-contractual). There had by then been no discussion of the price of acquisition of majority ownership; the parties were in the course of negotiating. I do not accept that Mr Seneschall did not progress other investment opportunities because he was confident that the acquisition by Market Fresh of majority ownership would entail, in any event, payment of the sum required to pay Nucleus.

236. On Tuesday 30 July 2019, Mr Williams emailed Mr Seneschall to say that combining the Seneschalls' salaries, the broker's "*feeling*" was that he could get enough to cover the repayment of the Nucleus Loan using the free equity in their home. In other words, Mr Seneschall was contemplating a re-mortgage of his

house to a very significant degree, and to service that re-mortgage would be dependent on a continuation of income from the Company. His position was a most precarious one. Mr Northall's submission about this was that, "*In context, it is clear that* [Mr Seneschall] *did not progress the discussion with alternative lenders because the day before,* [Mr Marshall] *had informed him that* [Market Fresh] *needed to acquire 50% of the business to borrow money from Barclays, which money would necessarily include £350,000 for* [Mr Seneschall's] *own shares, which would be used to pay off the Nucleus Loan*."

237. As I have said, I do not accept the suggested conclusion: at most, Mr Seneschall stopped investigating the possibility of re-mortgaging because of a hope (no doubt well founded) that Market Fresh would (if he, Mr Seneschall, agreed) buy a 50.1% shareholding, which would (again, he no doubt hoped and reasonably anticipated) be enough to meet the Nucleus repayment (as well as that outcome being made more likely by the fact of Market Fresh being a substantial shareholder and therefore being commercially bound to wish to support the Company, rather than allow its collapse).

238. The agreement in principle regarding the acquisition of a 50.1% shareholding was probably reached on 2 August 2019, at the meeting in Soho. Following the meeting, Mr McCormick texted Mr Marshall and said: "*Post meeting and walking to Oxford Circus with John, it feels like there is a realisation that why would they not do the 50.1%/how can they avoid doing it. Reality as you pointed out, 49.9% with no money in is a pretty good deal*."

239. Mr Northall submitted that the "*only credible interpretation of this text message*" is that "*no money in*" meant "*paying off the Nucleus Loan secured*

against the Seneschalls' home". I do not disagree with that interpretation, but it does not mean that the Redemption Agreement was made; it means, in my judgment, no more than that the parties anticipated that the investment required to acquire majority ownership would likely be enough to pay Nucleus; it does not entail a contract to pay that sum in any event, regardless of the Company's circumstances (whether to Mr Seneschall, or to or *via* the Company). This is perhaps where Mr Seneschall was mistaken - he mistook (if he did) the promise or prospect of investment, for a certain and enforceable promise of payment to Nucleus; but the two were not the same. In any event, Mr Seneschall had no real choice, as Mr McCormick said.

240. I also reject Mr Seneschall's pleaded case that Mr Marshall's "*statement relating to Barclays' purported requirement was materially false and/or to the extent that Barclays had stipulated that Market Fresh required majority ownership of Trisant, this only arose because of the nature of the loan sought by Market Fresh and misrepresentations made by David Marshall and Market Fresh to Barclays as to (a) the purpose of the loan (to buy equipment for use by Trisant); and (b) an agreement that Trisant would become a wholly owned subsidiary of Market Fresh in 3-5 years in any event*."

241. There was no evidence that Market Fresh could have raised the money in a different way but chose to do so through an EFG for some wrongful purpose; in any event, Mr Seneschall could have refused the investment on the terms suggested. The suggestion that Market Fresh concealed from Mr Seneschall that it was seeking to borrow under the EFG Scheme or that had he been told, he would have sought investment elsewhere, or "*insisted upon Market Fresh*

seeking finance through more traditional lending", is fanciful – Market Fresh was under no obligation to explain the source of its borrowing, and there was no substantial evidence of any other available investment. Market Fresh was not under any obligation to pay more than it paid, whether before or after the ISHA (at any rate, before the HoTs, and even then, the only consequence of a failure to pay was to return shares unpaid for).

242. Furthermore, Mr Marshall did not suggest borrowing from Barclays as a means of facilitating repayment of the Nucleus Loan – the loan was required because Market Fresh could not otherwise afford to pay even the whole of the first £700,000 without the sale of the Irish Asset, or some alternative source of available funding. The proposition was not that Market Fresh would get the loan and pay Nucleus; it was that it would get (if possible) the loan to bridge until other funding was available and/or to make an investment of more than £700,000 which would, circumstances permitting, enable payment of Nucleus, but without creating an obligation in contract to ensure or guarantee its redemption.

243. Furthermore, I do not accept the argument that having offered an additional 10% (of "his own" shares, by the 18 April 2019 email) in return for £350,000, which he intended to use to redeem the Nucleus Loan, the greater investment agreed in principle on 2 August 2019 "*necessarily*" included that which had been previously proposed (but not agreed); that supposed "necessity" is simply absent.

244. In fact, in the altered circumstances, a new agreement was (ultimately) forged, for a larger sum, from or using which Mr Seneschall believed, perhaps perfectly

reasonably, that repayment of Nucleus was a likelihood. On that footing, he agreed to the proposal made. The transaction was not 10% of Mr Seneschall's shares for an agreed sum, plus 20.1% of shares issued by the Company for another sum; it was (as recorded in the HoTs) a shareholding of 30.1% (comprising shares issued by the Company) in return for £1.1 million.

245. Returning to the pleaded "evidence" referred to above at paragraph 199, I therefore disagree that during June and July 2019, there was an agreement as set out at paragraph 18 of the A/P, that £1.05 million would be paid by Market Fresh in return for a 30% shareholding, including 10% from Mr Seneschall himself, and I reject the submission that somehow extant but concealed within the agreement in principle regarding majority ownership, was an agreement regarding payment of £350,000 to Mr Seneschall, or hypothecated for the purpose of paying Nucleus. None of those suggestions bear scrutiny.

246. As I have said, there was at this point (about 2 August 2019) still no agreement regarding the price to be paid by Market Fresh for the additional shares it required (and indeed, Barclays had not yet agreed to lend anything). As to that, on 2 August 2019, after their meeting, Mr Seneschall emailed Mr Marshall and Mr McCormick, and said:

> "*As we all agreed, the next critical step is to get things up and running as soon as possible, to which end, I've had a brief chat with Lynne and shared with her the thinking behind the next tranche of shares to be taken up and by Market Fresh and as I thought she is in broad agreement that it is both the right thing to do and with the right partner.*
>
> *As such, we are in a very good place all round.*
>
> *However, having thought about things on the journey home, I think there's a couple of additional elements we need to include as part of the overall deal. Nothing which is overly dramatic, but elements which allow Lynne and myself to get a little more long term value out of the share sale.*

So, I think the total 50,1% sale should come in at £2,000,000, so effectively increasing the value of the 20.1% we've not really touched on before to nearer £47,500 per original share. My reasoning here is if we need £1,800,000 or thereabouts to run the business properly, some money coming to us both would sweeten the pill slightly and be politically expedient from our partners view. (David, I know you can see Sally asking what's in it from our perspective and this would go some way to dealing with that negative). Additionally, I think we would like an increase in salaries, nothing huge, but we are both running well below where we need to be and finally I think we need to build in a couple of employment options which I am sure you already have in place with Market Fresh etc such as health insurance, company car options and for the sake of the business key man insurance cover.

Clearly, I am raising these things now as food for thought. As you know, we are very flexible and very adaptable but I feel giving away 50% of the company for what I'm sure will prove in time to be quite cheaply, needs a little sugar coating now just to make the last two years feel worth the effort."

247. Again, whilst true that this offer built on the fact of the previous (unaccepted) offer of a 30% shareholding in return for £1.05 million, that foundation was no more than part of the means of calculation of a single, undifferentiated sum; it did not entail a different price per share depending on how many had yet been issued (as is plain from the HoTs later agreed).

248. On 7 August 2019, the ISHA was made. The existence of the alleged Redemption Agreement is inconsistent with Clause 21, the entire agreement provision. I do not agree Mr Northall's submission that the "*subject matter*" of the alleged Redemption Agreement was or would have been other than, or beyond or outside that of the ISHA. The subject matter of the ISHA was (or certainly included) the acquisition by Market Fresh of shares in the Company, whether Subscription Shares or Option Shares. An agreement that it would acquire a further 10% holding (beyond the 200 Subscription Shares in return for £700,000) on terms obliging it (to Mr Seneschall) to redeem or enable the Company to redeem the Nucleus Loan in any event, regardless of the financial

condition of the Company, would be an agreement directly concerning Additional Option Shares. As such, an extant, contractually binding Redemption Agreement would be inconsistent with the terms of Clause 4 (premised on there being no such extant contract) and would concern its very subject matter: it cannot be said that there was an option (or not yet an agreement) to acquire more shares, whilst at the same time saying that there was such an agreement.

249. Indeed, Mr Northall's argument in this respect was contradicted by his own further argument that when, subsequently, the parties reached an agreement for the purchase by Market Fresh of a further 30.1% of the Company's issued shares (as recorded in the HoTs) that agreement effectively incorporated the Redemption Agreement in respect of a part - 10% - of those shares. If the additional 30.1% were Additional Option Shares, then the 10% were necessarily also Additional Option Shares, and were thus part of the ISHA's subject matter.

250. In any event, had there been such a contract, it is likely as a matter of fact that it would have been recorded in the ISHA, but it was not. That fact makes it less likely that the Redemption Agreement was made. Neither is the Redemption Agreement referred to in the HoTs which it likely would have been if contractually agreed.

251. Mr Northall also relied on a message sent by Mr McCormick on 8 August 2019, to Mr Marshall: "*I've spoken to John again and reiterated how important balance sheet is, re Barclays coming in and allowing everything else to flow*." He suggested that "*allowing everything else to flow*" was a reference to allowing repayment of the Nucleus Loan from the Barclays loan. As to that, he might

conceivably be correct, but again, it does not demonstrate the Redemption Agreement; far more likely is that Mr McCormick meant that without Barclays, there would be no Market Fresh investment for use by the Company for any purpose at all.

252. Negotiation of the additional price continued. On 14 August 2019, Mr Seneschall emailed Mr Marshall, copying in Mr McCormick and Ms Jones:

> "*I caught up with David this morning on the money front and all that sounds good and positive. I just want to confirm a couple of things though, so everyone is on the same page.*
>
> *When we discussed the next steps in Soho you proposed an additional £1,100,000 for the next 30.1% of the business, given you currently hold 20%. I countered by suggesting £1,300,00 was a more realistic figure, valuing the business as it stands at £4,000,000 which seems about right. Can we agree what the additional 30.1% will cost you please?*
>
> *Additionally, the one date set in tablets of stone is the repayment (or re-structuring) of the loan against my house. This has to be resolved by 7th September, preferably before. Can you confirm that we will be in a position to satisfy this charge? Other than that, there's the other items mentioned in my last email, which seem unimportant in the great scheme of things, but politically carry much significance*."

253. Two things are clear from this email: first, that the parties were negotiating an undifferentiated single sum in return for a 30.1% shareholding; second, that (in addition to price) there was as yet, no agreement regarding timing, and specifically, regarding whether the investment would be forthcoming sufficiently quickly to pay Nucleus – a date "*set in stone*", as it was. In this respect, it was about the timing of the investment specifically, that Mr Seneschall was asking, not about the amount.

254. In the event (albeit not clear when) the price agreed for the additional shareholding was £1.1 million (in other words, the sum proposed at the meeting on 2 August 2019, by Mr Marshall). As to that, Mr Northall said, in Closing,

that agreement was reached in Market Fresh's "… *full knowledge … that* [Mr Seneschall] *required £350,000 for his "own" 10% to pay off the Nucleus Loan by 7 September 2019*." I reject that submission: it is not supported by the evidence. Market Fresh knew that Nucleus had to be paid or dealt with – that was common knowledge – but nothing supports the suggestion that Mr Seneschall "*required*" payment of a specific sum for "*his own*" shares, or that Market Fresh agreed as a condition to pay a specific sum for a specific tranche of shares, for a specific purpose; that was not the nature of the agreement, which was, essentially, about the cost (in a single sum) of an additional shareholding beyond the 20% which had been negotiated previously.

255. On 22 August 2019, Barclays confirmed approval of an EFG Scheme loan to Market Fresh, of £450,000. Mr Seneschall was told about the loan approval by Mr McCormick on the same day, and his reaction (in an email to Mr McCormick) was that it was "*excellent. Big sigh of relief*". In the same email, he set out "*a whole series of payments we need to make over the next few days to get things back on an even keel*", payments which were "*over due or due*" and also "*of course*" the Nucleus Loan "*on or before 7th September!!!!!*". But again, whilst this plainly evidences Mr Seneschall's belief at that stage that (borrowing having been approved) the Company would be able to repay the Loan, as well as meeting other pressing obligations, it does not demonstrate the alleged Redemption Agreement (as to the existence of which it demonstrates nothing).

256. Again, the crucial point was about investment timing – about which nothing at all had been agreed, as Mr Seneschall was well aware. In cross-examination by Ms Hallett, he said as follows:

> "*Q. It is fair to say that you kept pushing throughout the summer for the Nucleus loan to be paid by Market Fresh, and we can see an example of that* [in the email referred to above at paragraph 255]. *So by now we have got to 22nd August. Towards the bottom of* [the same email], *we can see that you have added to the list of immediate requirements you have added: "And of course, Nucleus Finance £336,000.00 on or before 7th September!!!!!" But you knew by that stage did, you not, that it might not be paid off by 7th September?*
>
> *A. It might not be paid off, yes.*
>
> *Q. And again nobody had guaranteed that it would be cleared, had they?*
>
> *A. No, "might" is not a guarantee*."

257. In fact, unknown at that point to Mr Seneschall, the sum agreed to be lent by Barclays (£450,000 not £850,000) was not, as far as Market Fresh was concerned, sufficient to enable investment of a sufficient sum, sufficiently quickly, to meet the Nucleus obligation in September – again the problem was one of timing. Equally, and obviously enough, Mr Marshall and Mr McCormick knew that Mr Seneschall would be extremely upset to be told that fact. They therefore communicated between themselves about how to inform him and manage his reaction.

258. On 23 August 2019, Mr McCormick sent a WhatsApp message to Mr Marshall which read, "*great news on Barclays...we just need to discuss and implement a plan/message on* [Mr Seneschall's] *house. He definitely thinks it can be paid before or by 7th September...*" He was correct to say that – Mr Seneschall did indeed definitely think that (as demonstrated for example, by his email referred to above at paragraph 255). As I have said, Mr Marshall and Mr McCormick knew that Mr Seneschall would be upset to be told otherwise (and it follows that they knew at that time that Mr Seneschall still anticipated payment to Nucleus before 7 September 2019).

259. Accordingly, on 23 August 2019, Mr McCormick sent an email to Mr Marshall enclosing a draft email to be sent to Mr Seneschall explaining that Barclays had not lent as much as had been hoped and that therefore, Market Fresh could not repay the Nucleus Loan by 7 September 2019. The draft email read as follows:

"*Hi John,*

Managed to catch up with Dave briefly, he is in Ireland.

The level that Barclays came back at isn't what was expected, but is ok and can manage it within the cash flow. With that there isn't the cash to clear the Nucleus loan by 7th September. Although clearing the loan has been discussed back in May, as the original financing requirements have changed and increased we have also talked about rolling this over or adding the monthly repayments into the balance sheet for the business to cover. To clarify the latter would not mean the £17,000 a month coming from the £1.8m agreed for the 50.1% share. This would be managed in the overheads within the business.

We still aim to get the Nucleus loan away from your house by 31st March 2020 as we said last time we were together in London and Dave is currently working on structuring selling a share in Market Fresh for that.

The costs continue to raise to bring the site on stream and additional debts added and we are prepared to work with that but we need to work together until we start producing and become commercially viable.

With Dave's contacts he can work with you a rolling over the Nucleus loan."

260. One purpose of the draft email was therefore to ask Mr Seneschall to roll-over the Nucleus Loan for 6-7 months to 31 March 2020.

261. On 23 August, Mr Marshall and Mr Seneschall seem to have spoken, and Mr Seneschall was told the news. The draft email was not sent. Nonetheless, it was submitted on Mr Seneschall's behalf that it recognised an "agreement" to redeem. I disagree. If anything, it reflected an agreement about the timing of the investment, and reflected the parties' shared aim regarding Nucleus. That essentially was confirmed in Mr Seneschall's cross-examination:

> *A. …this is literally the first time I have seen it. It basically says "There is a Nucleus loan, it needs repaying on 7th September, what are we going to do about it?" ….*
>
> *Q. But it is right to say, is it not, that it was never agreed that Market Fresh would redeem the Nucleus loan by 31st March 2020?*
> *A. It was not agreed directly. However, if you read Mr. McCormick's third paragraph, clearly there is an expectation that they are going to repay it, "it needs flipping until 31st March*".

262. After that conversation, Mr Seneschall started to look at refinancing the Loan to a future date (31 March 2020) because of what had been said, which was, in effect, that it was not possible to pay enough to redeem immediately, but that the aim was to pay the promised sum by the end of March 2020. His steps to refinance are consistent with the Redemption Agreement, but they do not establish it; they are equally consistent with the existence of a mere aim or hope to redeem at that future time.

263. In the circumstances, Mr Seneschall did not rely on a promise to redeem at that future date, he acted as he did because he was told that immediate payment was not possible and because the investment sum was to be paid by the end of March 2020 if at all, so that as a matter of timing the whole sum would (if ever) be paid

by then; the agreement to "roll-over" the Loan removed the concern regarding timing, but said nothing about whether payment to Nucleus would necessarily be made.

264. All of this represented, from the perspective of Mr Seneschall, a definite change from the outcome he anticipated. As I have said, he had plainly contemplated that in return for the acquisition of a 50.1% stake, Market Fresh would invest enough, and (importantly) quickly enough, to enable payment of Nucleus (although I bear in mind that there was not, until the HoTs, any contract in that regard, and that both Market Fresh and the Company/Mr Seneschall were free to withdraw from the anticipated transaction, and there was no agreement at all about the timing of any investment).

265. Accordingly, on 26 August 2019, Mr Seneschall emailed Mr Marshall and Mr McCormick, saying, amongst other things, as follows:

> "*What I am really upset about is the issue regarding the loan against my house. I have made it very clear from day one of discussions, this is the most important element for me in agreeing to the deal. To be told on Friday that it isn't possible because Barclay's haven't provided the full amount asked for is a huge issue. We agreed to 50.1% of the company so Barclay's would provide the money, if this now isn't the case do they still expect the 50.1%? I suggest not, so what is the deal here. I need more clarity and more explanation please*."

266. This reaction was perfectly understandable, but does no more than say, as was perhaps apparent in any event, that Mr Seneschall's agreement to the Market Fresh proposal was significantly motivated by his urgent need to relieve himself and Mrs Seneschall of their financial commitment in respect of Nucleus; but again, that does not demonstrate the Redemption Agreement; it demonstrates that Mr Seneschall had a particular, and no doubt good personal reason, to agree investment on the proposed terms. Because of that, the altered circumstances

were plainly most unwelcome to Mr Seneschall; what was being proposed was not what he had anticipated, and his unhappiness was understandable; but Market Fresh was not in breach of any agreement in changing its position; no agreement had by then been made, and no agreement was subsequently made until 7 October 2019, in the terms of the HoTs. This was no more than a step in the continuing discussion.

267. Accordingly, on 29 August 2019, Mr Seneschall emailed Mr Marshall, with an outline of how to manage the matter prospectively:

> "*I think we have to agree a date by which point all of the £1.8 million for the 50.1% of the business will be paid over by, 31st March 2020 was mentioned yesterday, is this still the target date?*
>
> *I am looking at ways of flipping the loan against my house, again, I am looking at an extension to the end of March, I believe that was what was agreed as suitable from your position."*

268. On the same day, he emailed Darwin Gray in relation to the Heads of Terms then being negotiated. He said, amongst other things, that:

> "*...I want to put some clear time lines into the agreement, with a section which guarantees all money for the shares will be paid into the Trisant account by 31st March 2020. I'd quite like to give dates for each of the 10% lumps if we can, they will push back on this I have no doubt, but first 10 end October, second 10 end December and final 10 end March might work and be worth proposing and seeing how they react. I'd also like to put in a penalty section (again they will push back) saying failure to deliver against this will result in interest being charged at a rate of 10% per day against the outstanding amount or a figure/timeframe which is workable*."

269. That email is significant because it demonstrates that Mr Seneschall knew that without such an agreement (in respect of interim payments) there was no certainty about when any part payment would be made; in other words, he anticipated the very problem that later arose, given that no such dates were ever agreed.

270. On 30 August 2019, Mr McCormick emailed Ms McKendry-Gray, Mr Marshall and others, regarding the terms of (what became) the HoTs. He described, as having been "*verbally agreed*" a payment of £1.8 million in return for a 50.1% shareholding. Amongst other things, he said, "*Finally, the Nucleus loan will be rolled over as I outlined yesterday, but it was discussed during the meeting that we will look to take John's liability away by the 31st March 2020 once factory is up and running and circumstances permit*." That email – not sent to Mr Seneschall, but to Market Fresh's legal advisors – is consistent with my conclusion that payment of the Nucleus Loan (and/or the provision of some alternative support which did not involve the exposure of the Seneschalls to a security risk) was or would be dependent on the circumstances at the relevant time – it was not a guaranteed payment, and it was not a separate, collateral contract for the sale by Mr Seneschall of 10% of his shares (no such thing was even remotely suggested by this communication).

271. In my judgment, Mr Seneschall was willing to give up his extra % shareholding (and to enable Market Fresh to become the majority shareholder, whilst Ms Jones would remain the holder of no less than 15%, which she was unwilling to further dilute) because he was in a position of greater risk: he had no choice and he had an incentive.

272. He believed, or chose to believe, that the investment would be (a) forthcoming and (b) enough to meet the obligation to Nucleus, but he was always aware that there were no specifically agreed dates for payment, and always aware that the HoTs made payment of the entire sum optional (in the sense that there was an agreed consequence in case of failure to pay).

273. Before Barclays offered lending, it was practically impossible for Market Fresh to reach any binding agreement; it did not have the resources to do so. After the Barclays offer, the position changed, because the sum offered was less than had been anticipated. The agreements in fact made were recorded in the ISHA and the HoTs. The suggestion that there was another, collateral but unrecorded agreement between the same parties in respect of funding and shares is unfounded.

274. Having said that, there is little doubt that Market Fresh used the prospect of payment to Nucleus (or somehow the satisfaction of Mr and Mrs Seneschall's contingent liability) as an incentive to persuade him to agree to Market Fresh becoming the majority shareholder. Had he not agreed, no money would have been forthcoming, and the debt to Nucleus would certainly not have been paid.

275. So in the circumstances, Mr Seneschall, by agreeing to the proposed transaction (an investment of a further £1.1 million in return for 30.1% of the shares) "bought" the prospect, but not the certainty, of payment to Nucleus, against, in the alternative, the practical certainty of the Company's inability to pay. If anything, the alleged roll-over was about timing – there was an understanding that enough of what was promised would be paid at the relevant time to enable payment to Nucleus, assuming that the sum required was less than what remained to be invested (in other words, less than the outstanding promised payment) and assuming also that the circumstances of Market Fresh permitted payment, and those of the Company. In one sense, it is obvious that there would have been such an understanding, because the Company had no choice but to deal with the Nucleus Loan – it was a financial, commercial necessity, and one

which it was in the interests of Market Fresh, as majority shareholder and principal investor, to deal with, as much as in the interests of Mr Seneschall.

276. This explains, in my judgment, the real meaning of Mr McCormick's comments (and the underlying comments) found for example:

i) in his email of 6 January 2020 sent to Mr Marshall and others, "*Eileen reminded us on 9th December that clearing the house is not in the original shareholder agreement of* [sic] r*evised HoT's. It is only a verbal agreement. The issue of the house does need addressing again. If the original agreement is maintained, then on requirements to the end of January we overspend against original investment*"; and,

ii) on 7 February 2020, in a version of the investment breakdown, "*As Eileen recently pointed out in an e-mail on 9th December clearing the house loan is not in the HOT's. However there has always been an "agreement" that the original loan against John's house would be taken care of as part of the total £1.8m investment. This was clearly an agreement whenever* [sic] *the investment value was though* [sic] *to be much lower*."

277. In my judgment, these comments, albeit expressed in somewhat obscure language, reflected an understanding that the Nucleus Loan would be "*taken care of*", or repaid, if, and assuming that, the agreed (outstanding) investment was sufficient to do so, and all the circumstances permitted – but if not (as by then, Mr McCormick seems to have anticipated would be the case) there was or would be a problem – a problem which needed "*addressing again*". Payment to Nucleus was not a formal precondition, or term – it was at all times dependent

on the circumstances, albeit to some extent a necessity (because the sum was owed) and to some extent a significant personal desire (because it affected Mr Seneschall's home and family).

278. In summary, drawing together the evidence, I conclude that there was no Redemption Agreement for the following reasons:

i) between February 2019 and October 2019, the parties engaged in a course of negotiations regarding the terms of the proposed investment; those negotiations were punctuated by two contracts, the ISHA and the HoTs; the HoTs gave final form to the parties' agreement.

ii) from about 18 March 2019 there was an agreement in principle that Market Fresh would acquire (in two "tranches") a 20% shareholding in return for £700,000.

iii) on 18 April 2019, Mr Seneschall raised the possibility that Market Fresh might acquire an additional 10% shareholding, in return for further investment of £350,000 (a "3rd tranche").

iv) that proposal was likely discussed on 14 May 2019, at the meeting in Soho, but there was no agreement.

v) Market Fresh sought to borrow from Barclays.

vi) on 24 July 2019, Barclays told Mr Marshall that in order to borrow, Market Fresh required a holding of more than 50% in the Company; the proposal that Market Fresh should acquire (only) an additional 10% shareholding for £350,000 thus became an immaterial part of the

negotiating history; in order to borrow from Barclays, it now needed to acquire, at least, an additional 30.1% shareholding beyond that which was the subject of their working agreement.

vii) on 2 August 2019, at the meeting in Soho, Mr Seneschall agreed in principle to Market Fresh becoming the majority shareholder but no share price was agreed; part of the reason for his agreement was that he knew that the Company needed to pay the Nucleus Loan on 7 September, and he was acutely aware of his own personal, financial exposure should it not do so; he had good reason to agree a greater dilution than Ms Jones, which is what he ultimately did.

viii) on 7 August 2019, the ISHA was signed; it contained an entire contract provision.

ix) during August 2019, it was agreed in principle that the additional 30.1% shareholding would cost £1.1 million.

x) on 22 August 2019, Barclays agreed to lend, but only £450,000, not the £850,000 that had been sought; Market Fresh therefore decided that although the price of the further 30.1% would still be £1.1 million, it could not invest enough, quickly enough, to allow the Company to meet the Nucleus repayment obligation in September 2019; Mr Seneschall was told, and by necessity, repayment of the Nucleus Loan was deferred; at that stage there was no binding agreement about the acquisition of additional shares – Mr Seneschall was not obliged to agree a particular price or timetable, or entitled to insist otherwise, but he had no real choice; the terms agreed were the only terms made available to him.

xi) the HoTs were made, on 7 October 2019; they provided for payment of £1.1 million in return for a 30.1% shareholding, as had been discussed; there is no room for any further or collateral contract made with Mr Seneschall alone; no other, additional shareholding was ever discussed or negotiated; the HoTs comprised the agreement ultimately struck in respect of the whole investment and the whole agreed shareholding; it represented the final conclusion of the negotiation arc that had begun in March 2019.

xii) in any event there was an internal contradiction in Mr Seneschall's case: an assertion that the agreement about the sale of his 10% shareholding was outside the ISHA and the HoTs, but at the same time, that the alleged agreement in June/July 2019 about his 10% shareholding was somehow incorporated into the subsequent agreements, because the agreed price of that 10% was part of how the parties agreed the overall price of 30.1%.

xiii) after the agreement in principle regarding the first 20% shareholding, the negotiation was simply about the number of shares, their price, and the timing of any payment; but the price was in an undifferentiated sum (however it was being calculated by Mr Seneschall); no part of the price was formally hypothecated in favour of a specific purpose, although doubtless Mr Seneschall anticipated (perhaps perfectly reasonably) that were the whole sum to be paid (and were Market Fresh to be an investor and shareholder to the fullest agreed extent) it would be possible to meet the Nucleus obligation and/or to replace the security provided by Mr and Mrs Seneschall – that is part of why he was willing to agree the HoTs;

he thereby "bought" the prospect, but not the certainty, of payment to Nucleus, or its replacement/successor lender, against, in the alternative, the certainty of the Company's inability to pay.

xiv) During his cross-examination by Ms Hallett, Mr Seneschall effectively accepted that there was no contract:

> "*Q. If we pull all that together, despite your hopes, Market Fresh never agreed to redeem the Nucleus loan, whether by 7th September or 31st March, did they?*
>
> *A. As a yes or no answer, no, they did not. However, I think you will find from the inference from very many emails that 31st March was a date set when they wanted to repay.*"

xv) Having said that, I do accept that it was throughout apparent to Mr Marshall and Mr McCormick that repayment of the Nucleus Loan was important, both to the Company and to Mr Seneschall. That prospect was no doubt part of Mr Seneschall's reason for agreeing that Market Fresh would become the majority owner. From the investment agreed to be made (as ultimately set out in the HoTs) Mr Seneschall certainly anticipated that it would be possible to pay Nucleus, as possibly did Mr Marshall and Mr McCormick; and there was probably an understanding that if possible, payment would be made. However, whether or not it would be possible, would depend on the circumstances prevailing at the time in question. There was no guarantee of payment in any event, and certainly no agreement, by collateral contract, that an additional 10% of the Company's shares would be bought, directly from Mr Seneschall in

the required sum – indeed, that suggestion is simply not credible; had there been such a contract, it would have been recorded, but was not; after the ISHA, there was only one further investment contract, and that was on the terms of the HoTs.

279. Against that background, I turn to Mr Seneschall's case under s. 994 of the 2006 Act.

[F] Unfair Prejudice

[F1] Mr Seneschall's Case in Summary

280. As to unfair prejudice, in essence, Mr Seneschall's case - the correlative of his conspiracy claims - was that he was the victim of an undisclosed plan, which began in June 2020 "*at the latest*", and which involved "*procuring and effecting control over the Company's affairs, especially in relation to the payment and deployment of investment monies, and his exclusion from the business*".

281. It was alleged that he:

i) was divested of his responsibility for, influence over, and executive participation in the Company's affairs, and ultimately lost his employment (and therefore remuneration);

ii) agreed to the dilution of his shareholding ("*in addition to the transfer of 10% of the equity from his own shares*") in the "*mistaken belief*" that:

a) Market Fresh required majority ownership to progress its investment;

b) Market Fresh's majority ownership would not result in a change of the rights and responsibilities prescribed by the ISHA; and

c) Market Fresh would honour the Redemption Agreement;

iii) suffered a reduction in value of his retained shareholding to zero (or at any rate, that its value was diminished) because Market Fresh "*drip-fed*" its investment in the Company, to be used only for specific purposes; and,

iv) agreed to roll-over the Nucleus Loan and subsequently, to provide security for the Reward Loan.

282. In summary, Mr Northall submitted that these acts and their consequences were unfair, because they were in breach of the ISHA and the HoTs, and of the duties owed by Mr Marshall, Mr McCormick and Ms Jones as directors, and of equitable restraints on the conduct of Market Fresh and Ms Jones, as the Company's other members, and of the Redemption Agreement.

[F2] <u>Preliminary Points</u>

283. A number of these allegations can be dealt with in consequence of findings already made.

284. First, as explained above, there was no Redemption Agreement, and therefore no act in breach of the Redemption Agreement.

285. Second, Mr Seneschall's belief that Market Fresh required majority ownership of the Company, was neither "*mistaken*", nor induced by any wrong committed by Market Fresh; it was in consequence of Barclays' requirements, themselves

in consequence of the rules of the EFG Scheme. Mr Seneschall was free to seek investment elsewhere, on different terms; he did not have to agree to the terms of the transaction proposed to him by Market Fresh; he did not have to agree to comprise Market Fresh the majority shareholder. He freely chose to take all of those steps, and freely chose to agree the share issues to Market Fresh in return for payment in sums which he freely negotiated, at a proper value (at any rate, at a value that he cannot complain about). None of this amounts to prejudice (or if it does, it is not unfair).

286. Moreover, the fact of Market Fresh's majority ownership was irrelevant to what happened subsequently (at any rate, irrelevant to the grounds of unfairness alleged in respect of subsequent events). Although at one point, consideration was given to the use of majority ownership powers to effect Mr Seneschall's removal, that was not the method ultimately used.

287. Third, again as I have held, the agreement to roll-over the Nucleus Loan was not in consequence of any wrong, or unfairness; it was a product of the fact that Market Fresh was not willing or able to invest enough, quickly enough (at a time when it was not obliged to invest anything more) to pay Nucleus in full, in September 2019.

288. Fourth, even if it were to be proven that Mr Seneschall's shares had been reduced in value because Market Fresh "*drip-fed*" its investment, I have held that its conduct in that regard was not in breach of the ISHA or the HoTs, and even if it was (because for example, of a failure to "*negotiate*" or "*agree*") the breach made no difference to the outcome, because the Company was powerless

to compel Market Fresh to do otherwise (to compel it to invest more, more quickly).

289. I acknowledge, as I have already said, that Mr Seneschall objected to "*drip-feeding*". On 18 April 2019, for example, he emailed Mr Marshall (copying in Mr Williams and Ms Jones) and said:

> "*So, in an ideal world, next week £100,000 would be very useful and would allow us to get real momentum behind several projects. We could manage with less, but I'd need to do some quick footwork and let people know early to ease things through.*"

290. He repeated much the same point in another email of 20 April 2019, also to Mr Marshall, referred to above at paragraph 115.

291. Again, on 3 July 2019, Mr Seneschall emailed Mr McCormick, and said:

> "*I am slightly concerned that this is an investment and as such how we spend it, when we spend it etc is down to us. Clearly, we are investing every penny back into the business so we can get the factory operational as soon as possible. However, if we'd treated this as a standard investment lump sums of £300,000 followed by one for £400,000 would have been the norm, in return for shares in a business with a rosy future. The fact that this hasn't happened, for very understandable reasons, is one of the factors as to why we are facing issues with builders and landlords and why managing the money has been so difficult over the last couple of months*."

292. In his evidence, Mr Seneschall complained that after the execution of the ISHA, if anything, the drip-feeding became worse, as the money "*came in dribs and drabs and every penny had to be requested in advance and pre-authorised*" and that Market Fresh required Mr Seneschall to send a weekly list of creditors who needed paying.

293. On 26 August 2019, Mr Seneschall complained to Mr Marshall and Mr McCormick, by email, "*about the flow of money into the business. I appreciate your cashflow is tight but we can't go through a process of having every pound*

we spend being questioned or worse still not being released. I supplied a list of payments before I went on holiday, other than wages and landlord none of that money came through. We need money in the business, another reason for agreeing to the 50.1% as discussed in Soho a few weeks ago."

294. The approach of Market Fresh did not change after execution of the HoTs on 7 October 2019. So for example, on 18 October 2019, Mr Seneschall emailed Mr Farrell to say that although the money received was appreciated *"£1,150 or thereabouts doesn't really have much of an impact on things and leaves lots of people still calling us. Any idea when we might get a lump of £20,000 or so to really make an impact against all the littler sums?*" Later the same day, he emailed Mr Farrell again, asking, *"surely there is a way of freeing up funds so we can actually operate properly, rather than feeling like we're sitting on our hands all the time.*"

295. Mr Seneschall maintained his position during cross-examination. For example, he said, "*...their speed of investment was causing the business significant problems in payments and getting the factory finished. Without finishing the factory, we could not generate income. Yet on multiple occasions Market Fresh said, "Well, we will not pay you any more money until you have sorted this, this and this", crazy*."

296. I also accept that a substantial part of the reason for the approach adopted by Market Fresh was, as Mr Northall expressly submitted, "*simply that Market Fresh did not have the money to invest in lumps sums*". This was something known to Mr Seneschall. As he said in his email of 26 August 2019, "*I appreciate your cashflow is tight* ….".

297. However, those facts do not support the case advanced by Mr Seneschall. As I have held, both before and after the ISHA, Market Fresh was under no obligation to invest anything, at any agreed specific time, or in any specific sum/s according to any defined timetable. It was entitled to make payments as it wished and (importantly) could afford to make them, given its own financial position, which was, as Mr Seneschall knew, and as he now positively asserts, under pressure. Whereas "*drip-feeding*" might have been commercially inadvisable or unwise, or contrary to what Mr Seneschall and Mr Williams perfectly reasonably hoped and expected, it was not unlawful and it was not unfair, regardless of its impact on the business.

298. The central problem was that the Company was at all times undercapitalised; at no point did it have the resources it required to become fully operational; throughout 2019, its position was very precarious indeed, as was common ground between the parties. The simple reason for that was that the agreements made by Mr Seneschall/the Company with Market Fresh (itself under financial pressure) did not provide for or oblige Market Fresh to invest the required sums, at the required speed, so that although Mr Seneschall recognised and complained about the problem, it was not one which was solved by the terms of the investment agreements which he negotiated.

299. In a nutshell, this was a case in which the parties themselves agreed in terms that were not adequate to meet the needs of the Company, and subsequently blamed each other for the inadequacy of their own agreement.

300. Aside from these preliminary points, turning to the evidence and facts, I will consider the matter in two parts, as broadly did Mr Northall, reflecting the two

parts of the alleged evolving Conspiracy: first, events from about June 2019 until November 2019, and second, events subsequently.

[F3] <u>The Events of June to about November 2019</u>

301. In my judgment, Mr Seneschall suffered no unfair prejudice in consequence of the conduct of the Company's affairs in the period between June and November 2019. A summary of my reasons is at paragraphs 351-352 below, but I will first consider the relevant evidence and events.

302. I have held that the March Proposal was not contractual, and that no investment contract existed until 7 August 2019. The payments made before the ISHA was executed were thus pre-contractual and unsecured, paid and received in anticipation of the contract at that time being negotiated. I have also described the precarity of the Company's financial position at that time, and as a result, some of the urgent requests made by Mr Seneschall for payment of significant sums. In that context, I have explained the offer made by email by Mr Seneschall on 18 April 2019, to issue a further 10% shareholding in return for £350,000, and the meeting that subsequently took place on 14 May 2019. I have found that before that meeting, Mr Seneschall provided business forecasts that were inaccurate, almost certainly in order to encourage greater and speedier investment.

303. Mr Seneschall's case was that the Control Conspiracy began at some point in June 2019, at the latest. By 31 May 2019, Market Fresh had paid the Company £290,000; it had received no shares in return. As I have already described, at about the same time, the first draft of the agreement that became the ISHA was sent to Ms McKendry-Gray by Mr McCormick, and Ms McKendry-Gray sent a

"*basic*" due diligence questionnaire to Darwin Gray on 11 June 2019. The last date on which the Barclays Presentation (dated "May 2019") was amended was 12 June 2019, and although it was not absolutely clear when that Presentation was discussed with Barclays, it was common ground that it must have been at about the same time. Mr McCormick produced the Investment Breakdown on 13 June 2019, and by the end of June 2019, Market Fresh had paid the Company £359,981.80. On 2 July 2019, a meeting took place in London, between Messrs Marshall, McCormick and Seneschall. In that context, the following emails, relied on by Mr Seneschall in support of his case, were sent.

304. On 5 June 2019, Mr McCormick emailed Mr Marshall. He had visited the Factory two days earlier. He told Mr Marshall that although there was "*much work to do*", "*John's objective is to have the site commercially operational by 1st July. It feels optimistic at this stage but apparently services are being fed in this week and early part of next*." In fact, as I have said, the Factory was not operational, to any extent, until December 2019, albeit that the 2nd payment tranche of £400,000 in return for a 10% shareholding proposed in the March Proposal, was premised on the Factory being operational by July/August 2019, justifying the increased price per share by comparison with the first 10%.

305. Also in that email, Mr McCormick said:

> "*John is very keen for you to confirm a time whereby you can agree and sign the details of the investment. Once you have the agreement in place it will give everyone clarity on the partnership and facilitate more involvement, not just around the sales element but any other areas you feel MF/NWI can be utilised*."

He also said ("*stating the obvious*") that:

"*At the meeting in Soho Square on 14th May, John confirmed further payments were due through May and June. For your due diligence, it would be good for you to get a full list of payments required and have NWI accounts work with John and Andrew (Trisant Accountant) to keep a track of spend. It will also be a lever to ensure work is being carried out in a timely manner as required*."

Finally, he said:

"*We also need an account manager as soon as possible or we simply won't be able to cope and I can't do the job I need to*."

306. This was not even remotely the language of conspiracy. In fact, it demonstrates two things.

i) First, that Mr McCormick was genuinely concerned about the use to which monies were being put by the Company (uses of which he had no direct visibility or knowledge, and no means of verification); about the speed of progress of work on the Factory; and about the Company's immediate and future financial requirements (of which again, he had no real understanding and which had apparently changed, adversely, since the negotiation with Mr Seneschall began).

ii) Second, that the proposal to use NWIG's accounting team and possibly other human resources, was not sinister; it was a sensible commercial reaction to the situation, suggested in order to protect Market Fresh, and assist the Company itself.

307. Mr McCormick and Mr Marshall met on Friday 7 June 2019. On Monday 10 June, Mr McCormick emailed Mr Marshall, and said (Subject: "*IMPORTANT PLEASE READ: Trisant Investment I NWI Accounts Team*"):

"*Do you plan to use the NWI accounts team for Trisant and have you spoken to Jodie about it? You mentioned a few weeks ago that as most of the*

accounting will be invoice generating that may not be a necessity. That makes sense, but when we met on Friday I said it would be prudent for us to be involved especially during these early stages of set up. Start ups as you know are notoriously cash hungry, and I believe it would be hugely beneficial if our NWI team were involved in working with John and Andrew in relation to the ongoing expenditure, particularly in the short term."

308. Again, this was part of the unexceptional discussion being carried on in the previous email of 5 June 2019 and probably at the meeting of the previous week; there was nothing at all sinister in the suggestion, or remotely indicative of an unlawful scheme to seize control of the Company (of which as yet, Market Fresh was not even a shareholder). I reject entirely the submission made by Mr Northall that this was an email "*regarding a "plan to use the NWI accounts team for Trisant"*" (plainly, it was not, even as a matter of language) and that it was "*more than merely prescient*", but contained the "*the germ of the plan that resulted in the events of October and November 2019, which in turn developed into the scheme by which the Petitioner was marginalised and ultimately excluded from Trisant*." That is to take the words out of context.

309. On 11 June, the following day, Mr Seneschall emailed Mr Marshall and said "*things down here really are progressing at pace*" and "*It's pretty much a case of wiring and plumbing everything in from that point, finishing the floor and putting up the walls, getting engineers over from various equipment suppliers to commission machines etc and then going into test mode and certification. The only part of the project which is running behind is the new build of the retort 'house,' the additional fabrication work needing four weeks to be built specifically. It will be finished by the second week in July at the latest however. In the meantime we can commission the retorts and keep them weather proof, but not run the factory commercially*."

310. In the same email, having described the apparently rapid progress towards the comparatively imminent completion of work on the Factory, Mr Seneschall asked for more money:

> "*We will need more money in the (very) near future, be good to catch up in this regard. So, at some point soon, I need £30,000 for more building work, £25,000 for rent, plus £10,000 working capital and certainly by the 28th of the month, £35,000 for wages*."

311. Apart from anything, I bear in mind that the March Proposal (even if it had been contractual) provided for payment of the 2nd tranche of £400,000, by the end of August 2019. The email of 11 June sought payment of £100,000 (in addition to the sum of £290,000 already paid) by the end of June (and premised on the Factory by then being "*in production*", which it was not). As at the close of business on 10 June 2019, the Company's bank account was in credit, but in the sum of only £2,163.50.

312. Also on 11 June 2019, as I have set out above, Mr McCormick emailed Mr Marshall, and amongst other things said:

> "*For your own due diligence and on your behalf as a proactive investor, I am very keen for us to be involved in the accounting side of things, mainly in this start up phase to ensure we have the right checks in place against investment and proposed spend. Anyone receiving investment should not see this as a negative, and need to remember that it is your investment that is bringing this to fruition as quickly as it now is. Without it, this wouldn't be happening at this pace*."

313. Again, I reject the submission that this email is evidence of a conspiracy, or burgeoning conspiracy. In context, it was unexceptional, and given the sums paid and requested, wholly unsurprising; it was no more than a suggestion that Market Fresh should "*have the right checks in place against investment and proposed spend*".

314. As I have explained, the Barclays Presentation was produced at about this time, and was used in support of Market Fresh's application for borrowing. Although there was no evidence of what was said to Barclays at any meeting/s or (from Barclays itself, directly, apart from its correspondence) what precisely Barclays understood was being proposed, I accept that the Presentation contained a number of inaccuracies. For example:

i) it referred to the Company, in an "*Ownership Structure*" chart, as "*Market Fresh Manufacturing Limited*", although there was no agreement to change the Company's name;

ii) it described the proposal as payment to the Company in return for an initial stake of 30% (which had been proposed by Mr Seneschall, but not yet agreed) and stated that "*John and Lynne are then contractually reducing to minority shareholders with Market Fresh taking full control within 3-5 years*", although again there was no agreement to that effect;

iii) showed a "*Senior team operational structure*" in which Mr Seneschall ("*Managing Director Production*") reported to Mr Marshall, as CEO;

iv) identified the Company as a debtor of Market Fresh in the sum of £780,000.

315. Nonetheless, none of these demonstrate or evidence the existence of the Control Conspiracy or, as suggested, that even by then, Market Fresh had a "*settled intention to treat* [the Company] *as a subsidiary*":

i) first, insofar as there were inaccuracies, it is far more likely that their purpose (if deliberate, and if not corrected in discussion with Barclays) was to persuade Barclays to lend; and,

ii) second, in any event, as to ultimate majority ownership and control, the Presentation was substantially consistent with innocent commercial aspiration; there had been discussion between the parties of the possibility that Mr Seneschall would wish to sell most of his stake at some future time (in cross-examination, Mr Seneschall described it as "*definitely a possibility*"); had the Company prospered, that outcome was not improbable, and it may also have been what Market Fresh was hoping to achieve by means of negotiation and agreement in due course; there is no reason to infer from the Presentation a dishonest conspiracy or scheme of any sort.

316. Similarly, as described above, on 28 June 2019, Ms Rassell of Barclays emailed Mr Marshall with various questions regarding the proposed borrowing, including, "*When does Market Fresh Ltd obtain a majority share of the manufacturing company - note becomes wholly owned within 5 years - is there a staged transfer of shares?*" to which Mr Marshall replied that it was "*being put in place. It isn't finalised yet as to what quantity per year.*"

317. Again, this was not true - no such thing was being "*put in place*" - but I do not infer that Mr Marshall was thereby inadvertently revealing the Control Conspiracy (or even, that it was beginning to develop his mind). Far more likely was that he was doing his best to satisfy Barclays, in order to secure much needed borrowing. In any event, again, there is no reason to infer a dishonest

conspiracy; his response might equally suggest that Mr Marshall was contemplating a further negotiation (as indeed took place soon afterwards, when Barclays told him that majority ownership was required to borrow under the EFG Scheme and he reached agreement with Mr Seneschall, as I have described).

318. In the meantime, on 20 June 2019, Mr McCormick emailed employees at NWIG concerning getting access to the Company's website. He remarked that in relation to his discussion with Mr Seneschall:

> "*That was all I intentionally asked though and didn't speak to him at all about who will control it so for now keep it very top line asking for his access details. He has way to many other things to focus on at the factory to worry about that at the moment. Assume we are managing it and if by any chance he does raise the question let me know and we can agree what to say*."

319. I accept that this email reflects an intention to gain access to the means of control and management of the Company's website, and to keep from Mr Seneschall the fact of that intention. But it was sent on 20 June 2019, at a time when the parties were still (pre-contractually) negotiating the terms and magnitude of the investment and the terms of their relationship (and future relationship); Market Fresh was in the process of applying to Barclays for borrowing; it was not a member of the Company, and Mr McCormick was not a director. On all sides, the parties were entitled, within the law, to consider and advance their own commercial interests; they were not under any obligation to reveal to each other the scope of their private commercial intentions. In any event, there is nothing to suggest that Mr McCormick's actions were anything other than his alone, undertaken, in his view, for the benefit of his employer; there is no reason to think they were pursuant to an overarching agreement or combination with Mr

Marshall, or with an intention to injure Mr Seneschall. In my judgment, the email cannot bear the considerable weight attached to it by Mr Seneschall's case. I do not accept that by and from that time, at the end of June 2019, there was an unlawful means conspiracy to injure Mr Seneschall, or even the "*germ*" of such a conspiracy.

320. On 2 July 2019, Messrs Marshall, McCormick and Seneschall met in London, and on 3 July 2019, Mr McCormick emailed Mr Marshall (copying in Mr Farrell and Ms Coyne). Amongst other things, he said:

> "*A real positive from yesterday's meeting with John is the willingness to bring Will/NWI accounts into the mix. This will give us greater visibility and control going forward. The short term objective of continuing to fund until the Barclays money arrives is still the plan, but will of course be driven by the group cashflow during that time. I am with Will this afternoon to start assessing critical payments, but we will need to agree the level we can fund on a week to week basis*."

321. There is no reason to think that this was not a genuine expression of Mr McCormick's impression of what had happened at the meeting on the previous day. Moreover, I do not construe the word "*control*" as used in this email, to have any taint of wrongfulness or conspiracy. Indeed, had there been a conspiracy, of which this was part, the participants would not likely have revealed their intentions to Mr Seneschall. More innocently, in my judgment, in circumstances where, (a) there was still no contract; (b) Market Fresh was still not a shareholder; (c) Market Fresh had paid £359,981.80 to the Company, but without direct visibility regarding its use, or the Company's financial needs; (d) Market Fresh in any event could only afford to make payments piecemeal; and (e) Mr McCormick was Market Fresh's managing director, and centrally responsible for its affairs, this email is evidence that Mr McCormick was

seeking to understand and gain "*control*" of the situation, in order to monitor and protect Market Fresh's position, as was his duty.

322. On the following day, 3 July 2019, consistent with my view of Mr McCormick's intentions and motives, he wrote to Mr Seneschall, and said, amongst other things, as part of "*a brief summary of the key points we discussed to make sure we can keep the momentum, and get to the completion of the factory in the best time possible and as smoothly as we can*", that as to "*Future payments and accounts*", it had been "*Agreed that Will Farrell will manage these going forward. The NWI accounts team are vastly experienced in managing the groups affairs and will benefit us enormously*." He suggested, openly, that Mr Seneschall could meet Mr Farrell on 11 July (after a meeting already arranged – "*the perfect opportunity to make the introduction and review the next number of weeks*") and that Mr Farrell could visit the Factory on 18 July 2019.

323. Mr Seneschall replied later that day. He agreed with the notes of the meeting, other than that, "*The only one I feel is perhaps over-emphasised is the one regarding Will. I think it is a very interesting option, but without meeting him and understanding exactly how things would work going forward, it is for now at least an on-going discussion rather set in tablets of stone. As you rightly say, lets pick this discussion up next week after the TetraPak meeting*."

324. Plainly, Mr Seneschall had some reservations about the use of the NWIG accounts team and Mr Farrell's involvement. That may have been because, simply, he was reluctant to cede any great degree of control of the Company's affairs, or because he was anxious that greater scrutiny might reveal more about the fragility of the Company's financial position. But in any event, the point is

that Mr McCormick was not pursuing a concealed plot to seize control of the Company, he was (openly) seeking, as was his duty, and understandably, to monitor and protect Market Fresh's position, and at the same time, to strengthen the Company's business by adding to it (at no cost to the Company) NWIG's expertise and personnel.

325. By late July 2019, as set out above, Barclays had raised the requirement of majority ownership, and on 2 August 2019 an agreement in principle was reached with Mr Seneschall as to investment in return for a 50.1% shareholding. The ISHA was made on 7 August 2019, without any wrongdoing committed by Market Fresh, Mr Marshall or Mr McCormick.

326. The ISHA provided, by Clause 11, for Market Fresh to be given such information and access to personnel as it might reasonably require in order to monitor its investment. In addition, as a result of the ISHA, Mr Marshall became a *de jure* director, and from that point, howsoever called at the time, Mr McCormick seems to have occupied the position of director. As a result:

i) Market Fresh had an extensive contractual right to information, to which no objection could be raised; and,

ii) certainly Mr Marshall, as a director (and practically, Mr McCormick, who acted for him) was not merely entitled to seek information regarding the Company's affairs, but was under a positive obligation to do so, in order to fulfil his duties to the Company.

327. I have explained that after the ISHA was made, and subsequently, after the HoTs, Market Fresh continued, in the sense explained, to "*drip-feed*" its

investment, and that this was not in breach of any agreement between Market Fresh and the Company. In any event, it was not alleged that the sums made available by Market Fresh should have been used for some purpose or end other than those for which they were in fact used, according to the conditions of their investment imposed by Market Fresh. In other words, given the size of the amounts invested, the Company appears not to have suffered any adverse impact from the particular purposes for which they were used (or had any real choice in the matter, if it wished to continue to receive investment).

328. I have also explained the circumstances in which, in late August 2019, Mr Seneschall was told that Market Fresh would not invest enough, quickly enough, to repay Nucleus in September, and that this too caused him very significant anxiety. Again however, Market Fresh was entitled to act as it did. Doubtless however, the disappointment of his expectations caused him further unhappiness about the conduct of Market Fresh.

329. On 4 September 2020, the Company's aged creditors stood at £449,488.74 (categorised as "*Current*", or "*Period 1, 2 or 3*", or "*Older*", and of which £244,083,48 was classed as "*Older*"). On 7 October 2020, HMRC wrote to the Company ("*Urgent Action Required*") seeking payment of £42,004.61, some of which had been outstanding since June 2019.

330. It was against that background that on 25 October 2019, Mr Farrell emailed Mr Seneschall and Ms Jones and asked for access to the Company's online banking, and for a second current account signatory to be arranged. In the first instance, Mr Seneschall responded by objecting, "*No!!*" and by leaving the message set out above at paragraph 69 on Mr McCormick's telephone. On 4 November

2019, was the incident in which Mr Seneschall may or may not have sworn at Mr McCormick and Ms Jones, but which in any event demonstrates the extent of his unhappiness and anxiety, and the extent to which relationships were strained.

331. There was a Board Meeting on 5 November 2019, attended by Mr Seneschall, Ms Jones and Mr McCormick. It was important for two reasons.

i) First, the appointment of a second account signatory was agreed, as was bank access.

ii) Second, as recorded in the Minutes, there was discussion of an outstanding sum due to Tetra Pak as part of the "*original deposit*" in the sum of about £90,000-£100,000. The Minutes recorded that Mr McCormick "*confirmed understanding that down payment has/could be added to the lease agreement, and was a surprise*", in other words, that contrary to Mr McCormick's understanding, a significant part of the deposit due to Tetra Pak was outstanding, and had to be paid before its machinery could be used.

332. As to the Tetra Pak deposit, the background was as follows.

333. In his evidence, Mr Seneschall described the importance of the Company's connection with Tetra Pak as follows: "*By installing a Tetra Pak line at Trisant, our business model was transformed from a small scale niche-operation to an entirely unique production facility, which had the backing of a global business like Tetra Pak*."

334. On 11 January 2019, at the very outset of the relationship, Mr Seneschall had sent Mr McCormick a copy of the contracts which the Company was proposing to enter with Tetra Pak for the purchase and financing of processing and packaging machinery for the Tetra Pak line. The "*Lease Layout*" specified that the "*Sales Price*" for the machinery was €3,318,000, with an "*Advance Payment EUR 182,850.00*" (as a deposit/down payment") and "*Financed Amount EUR 3,135,150.00*" payable via quarterly interest payments at 4.188% reducing each quarter from approximately €33,000 over 120 months. The first quarterly payment was due 3 months "*after commencement*", being 3 months after the machinery became operational, which was at that time approximated by Tetra Pak at September 2019 (premised on the machinery becoming operational in June 2019 – somewhat similar to the factual premise of the March Proposal). The executed contract with Tetra Pak was sent to Market Fresh with the Company's responses to due diligence in June 2019.

335. On 25 April 2019, Mr Seneschall emailed Ian Williamson at Tetra Pak and said,

> "*As discussed albeit briefly yesterday, I am very conscious of the need to make a significant payment to TetraPak to cover the down payment on the equipment, but I am also keen to protect our cashflow situation, which as I am sure you can appreciate is somewhat stressed currently given the amount going out and the significant lack of funds coming the other way.*
>
> *As such I would like to propose the following; Trisant Foods make two payments of £50,000 to TetraPak over the course of the next three months, one in the middle of May and one in July, with a third payment, covering the balance of a little over £50,000 made in September. This would tie in with the planned launch of the Recart line in August, so that our first quarterly payment of £30,000 is made at the end of October/early November.*
>
> *By staggering payment in this way allows us the flexibility we need to be up and running as soon as possible without finding ourselves compromised on the cashflow front. I will add, we do have some flexibility on the payment plan, but as an initial proposal I thought this a good place to start. Let me know your initial thoughts, but I am very conscious of the need to make*

things happen soon given the delivery dates on the bulk of the machinery arriving in South Wales."

336. On 7 May 2019, Mr Williamson replied:

> "*I have discussed this internally and we are extremely worried about several aspects of this project*.
>
> *1. Contract obligations stated that a down-payment of €182,850 to be paid within 30 days from signing of the finance lease agreement. This final amended agreement was signed on the 21st February 2019 and an invoice issued. Before we deliver any equipment, this payment must be made in full.*
>
> *2. Secondly, we do not believe the civil works or utilities are sufficiently complete to take receipt of our equipment on the 20th/21st May 2019. We were looking to dispatch the bulk of our equipment early next week 13th/14th May where there is no provision for locating retorts or activity relating to services.*
>
> *Based on your feedback we will take a decision to progress as planned, or delay until these outstanding items are resolved.*"

337. Later that day, evidently after a conversation, Mr Seneschall wrote again:

> "*As just discussed, I can confirm that we will make two payments, one of £75,000 on or before the 31st May 2019 and one for around £80,000 (depending on the exchange rate) on or before the 31st July 2019. This is to cover the down payment on the machines being provided as part of the venture between the two parties. I believe we will need to sign a new contract to confirm this. I also understand that the second payment needs to be made before we can sign of on the machines being commissioned. As such if we have to bring the second payment forward, we will do so.*
>
> *I understand this is an unusual and exceptional plan and want to thank you for your flexibility and your energy in sorting this for us.*
>
> *I also understand how important it is to honour this agreement and will ensure we do so*."

338. On 23 May, and then again, on 27 May 2019, Mr Seneschall emailed Messrs Marshall and McCormick, and Ms Jones, and told them of the first imminent part of the Tetra Pak payment plan, "*We have to pay TetraPak £75,000 by the 31st May and I need to pay the builders one big chunk of around £50,000 so they can keep pushing forward* ….".

339. On 31 May 2019, £125,000 was duly paid by Market Fresh to the Company (plainly intended to be used, as to £75,000, to pay Tetra Pak). In fact however, only £60,000 was paid to Tetra Pak, on 3 June 2019.

340. On 13 June 2019, Mr Seneschall wrote to Mr McCormick, and said, amongst other things, "*We know for example we will need to pay Tetra Pak another significant lump sum, (£60,000 plus) but we don't know when for sure.*" It is difficult to reconcile that statement with the unambiguous agreement previously made with Tetra Pak, and the amount of the payment previously made to it. In fact, as at 4 September 2019, at any rate according to the Aged Creditor Analysis, Tetra Pak was owed £192,166.94, although that sum was, according to the list of debt arrears as at 31 August 2019, "*To be moved to HP*", a statement which supports Mr McCormick's evidence that it was not until 5 November 2019 that he came to know that the whole remaining part of the deposit had to be paid before the line could become operational.

341. In fact, there was no agreement to defer payment, which was still outstanding and due. This is clear from the an email sent on 6 November 2019, by Mr Ben Cutts of Tetra Pak to Mr Seneschall (copying Mr McCormick and Ms Jones):

> "*This was discussed in our face to face and I left with the understanding that this was "in the cashflow" and would be paid within 2 weeks. By the terms of the contract, the downpayment was due before installation even started as per the rules on financing from TLC. As far as the rest of the Tetra Pak organisation outside of this email is concerned this has been overdue for 8 months and to be blunt is causing concern at senior management level within Tetra Pak, particularly considering the constant change in scope and VO's we continue to add into the financing, far more than any of our other customers enjoy, against a backdrop of continued non-payment. Some consideration was given to the difficult processing installation, but there have also been several good will gestures made through the project including considerations on equipment pricing, financing flexibility and access to other equipment which has been used in*

the installation. The downpayment is contractual, non negotiable, and overdue. As there is now no practical reason to withhold payment our only alternative is to put the account on stop until this is resolved which is not the start that this venture needs.

Please advise when the outstanding payment will be made in full."

342. That email confirmed what Mr Seneschall had said at the Board Meeting of the previous day. In his subsequent email of 19 November 2019, to Mr Marshall and Ms Coyne, Mr McCormick said:

"*As you both know I have very recently discovered that the second instalment of the deposit on the Tetrapak machine wasn't put on the lease agreement as indicated, and is in fact now 8 months overdue and they have been chasing.*

The outstanding balance is €152,742 I £138,856.36 (@ 1.10)

Tetrapak work very much in straight lines and although I put a payment plan to Ben Cutts (Business Development Director) because of the length of overdue deposit, Tetra Lavel Finance are not willing or able to accommodate. There is the potential of a deferment of the quarterly rental payments if we get back up to date though.

- *When the machine is commissioned, lease agreement kicks in and first payment of £33,000 will be due in 3 mths. Currently that would be Feb 2020.*
    - *Machine is ready to be commissioned.*
- *If we pay and get up to date they will look to defer payments until we get (more) business through the factory.*

Although they have rejected a payment plan over 6 months I would at the very least ask for the outstanding balance to be paid in 2 instalments.

Tetrapak will not authorise or guarantee use of the machine until deposit is paid, which would result in a delay to our first product launch with Muru."

343. The evidence regarding the precise composition of the sum due to Tetra Pak as at the beginning of November 2019 was confused. Nonetheless, I accept that, as stated in that email (internal to Market Fresh/NWIG) Mr McCormick did not

know before 5 November 2019, that the outstanding part of the Deposit could not be deferred, and that information came as a "*surprise*" to him.

344. On 14 November 2019, Mr Williams resigned. In his resignation letter, set out above, he referred to "*Decisions resulting in preferring certain creditors …*". In cross-examination, he gave the following evidence:

> *"Q. Preference has a certain meaning in insolvency law and I was just wanting to check that what you were saying in your witness statement is the same understanding I have as a lawyer. Was your understanding that it was preferring one creditor over another in a company which was insolvent; the test is a bit more complicated but that is the gist of it?*
>
> *A. I would accept the fact that you, Sir, would know a lot more of the detail. From my accountant's understanding is it is you choose to pay one creditor in front of another to the detriment of all of the creditors and the shareholders not just the action of preferring one.*
>
> *Q. And that issue arises when the company is insolvent?*
>
> *A. Yes, that is my interpretation of it.*
>
> *Q. And so your understanding was company insolvent in November, therefore these issues arise?*
>
> *A. Yes.*
>
> *Q. Would it be fair to say that on your understanding the company was insolvent on one or other of those tests throughout your experience, your time, your involvement with it?*
>
> *A. Yes, like many start-ups, and I think all the forecasts that I generated did not disguise that fact at all. The balance sheet showed that one of the first tests is net current liabilities. On several occasions net current liabilities were shown in the forecast. So, yes, I think during my time I was always very conscious to advise the directors that we were trading under those circumstances but I also advised them that it is legal to be technically insolvent but you can still be a going concern if there is a realistic proposition of trading out of that circumstance for the benefit of all creditors and shareholders*."

345. On 21 November 2019, Mr Seneschall, Ms Jones and Mr McCormick received advice from Darwin Gray regarding "*the potential risks*" to the Company's directors of granting bank access and authorising a second signatory. I note,

amongst other things, that the advice contained the following (emphasis added), which is consistent with my own conclusions concerning the obligations of Market Fresh under the HoTs :

> "*TF and MF recently entered into heads of terms as part of which MF has the right to invest £1.1m (in addition to the previous agreed investment of £700k) in exchange for shares totalling 50.1% of TF.* ***However, as you know MF has no obligation to proceed with that investment****. The longstop date for the investment is 31St March 2020. If MF does not make the full investment by that date, then the position in relation to the shareholdings will be regularised and those shares which have not been paid for will be returned*."

They also said:

> "*We appreciate that TF needs a cash injection and also that MF (and the TF board) want good financial governance*", and that to meet those objectives, they had given thought to "*other potential solutions*", including ("*such as*"), "***A binding commitment that the investment from MF provided for in the heads of terms is paid in specific tranches with specific payment dates, which will give TF assurance that it will receive funding****, rather than handing over control of its financial decision-making with no assurance that any money will be received*"

346. On 18 December 2019, another Board Meeting took place, and Mr McCormick and Ms Jones raised with Mr Seneschall the email found in Mr Williams' email account in which Mr Seneschall had said: "*As for MF, I'll be stitching them up over the next few weeks too!!*"

347. Mr Seneschall agreed to apologise for the email, in writing, which he did on the following day. In the Board Meeting minutes, it was stated that, "*With the concern and mistrust created with this statement,* [Mr McCormick] *stated that Trisant Foods accounts and payments will now be managed by Faith and Will.*"

348. On 20 December 2019, Mr McCormick emailed Mr Marshall with the subject title "*Trisant Amalgamation*" stating that "*we basically now have control at*

Trisant, so it seems a logical step at some point to try and bring the factory into the NWI fold or in fact look at merging into MF?"

349. Shortly after the period under discussion, on 11 January 2020, Mr Seneschall emailed Mr McCormick and Ms Jones. The email's subject line was "*Thoughts; Roles and responsibilities*", and it read as follows:

> "*Picking up an email from early this week and building on a brief conversation between David and myself yesterday, I thought I'd pop down a few thoughts on how we can improve on roles and responsibilities going forward, particularly now that we are in a new phase of development of the business, which is all about getting more business through the door and making Trisant Foods the go to choice for any company looking for retorted pouches or Tetra Recart.*
>
> *Clearly, Lynne is fully on top of running the factory and all the elements needed to make it work and is very effectively building a team down in Llantrisant to ensure that all future production can be handled efficiently and cost-effectively. The factory always was and should always be Lynne's responsibility.*
>
> *David's team in the broadest sense is looking after the money side of things and the sales side with the multiples and larger accounts. This plays to the strengths of David, Dave and Andrew and utilises the backend staff with Will in particular being key in keeping things tight and running efficiently.*
>
> *As for myself, I think it would make sense to step away from being at the factory quite so much and spend my time building relationships with brands (smaller opportunities than David and co are chasing), putting Trisant on the map through PR and in particular the internet and social media working with the Neverwhatif team in Essex, attending exhibitions and doing the prospecting for new business which is key in making the most of the opportunities that exist. By spending less time at the factory I think will actually improve communication as I will need to actively keep Lynne in particular in the loop of where we are with opportunities, although of course when potential customers and existing customers are on-site I will be there.*
>
> *Likewise, given we are stretched at the moment I am always happy to help out on the factory floor as required*."
>
> *I just wanted to put this out there now so we can flesh it out further in the next couple of weeks, but given the factory is now up and running we now have to fill that capacity and therefore the focus must be on generating new business opportunities. It also means we can strip so costs out of the business potentially with disposing of the flat and the associated costs.*

Clearly, this is something we need to discuss at some point soon, but I feel it is making the most of everyone's core skills and abilities and will reap dividends moving forward."

350. In this email, Mr Seneschall expressed two points:

i) first, that he had by then agreed (without obvious discontent) to the arrangements concerning payment and other financial controls that had been proposed and formally agreed in October/November 2019; and

ii) second, that his experience and skills were better suited to marketing than to financial management, on which point there seems by then to have been a consensus.

[F4] <u>June to November 2019: Conclusions</u>

351. In the circumstances, I reject the allegation that there was a conspiracy, and on that basis, unfair prejudicial conduct of the Company's affairs between June and November 2019.

i) The allegation of wrongful drip-feeding fails; I note that the advice received from the Company's solicitors in November 2019 was to the effect that Market Fresh was under no obligation to invest any further sums, or to do so by any certain date.

ii) There was no Redemption Agreement.

iii) There was no misleading in respect of Market Fresh's requirement to become majority shareholder; the terms and amount of the investment were freely negotiated.

iv) Neither the June 2019 emails relied upon nor the Barclays Presentation support the allegation: there was no sinister or ulterior motive behind suggestions that NWIG's accounting/financial personnel be used; if anything, it was a suggestion wholly to the advantage of the Company.

v) The request for access to the bank account was in substance a request for information justified by Clause 11 of the ISHA, and in any event was in rational response to the Company's extremely precarious financial condition; it caused no prejudice to Mr Seneschall.

vi) The request for a second authorised signatory caused no prejudice to Mr Seneschall - he was not thereby excluded from participation in the Company's affairs, and it is not alleged that any payment/s made were in themselves wrongful, or even ill advised.

vii) The discovery of the email to Mr Williams in which Mr Seneschall had threatened to "*stitch up*" Market Fresh was also a matter of genuine and serious concern, and in itself supported the imposition of controls on Company payments. Although Mr Seneschall apologised for having sent the email, he did not explain what he had planned.

viii) I have, as explained below at paragraphs 486 onwards, rejected Market Fresh's counterclaim; nonetheless, I have found that Mr Seneschall made a number of exorbitant claims to creditors, as well as having previously made financial and business forecasts that were inaccurate, and having not fully disclosed (after the execution of the ISHA) important aspects of the Company's affairs, for example, in particular, in respect of the position regarding Tetra Pak.

ix) It was undoubtedly the genuine view of Mr McCormick that Mr Seneschall was irresponsible or (at least) incompetent in respect of financial matters. In his evidence, he said he made no secret of having "*not wan*[ted]" Mr Seneschall "*anywhere near the finances*" (or indeed, of having found Mr Seneschall very difficult to work with) or having believed that Mr Seneschall would have been better deployed in a marketing role.

x) The Company's financial position – and by extension, that of Market Fresh – was extremely concerning.

xi) Mr Seneschall consented, both at the Board Meeting on 5 November 2019, and subsequently, as evidenced in his email of 11 January 2020, to the arrangements in respect of bank access and the use of a second signatory; as he himself said, the arrangements reflected and best utilised the particular skill and experience of those involved and available to assist; he did so, notwithstanding the advice received from Darwin Gray on 21 December 2019 regarding the risks of granting bank access and authorising a second signatory, and whether those steps were possibly in breach of the directors' duties; I acknowledge that some commercial pressure was exerted, by means of threats not to advance more money, but (as Darwin Gray pointed out) Market Fresh was not under any obligation to advance more money, so the threat was one which it was entitled to make.

352. Ultimately, I agree with the Respondents, that as at about November 2019, the nature or sense of the "control" sought or attained was "control of a fraught

situation", rather than "control of the business to the exclusion of Mr Seneschall". This, in my judgment, is the meaning of Mr McCormick's email of 20 December 2019: "*control at Trisant*" meant control of the situation, by means of visibility and participation.

[F5] <u>The Events of November 2019 to March 2021</u>

353. I have referred above, at paragraphs 74 and 76, to Mr McCormick's messages to Mr Marshall of 8 and 9 November ("*I want you up to speed on Trisant and a course of action I/we are planning for the business*") and his "*4 Step Plan*" email of 9 November 2019. It is worth setting out again the material part of that email:

> "*1. Bring an end to the services of Andrew Williams I Company Secretary and Accounting Consultant*
>
> *2. Terminate the role of Sally Seneschall.*
>
> *3. Reduce/end Johns involvement within the business were possible, especially around finance.*
>
> *4. Give notice on the 'company' flat.*
>
> *There are tensions on site at the moment because of John and Sally, which is distracting Lynne from the primary and critical objective of getting the site through its audits. She is 100% in support of the plan, but we need to keep her focused and minimise the stress being created by John. She is also concerned about John's lack of understanding*."

354. I treat and understand those communications according to their plain, ordinary language, meaning as follows:

i) there was a "plan" in the ordinary dictionary sense of a proposal according to which some things were to be done, those being the things explicitly set out in the email;

ii) that plan was originated by Mr McCormick, although he sought and needed Mr Marshall's approval;

iii) Ms Jones was aware of the plan and agreed to it;

iv) Mr McCormick was genuinely concerned about Mr Seneschall's conduct in respect of financial matters in particular.

355. Having said that, there was nothing in the stated plan at that stage necessarily involving unlawfulness, or even loss to Mr Seneschall. Moreover, even assuming that Ms Jones knew something (and she was not party to the email) it is not apparent, even accepting the words at face value, the extent to which she was, at that stage, aware of Mr McCormick's suggested plan, or precisely what she thought it would entail.

356. In the event, as to the first of those planned steps, without any act having been taken to bring it about, on 14 November 2019, Mr Williams resigned, following the incident with Ms Tucker. I should add that I was not wholly persuaded that Ms Jones' immediate reaction to that incident was not uninfluenced by a desire to bring about the end of Mr Williams' involvement, but I need not make a finding about that.

357. On 25 November 2019, Mr McCormick emailed Ms Coyne and Mr Marshall (copying in Mr Farrell) regarding the Company's payment requirements. He said that "*we either push ahead now or pull out now*." And further:

> "*You may have also noted earlier, the plan is to look to suspend John from the board via 51% majority vote and I would like to do that as soon as possible. If we keep to this and then pay the Tetrapak deposit next week, we will be close to the point whereby we have 51% of the board with Lynne's support*."

358. This email underlines that the wish was to exclude Mr Seneschall from participation in the Company's affairs, or at any rate, to reduce the extent of his

participation. By that stage, Mr Marshall seems to have known about and supported that step. But again, having said that, he and Mr McCormick appear to have been exploring at least the possibility of using legitimate means (the power of Market Fresh as majority owner, to pass an ordinary resolution).

359. Later that day, Mr McCormick wrote again, this time to Mr Marshall only, presumably in advance of a planned meeting or conversation:

> *"Summary ahead of tomorrow*
>
> *• Ultimately we don't trust John with cash and making business critical payments.*
>
> *• Suspending/removing John unlikely based on shareholder agreement. 2:1 vote doesn't work*
>
> *• Opening a bank account unlikely to help*
>
> *• Access to bank and dual signature invoice sign off another 5-10 working days away*
>
> *• We don't have any time. Tetra need paying as do many others*
>
> *Options*
>
> *1. Work with John. We now have more visibility on the business with regards to the future. I am involved with all partners now and am cc'd at least. We also have sales. The history is the problem.*
>
> *a. The problem is trust on payments and until we get the bank access that wont change.*
>
> *b. However if I get John and Lynne's (the directors) confirmation of payments rather than the perception its Will, does that help our confidence level? In theory they should be allocated as per the directors dictate. It was agreed at the board meeting we need to manage money efficiently.*
>
> *2. Try to get Johns suspension/dismissal through misappropriation of funds.*
>
> *a. You've said that's difficult*
>
> *3. Pull the plug now and let it go into admin and potentially try to buy from the receiver. That's risky though in case there are other parties interested.*
>
> *4. Buy John out*

a. Not an option

I will expand on these tomorrow but we do need to make a decision though. There is no time. 1b I feel is of particular importance."

360. Plainly, there continued to be discussion between Mr Marshall and Mr McCormick about how best to achieve their aims, certain possibilities having been considered and dismissed (including, it would seem the possibility of using Market Fresh's shareholding, or of accusing Mr Seneschall of "*misappropriation of funds*"). Given subsequent events, I note that there was no suggestion that Mr Seneschall could be dismissed for gross misconduct. Finally, again, I note that Mr McCormick expressed his view that Mr Seneschall was not to be trusted in respect of financial and "*business critical*" decisions – whether or not he was correct, I accept that such was his genuinely held opinion.

361. In addition to Mr Seneschall's removal, or the reduction of his role, there is evidence that the desired end was to purchase Mr Seneschall's shares in the Company; certainly that seems to have been held as a possibility (and as set out below, was discussed in greater detail subsequently) despite what was said in Mr McCormick's email of 25 November, that he understood it was "*not an option*". So for example, on 10 December 2019, Mr McCormick messaged Mr Marshall as follows:

"*are you in the office on Thursday for a catch up on John? Had a chat re his valuation on shares and have emailed you and Jodie. Need to run my next steps proposal by you as I'll also need some of Eileen's time that you will need agree too. Lynne still on the same page*."

362. After Mr Williams resigned, he accepted that he was asked to delete his email account by Mr Seneschall. Nonetheless, at least some emails seem to have remained accessible, and on 12 December 2019, Ms Jones sent Mr McCormick a WhatsApp message in the following terms:

> "*I have been going back through Andrew's* [Mr Williams'] *emails looking for anything relating to factoring. Nothing yet. But...You and Dave can do your worst as far as I am concerned. He has slated me and my family via emails. I am furious*."

363. From that message, and leaving aside for a moment Ms Jones' case that insofar as she acted against Mr Seneschall, she did so in reaction to his own acts against her, I infer that Ms Jones must by then (if not before) have known that Mr Marshall and Mr McCormick had in mind a plan to end or diminish Mr Seneschall's involvement.

364. As part of that plan, there continued to be consideration of a possible offer to Mr Seneschall, presumably for his shares, but certainly in return for achieving their aims. For example, in his email of 6 January 2020 to Mr Marshall, Mr McCormick said, "*We also need to discuss what we do or don't offer John to keep him from the business now that we have the control*".

365. As I have set out, on 11 January 2020, Mr Seneschall sent the email referred to above at paragraph 349. That email suggested to Mr McCormick the possibility of achieving his purpose in a manner more consistent with Mr Seneschall's own views about the future conduct of the business.

366. Thus, two days later, on 13 January 2020, Mr McCormick emailed Mr Marshall, Ms McKendry-Gray, Mr Farrell and Ms Coyne with the subject line: "*John Seneschall/Potential Next Steps*". The email stated (emphasis added):

> "*In order to get John off site, one of the considerations we looked at last week was making his role redundant due to core responsibilities moving to the right members of staff ie operations Lynne and the team, sales/commercial David & the team and accounts Will and Faith.*
>
> *Following a discussion John and I had on Friday (ahead of the Little Freddie meeting) John might have given us some scope to pursue this*

> *further. We could probably benefit from Rue's input, but* ***he has sent an email supporting the change in responsibilities***."

367. Also reflected in that email is that by then, another means of reducing Mr Seneschall's involvement had been raised, being that of making him redundant.

368. On 29 January 2020, a meeting took place in Essex between Mr Marshall, Mr McCormick and Ms Jones. As to what happened at that meeting, on 10 February 2020, Mr McCormick sent Mr Marshall a text message in the following terms:

> "*Morning mate, if I send an email today/tomorrow re next steps for John, do you think you might be able to spend a little time on it this week? Email will be an extension of last discussion when Lynne was over. Would like to start taking the necessary steps now. Cheers*"

369. Again, both the fact of the meeting (at which Mr Seneschall was not present, and to which he was not invited) and this subsequent text message support the conclusion that Ms Jones was a participant in (or at the very least, knew substantially of) the plan in respect of Mr Seneschall's involvement in the business.

370. On 7 February 2020, as explained above, the lease of the Flat was terminated. That was the third step set out in the 4-Step Plan email. In all the circumstances, including the steps then being considered, and those taken subsequently, and the fact that it had been explicitly stated in Mr McCormick's email only two months earlier, it is plain that the lease was terminated in order to reduce the practical possibility of Mr Seneschall being physically present at the Factory, rather than for some good reason of economy, or in the Company's best interests. Indeed, Ms Jones had known of the cost of the Flat since at least January 2019, when the lease was renewed. Mr Seneschall was the Company's managing director, but he lived in London; to pay for a property near the Factory in which he and

Mrs Seneschall could stay, for the purposes of their work, was an unexceptional, sensible step. The termination of the lease was driven by the plan to bring about the end of Mr Seneschall's involvement.

371. Discussion about Mr Seneschall's redundancy continued: on 11 February 2020, Mr McCormick emailed Ms Harries (copying Mr Marshall) in the following terms:

> *"As you know from the meeting you came to a number of weeks ago, there was discussion about John's role and the proposal to make the role of MD redundant. We want to try and do this in March. If we do it in that time frame, it will give Dave* [Mr Marshall] *and the team some time to work on the wider offer of him agreeing to step away from the business.*
>
> *We now have control of the business which was our aim but has been time consuming. Between myself, Will* [Mr Farrell], *Lynne Jones and Faith Jones we now manage the business and John has little input into any crucial areas."*
>
> *His original role is nothing like it was, in fact he did actually send out an email to Lynne and I on 11th Jan indicating that he would step away from being at the factory as much and focus on marketing, website, social media etc. On occasions he is still trying to get involved with some of the smaller commercial stuff but I can manage it. It is a hinderance but can manage it.*
> *We also have the challenge that John and Lynne's relationship is absolutely none existent!*
>
> > *"Dave's* [Mr Marshall's] *broad thought at the moment is:*
> >
> > • *Employment – Make the role of MD redundant.*
> >
> > • *Share holder position – Make an offer on his shares in the business in order to take a step back.*
> >
> > ○ *There a few elements to this and needs greater consideration, which I'm sure Dave will get to shortly.*
> >
> > *So with the above in mind, are you able to assist in starting the process?*"

372. The email is unambiguous in respect of the intention to make Mr Seneschall redundant, and to bring his involvement to a complete end, by purchasing, if possible, his shares.

373. On 27 February 2020, Mr McCormick sent a WhatsApp message to Mr Marshall asking for a call that day to discuss topics including "*Loan on John's house. Via your contact he now has an alternative loan. Related to above point, we need to sit and discuss what deal we put to John*".

374. At about that point of course, the Covid Pandemic intervened, and provided a more immediate (and perhaps at that time inherently sensible) alternative to redundancy. Thus, on 24 March 2020, Mr McCormick emailed Ms Harries and Mr Marshall with the subject line: "*John Seneschall*". The email stated:

> "*At some point in the not too distant future we will still be dealing with John's role. Dave mentioned yesterday that we may look at furloughing him in the short term, and will look into it.*
>
> *I will pick that up with Dave over the comings days, but also thought it would be good for you to know some further clarification on how long he has been employed. It appears although the company was registered in Feb 2018, neither John or Lynne were employed immediately. All three of them, John, Lynne and Andrew Williams were self-employed.*
>
> *Lynne believes it was June 2018 at the earliest they became employed, but could even be as late as Jan/Feb 2019. That means we have another few months to go and keep under the 2 years.*
>
> *Just wanted to share that for now and will be in touch on what the plan might be for John.*"

375. It appears that Mr McCormick considered that furloughing other staff provided an opportune means of removing Mr Seneschall, or a context in which to do so: on 31 March 2020 he messaged Mr Marshall, to say that he was "*going to get Rue to deal with John's furlough. Lynne has asked Rue about putting a few of the factory staff on furlough so would be a good link*". I infer that by "*good*

link", he meant that the act would appear to be logical and innocent (although it was in fact, still unknown to Mr Seneschall, in furtherance of a plan to reduce or end his involvement in the Company).

376. On 1 April 2020, Mr McCormick notified Mr Seneschall that the decision had been taken to furlough a number of staff for 1 month (and review at that time) with immediate effect, including Mr Seneschall and Ms Jones. Although Mr Seneschall was initially resistant to this suggestion, he was assured by Ms Harries and Mr McCormick that he would still be able to carry out his role and responsibilities as Managing Director and that he would be furloughed on full pay. Furthermore, on 2 April 2020, Mr McCormick told Mr Marshall that "*Lynne agreed to it in her usual selfless style to help to try and get it over the line with him and signed the papers. But we actually need her working*."

377. Subsequently, on 3 April 2020, Mr McCormick sent an email with the subject line "*Test*" from his personal email account to a personal email account to which Ms Jones had access. Thereafter, they corresponded regularly about significant work related matters (and by means of WhatsApp) including purchasing new premises and a significant commercial prospect with the supermarket retailer, Lidl. Mr Seneschall was not copied into these communications, nor ever informed of their existence or contents. His exclusion from those discussions must have been deliberate.

378. During this period, negotiations with Reward were continuing. On 22 April 2020, Mr McCormick sent a WhatsApp message to Mr Marshall asking for a call. Mr McCormick explained that he needed "*to get something to Reward Capital but want your advice on them first. You know them better than I. I'll*

explain properly when you call, but it involves info sharing and Me trying to keep the value of potential business from John." I infer that in the context of a possible offer to buy Mr Seneschall's shares, Mr McCormick did not want to give Mr Seneschall information about the Company's value.

379. On 29 May 2020, Mr Seneschall's period of furlough was extended, and discussion of his prospective redundancy was resumed, with some urgency. This is clear from the following:

i) First, on 29 May 2020, Ms Jones sent Mr McCormick various documents (from her personal account to his personal email account) including "*Managing Director Job Description [Senior Management Commitment 1.0]*".

ii) Second, on the same day, Mr McCormick emailed Ms Harries (Subject: "*Trisant Foods/Managing Director Redundancy*"), and said:

> *"As we have previously, briefly discussed, with the changing priorities of the factory and subsequent requirements of personnel, it has been decided that the role of Managing Director is no longer required.*
>
> *Can we schedule some time as early as possible next week to discuss how we manage and start the process please?*
>
> *John did not start his official employment until August 2018. Until that point, John, Lynne, Sally and Andrew we all consultants*

iii) Later that day, Ms Harries replied:

> "*Thanks for the update. I cannot advise correctly without having sight of all his personnel files.*
> *I need his contract of employment signed, the company handbook or their redundancy policy and an outline*
> *of the full business case for the redundancy proposal.*
> *If the MD role is no longer needed how was this decided, what was the selection criteria and or business /rational for it ie restructure,*

> *finance lead, what etc. This is what he will need to be advised of in writing as part of the process. Initially you stated he was employed from April 2018 so where is the paper trail to confirm it was actually August? It is essential we have paperwork and audit trails or this will end up with a claim I am sure, so it must be done correctly.*
> *I will need all this information and copies of all his signed paperwork to outline time scales and process and letters needed.*
> *I am free on Tuesday 2nd June next week for a call to discuss further*."

380. However, it was at that point, as redundancy plans were being developed, that yet again, circumstances changed significantly, because on 1 June 2020, Ms Tucker brought her employment claim against the Company and Ms Jones.

381. On 11 June 2019, Mr Seneschall spoke to Ms Harries about Ms Tucker's allegations. Ms Harries' notes of that conversation recorded: "[Mr Seneschall] *stated that there is a long-standing issue with* [Ms Jones'] *conduct*" and that he had provided a history, and the names of individuals who he said would corroborate that allegation. They further recorded:

> "*John — wants Lynne removed. The business cannot continue as it is. It's not a safe environment, it's not friendly when you come in you say hi morning and Lynne is rude and grunts at you. He even feels bullied by her. She is negative, confrontational and physically obstructive. Her fractious behaviour is damaging to the company. Staff won't work for the company recruitment Company's now won't send them candidates and they are losing client several in the last few months.*"

382. Mr Seneschall followed up with Ms Harries on 16 June 2020 – "*I'm just following up on our conversation of last week to see where we are in the process, what are the next steps etc. and to ask if you require any phone numbers or email addresses of people I mentioned in our discussion who can give you their perspective on matters. If you would like a list of names and contact details please let me know*."

383. Following Ms Harries' reply, Mr Seneschall sent a list of potential witnesses, saying "*There are many more I could add to the list including from potential customers, but would rather hold off on this group for now if possible. I think the above gives you a broad sweep of individuals*." Whether or not he was colluding with Ms Tucker, he was without any doubt very keen to have these complaints raised against Ms Jones.

384. Ms Harries' notes recorded that she asked Mr Seneschall whether his relationship with Ms Jones was "*retrievable*", and he replied that he, "… *does not see it no because she is a saboteur. The only people to lose is him as he will lose his house and Dave Marshall and his investment, she will lose nothing she can walk away after working to destroy things with no consequence*."

385. On 12 June 2020, Mr McCormick sent a WhatsApp message to Mr Marshall, referring to Ms Harries' summary, and saying that Mr Seneschall "*has confirmed he wants Lynne out*".

386. Ms Jones' case was that having been told that Mr Seneschall was gathering evidence against her, she responded by doing likewise against him; in other words, that she had only "*moved against*" Mr Seneschall in reaction to his steps to remove her. In cross-examination, she said as follows: "*I openly admit to saying, I knew Mr. Seneschall was on an absolute witch hunt to discredit me and get me out of the business and I made it very clear that if he was going to come after me, we would look at his wrongdoings as well*." "*Q. So that is promotion of a dispute, it is not trying to avoid a dispute. Do you agree with me, Ms. Jones? A. I do not, because he has been involved with John for at least a month earlier compiling witness evidence and witness statements against me*

and I made it very clear that if – for as much as we are all in it together, if we are going to go down that road it is tit for tat. Q. When did you start compiling your evidence then? A. When I found out what John was doing."

387. On 23 June 2020, Mr McCormick forwarded to Ms Harries the email from Mr Seneschall sent on 11 January 2020 (referred to at paragraph 349 above) in which he had praised her running of the factory, and asked Ms Harries whether this might "*help us in any way to push back?*" Later that day he wrote again, explaining "*When I say push back I mean turn the tables on him in effect making similar accusations about his behaviour*." Also on the same day, he wrote to Ms Jones, and asked whether she would "*put together a list of John's misdemeanours?*" to which she replied, "*Your* [sic] *probably going to regret asking me I am off on one*".

388. It was at about this point that the notion of reducing Mr Seneschall's participation in the business by making allegations against him of gross misconduct, and of thus achieving that step of the 4-Step Plan, first came to the mind of Mr McCormick and began to develop explicitly in his communications and dealings with Ms Jones and Mr Marshall. That it had not been considered previously is a reason to think that it was raised in late June 2019 not because of a genuine belief that it was justified by Mr Seneschall's conduct, but in order to achieve that component of the plan articulated in November 2019.

389. Accordingly, two days later, on 25 June 2020, Mr McCormick sent Ms Harries a list of allegations against Mr Seneschall which he and Ms Jones had compiled. In her response, Ms Harries noted that whilst there was "*some leverage here*" (language which suggests an understanding that a finding of gross misconduct

was the desired end) she was concerned about some allegations being stale, dating from "*October 2019. In best practice the company should deal with any misconduct within 3 months of the incident. It's now June.*" I note that nonetheless, the suspension letter eventually sent, on 13 July 2020, as set out below at paragraph 410, did contain allegations in respect of conduct in October 2019, and furthermore, in respect of even earlier conduct, as far as back as the execution of the ISHA in August 2019.

390. On 27 June 2020, Ms Jones' husband was admitted to hospital, with serious breathing difficulties; the details are unimportant to this litigation, but he was, it transpired, very seriously unwell. On 28 June, he was operated on.

391. On 29 June 2020, amongst other things, Ms Harries wrote to Mr McCormick, and said that she was in the process of drafting Mr Seneschall's suspension letter. She asked, "*next steps are to determine if* [Mr Seneschall] *is being suspended today or tomorrow*". Mr McCormick replied that he and Mr Marshall would agree upon timing. Plainly, a settled decision to suspend Mr Seneschall had been made.

392. On 1 July 2020, Ms Jones was suspended, on the basis of the allegations discussed by Ms Harries with Mr Seneschall on 11 June.

393. On 2 July 2020, Mr McCormick wrote to Mr Marshall, "*John not signing the loan until next week. There is the potential he will continue to stall until Lynne is dismissed*." That message was a reference to the Reward Loan, which was at that time being arranged, and which eventually replaced both the Nucleus Loan and the Alfandari Loan. Mr McCormick was concerned that unless Mr Seneschall succeeded (or was given to think that he had succeeded) in bringing

about Ms Jones' dismissal, he would not co-operate in the anticipated refinancing.

394. Pausing there, there was disagreement between the parties about the cause of the delay in refinancing the Nucleus Loan, which had fallen due for repayment in September 2019, and in respect of which default interest had since been rapidly accumulating. Ms Hallett suggested that it was the deliberate act of Mr Seneschall, designed to allow interest to accumulate in order to jeopardise the Company, and thus to "*bounce*" Market Fresh (as its majority owner/investor) into repayment of the Nucleus Loan (ending Mr Seneschall's exposure as guarantor/mortgagor). Ms Hallett suggested that this was the meaning of Mr Seneschall's 13 November 2019 email to Mr Williams, that "*As for* [Market Fresh]*, I'll be stitching them up over the next few weeks too!!*". Mr Seneschall on the other hand, accused Mr McCormick of deliberately delaying the refinance, in order, presumably, to weaken his position, and exert pressure on him in pursuit of the Control Conspiracy.

395. On balance, I was not persuaded that Mr Seneschall deliberately delayed the replacement of the Nucleus Loan (although he seems not to have progressed it with any particular vigour in the last months of 2019). But having said that, neither am I persuaded that Market Fresh delayed or impeded the process, not deliberately at any rate – there was no substantial evidence of Market Fresh having done so, and delay was not in its best interests because it created the risk of Nucleus enforcing its debt (as from time to time it threatened) and Market Fresh losing its investment (effectively the point made by Ms Hallett in support of her suggestion that this was Mr Seneschall's plan, albeit a somewhat high

risk one). Moreover, there was evidence that as at the beginning of July 2020, certain necessary steps had not been taken by the Seneschalls themselves to procure the loan, for example (as acknowledged by Mr Seneschall in cross-examination) the requirement that Mrs Seneschall should receive independent legal advice.

396. In any event, whatever the cause of the delay, in order to understand the events of June/July 2020 as they unfolded, it is necessary also to know something of the background to the refinancing, as follows:

i) On 12 September 2019, shortly after the Nucleus Loan fell due (and because of what he had been told in August about the inability or unwillingness of Market Fresh to invest sufficiently to allow for immediate repayment) Mr Seneschall obtained a loan offer from Social Money Ltd (trading as "The BridgeCrowd") to borrow just over £370,000. In cross examination, he conceded that he had not at that time told Market Fresh about that offer.

ii) On 9 October 2019, Mrs Seneschall emailed Mr Williams (copying in her husband) and said "*John needs to discuss with Dave M. If we flip it to new lenders then the £406,000 is payable by end of March. If we pay it back early then that figure may be less. If we don't flip then we are paying original £337,000 due by Sept 7th plus £17k a month interest. So if we paid that in March then it would be £439,000. If however, Dave agrees to guarantee payment by say Dec then we would only accrue £51k interest in the 3 months thus it would be cheaper at £388,000 than if we flipped it. So all a bit up in the air about the repayment time line until*

this conversation is had (after getting the much needed money for bills asap!)" The suggestion being made was that if Market Fresh could be persuaded to invest enough to repay the Loan in December 2019, that option might be cheaper than repayment of a replacement loan, in March; in other words, "*until that conversation*" it was not clear whether or not it would be advantageous to replace ("*flip*") the Nucleus Loan.

iii) On or about 3 December 2019, Salehs Solicitors, on behalf of Social Money, contacted Ms Williams at Darwin Gray; Ms Williams informed Mr Seneschall and Mr McCormick and Ms Jones; Mr Seneschall could not recall whether this was the first time that the Company's other directors would have heard about Social Money in the context of the Company.

iv) On 16 December 2019, Mr McCormick intervened to ask that the Board consider the terms before agreement, and Mr Seneschall agreed.

v) On 18 December 2019, at a Board Meeting, Mr McCormick said that the offer was not suitable, and resembled a "*Wonga loan*".

vi) Mr Marshall had a connection at Reward Capital, and on 11 March 2020, Heads of Terms were agreed (at that stage, to re-finance the Nucleus Loan only). Mr Seneschall actively pursued the Reward Loan. On 22 March 2020, he completed and signed the relevant proposal form, and liaised with Darwin Gray.

vii) The consolidation of the two extant loans into a single re-financed liability was raised in about April/May 2020, because of Reward's desire

to take a first security over the Company's property, and because of Mr Seneschall's desire to release the security given over his mother's house.

viii) On 29 June 2020, Darwin Gray told Mr Seneschall that Nucleus was threatening to appoint receivers on 3 July 2020; they agreed however to wait until the following Friday, 10 July 2020. This was not the first threat. For example, on 2 April 2020, Ms Farrah Khalid of Nelsons Solicitors had written to Mr Seneschall (in respect of refinancing) "*We are instructed to proceed with taking steps to appoint receivers unless you are able to confirm a completion date. Our client was expecting completion to have taken this week in accordance with our emails last week?*"

ix) Accordingly, at that time, the Company and Mr Seneschall (and indeed, Market Fresh and Mr Marshall) were under extreme pressure.

397. On Monday 6 July 2020, Ms Jones spoke to Ms Harries to discuss the allegations made against her. On the same day, Ms Harries wrote to Mr Marshall and Mr McCormick saying that she "*had a very good and in depth conversation with* [Ms Jones] *to unpick the allegations made against her and can confirm that* [her] *suspension has been lifted with immediate effect*."

398. There was a dispute between the parties about whether, from that time, Ms Jones' "*suspension*" was artificially prolonged in order to give a false impression to Mr Seneschall, that the investigation into her conduct was continuing, or whether she stayed away from work (on "*compassionate leave*", in effect) because of her husband's illness. As to that, it is more probable than not that Ms Jones' suspension was artificially prolonged as alleged. There was

no other reason to delay its end, and the question of compassionate leave could have been considered separately. Further, as I have said, there was concern that Mr Seneschall would not co-operate in the re-financing if he knew that the case against Ms Jones had failed, and as I will explain, her suspension was eventually lifted, formally, on the morning of Monday 13 July 2020, at about the same time as Mr Seneschall was suspended, the Reward Loan having been executed on the previous Friday afternoon. In the circumstances, the striking coincidence in time of these events cannot sensibly be explained otherwise.

399. Resuming the narrative, also on Monday 6 July 2020, Ms Harries sent Mr Marshall and Mr McCormick a draft suspension letter for Mr Seneschall, asking whether the aim was to suspend him "*today or tomorrow or another specific time*", to which Mr McCormick replied, "*tomorrow, hopefully am*". The draft letter was dated 6 July 2020.

400. On Thursday 9 July 2020, Mr McCormick emailed Mr Marshall, Mr Farrell and Ms Coyne and others making an urgent request for funds of £6,757.12 to meet a deficit in the refinancing of the Nucleus and Alfandari Loans. Mr McCormick observed that if the funds were not provided (to enable the refinancing) it would "*prevent me from taking the next steps we have planned*". This was, it seems to me, a reference to the events as they unfolded on Monday 13 July 2020, which required for their execution the refinancing to have been completed.

401. In the event, it was not until the following day, Friday 10 July 2020, that the Reward Loan (of £667,000) was drawn down, at 4.05pm, and the appointment of receivers very narrowly avoided. Shortly before the refinancing, liability in respect of the Alfandari Loan was (on 28 June 2020) £127, 757.12 and in respect

of the Nucleus Loan (on 6 July 2019) was £563,142.88, being a total of £690,000, whereas the Reward Loan was for £636,000, and therefore less than the aggregate amount of those it replaced.

402. I would surmise that at the end of that fraught week, Mr Seneschall believed his position in respect of the Company to have improved somewhat: as far as he knew, Ms Jones was suspended and the case against her was progressing; the Nucleus Loan and the Alfandari Loan had both been refinanced and the possibility of losing his home had been averted; correspondingly, his own position, both financial and within the management structure of the Company was, or certainly appeared to him to be, more secure.

403. Pausing there, in respect of the execution of the Reward Loan, there was yet another issue.

404. Ms Jones' case was that she did not consent to the Reward Loan, such was her attitude at that time to Mr Seneschall, given his efforts to secure her dismissal, his "*witch hunt*". Her case was that she had no interest in saving Mr and Mrs Seneschall from the threat of losing their home, and that the Loan was therefore executed <u>without</u> her agreement or involvement. In support of that allegation is the fact that on 6 July 2020, Mr McCormick had written to Mr Marshall, "*John is also being a bit naughty. They need ID for Lynne and John appears to be trying to find some to give without letting her know*." In addition, there was evidence that legal advice had been taken as to whether Ms Jones' involvement was strictly required. In the circumstances, Ms Jones' case was that she could not be guilty of having acted to allow Mr Seneschall to refinance the Nucleus Loan in ignorance of his imminent suspension, since she had, if anything,

impeded the refinance. Mr Seneschall's case was that, on the contrary, she had, in the event, consented.

405. On this issue, I reject the substance of Ms Jones' case.

406. On Wednesday 8 July 2020, Darwin Gray sent Mr Seneschall, (i) a short form agreement between himself and Ms Jones, (ii) a stock transfer form, (iii) draft board minutes for the Company and (iv) a letter from Market Fresh waiving any pre-emption rights. Mr Seneschall forwarded these documents to Mr McCormick saying that "*these are the forms we need to process to agree that Lynne has the 2.5% shares we left with me as far as Companies House was concerned.*" Some months later, on 10 September 2020, Ms Jones was interviewed in relation to Mr Seneschall's complaints regarding his treatment. In the record of her answers, it was recorded that "*Lynne had lent him 2.5% of shares at some point. So, when the loan company wanted her signature and identification. She said she wouldn't give her identifications and agreement to the loan until she had her 2.5% shares back on companies house. **It was settled***" (emphasis added).

407. In the circumstances, I infer that Ms Jones agreed to the Reward Loan on the basis that she recovered legal title to the shares previously held by Mr Seneschall, and despite the fact that at that point she had no or little sympathy for him, or any particular reason to wish to assist him. Apart from anything, that conclusion is inherently very probable - she knew that the plan was to suspend Mr Seneschall immediately or very shortly after the refinancing, and that the refinancing was a necessary first step; I do not accept that she would have acted to disrupt or undermine that plan, or indeed, to jeopardise the Company's

survival, in which she had a continuing interest. Moreover, the recovery of legal title to the shares held by Mr Seneschall would no doubt have become far more difficult after his planned suspension and dismissal; it made sense, and was to Ms Jones' advantage, to deal with the point beforehand.

408. Returning again to the narrative, on Friday 10 July, at 5.28pm, less than two hours after the Reward Loan had been executed, Mr McCormick wrote to Mr Marshall that, "*I will be delivering Lynnes reinstatement & Johns suspension on Monday first thing …*" Earlier that day, Mr McCormick had sent an email to Ms Harries attaching "*Suspension Letter – John Seneschall 10.07.20*". That version of the letter was dated 10 July 2020. Again, it is abundantly clear that these steps had been pre-planned, and that their execution had been delayed until the refinancing had been completed.

409. Accordingly, on Monday 13 July, at 10.05am, Mr McCormick telephoned Mr Seneschall to suspend him; the suspension letter was sent shortly afterwards. The version of the letter in fact sent was dated 13 July 2020, having twice been amended since it was drafted by Ms Harries. On the same day, Ms Jones' suspension was lifted, despite, as I have said, Ms Harries having made or recommended a decision to do so on Monday 6 July 2020.

410. Mr Seneschall's suspension letter (signed by Mr McCormick) read as follows:

> "*We discussed the allegations of gross misconduct which have been made against you. In accordance with the Company's disciplinary rules and procedures, I confirm that you are suspended on full pay pending an investigation into the below noted allegations raised by Lynne Jones.*
>
> *It is alleged that:*
>
> *1. You have brought the Company into disrepute due to your actions. These actions include but are not limited to:*

a. Coercion and bribery, where it is alleged that you instigated the recent ET claim brought against the company by Emma Tucker.

b. You promised she would be rewarded with her job back if she brought a tribunal claim against the Company and specifically against Lynne Jones.

c. Continuously lied to suppliers and partners as to when payments were due to be made.

d. Gross Negligence as it is alleged you coordinated and approved an invoice for recruitment fees with RP and failed to pay this invoice or notify anyone in finance that is was due, resulting in late fees and threats of court action and potential CCJ's to be brought against the Company.

e. You have negatively affected the Company's reputation locally due to your actions.

2. Carried out bullying and aggressive behaviour

a. On the 04/11/2019 it is alleged you called Lynne and David 'CUNTS' publicly in the office and threw an object after being questioned about funds used to pay your rent and other items which had been allocated to production.

b. Aggressive and confrontational behaviour towards Will Farrell (Finance) both verbally on the phone and emails.

c. Intimidating behaviour which has impacted the office negatively on the days you were there.

3. You have deliberately misled the Board with malicious intent. These actions include but are not limited to:

a. Raising false and malicious claims against a fellow Director.

b. Providing misleading information and obstructing access to vital Company finance and information.

c. An email dated 13/11/2019 where you state you will be stitching up Market Fresh over the next few weeks.

d. You extended the rental agreement on the property for a further 6 months without board knowledge or approval.

4. Creating a breach of trust through abuse of company expenses, failing to act in the best interest of the Company in line with your fiduciary duties.

a. Misuse of Company funds where it is alleged you used company funds to pay the rent, utilities and all bills associated with your flat.

b. On the 16/8/2018 the Company credit card was used to purchase mattress, bedding and personal furnishings without approval.

c. Use of the Company credit card for personal hotel stays.

5. You have created a clear breach of trust and confidence through the collective set of alleged actions noted above. Materially breaching a duty to act loyally, in good faith and in the Company's best interests.

6. There have been breaches of warranties as defined in clauses 5.1(e), (j) and (k) of the shareholders agreement. We reserve our right to bring a claim against you directly for these breaches as they relate to the amounts overdue for payment to the various suppliers and generally overdue payments relating to the property.

7. You have not conducted business in accordance with good business practice and as such have breached clause 6.2 of the shareholders agreement."

411. Professor Watson-Gandy submitted in Closing, that "*The coincidence of the timing of the Reward Loan and the notification of the lifting of suspension is more likely to been driven by his complaint leading to a stalling of the completion of the Reward Loan. Given his complaint made against Lynne Jones, she failed to cooperate with the completion of the Reward Loan, and John Seneschall had been left "with 30 minutes to spare" to complete the refinance before enforcement under the Nucleus Loan would have proceeded*." In other words, that it was because completion of the Reward Loan was delayed, that "*coincidentally*" it was only completed very shortly before the dismissal and Ms Jones' return to work. That submission misses the point: Mr Seneschall's case was (amongst other things) that <u>his own suspension</u> was delayed (despite having already been decided upon) until <u>after</u> the refinancing; that point is not answered by demonstrating that the refinancing was delayed.

412. I reject the submission that Mr Seneschall's suspension and Ms Jones' return to work were not deliberately delayed, and that it was no more than mere

"coincidence" that they happened to fall on the morning of the first business day after the execution of the Reward Loan. That submission was hopeless; it is plain on the documents that the delay was deliberate and that its purpose was to allow Mr Seneschall to refinance in ignorance of what was soon to happen.

413. Following his suspension, and an investigation conducted by Ms Harries, including at a meeting with Mr Seneschall on 22 July 2020, a hearing took place on 28 August 2020 (attended by Mr Seneschall, Ms Harris and chaired by Ms Fleming) and continued on 3 September 2020 (with the same participants). As a result, on 7 September 2020, Mr Seneschall was summarily dismissed for gross misconduct. Mr Seneschall appealed against his dismissal, and on 1 October 2020 his appeal was rejected, following a hearing conducted by Mr Marshall on 29 September 2020 (albeit the grounds on which the decision was upheld were more limited, and more specifically focussed on his conduct in respect of Ms Tucker, Ms Jones and the due diligence misrepresentations).

414. In that context, on 28 July 2020 (before the first hearing of the gross misconduct case against Mr Seneschall) Mr McCormick emailed Ms Coyne, Mr Marshall and Mr Farrell. In that email, in part, he said:

> "*We are currently working through John's disciplinary process, which might happen this week, it depends if he responds. The next stage would then be around any potential offer and getting the remainder of his shares. We haven't quite got to that stage yet with Dave.*
>
> *We have an update meeting with Eileen, Rue and Jonathan (Tees) in the morning. Part of that is to discuss the shareholders agreement, his breach of it and impact on his shares*." .

415. Again, the language and meaning is plain: the intention or proposal was first to dismiss Mr Seneschall, and in those circumstances, to offer to buy his shares in the Company. As stated above, in my judgment, essentially this was and had for some time been the planned course, albeit from a position of relative strength. Whether or not any offer was subsequently made (and I was not told of any) "*the next stage*", involving "*getting the remainder of* [Mr Seneschall's] *shares*", never happened.

416. On 6 August 2020, Mr McCormick sent a WhatsApp message to Ms Jones concerning a payment plan for the outstanding balance still owed to Tetra Pak. He said:

> "*Once John is out the way we are fine, but I'm not putting that or words to that effect in an email to* [Tetra Pak]" .

417. I take from the language of that message, and the circumstances, two points:

i) first, that it was being assumed by Mr McCormick (and Ms Jones) that as a result of the gross misconduct allegations against Mr Seneschall, he would in due course be "*out the way*", this being the plan; and,

ii) second, once that had happened, but not before, the money to deal with Tetra Pak would be made available, although this was not something to be told to Tetra Pak in the meantime (whether because of a fear that this intention might come to be known by Mr Seneschall, or for some other reason, was not clear).

418. On 28 August 2020, Mr Seneschall's disciplinary hearing began. On the same day, before the hearing started, at 10.15am, Mr McCormick sent a WhatsApp message to Mr Marshall, and said, "*it's ok,* [Ms Harries] *and* [Ms Fleming] *have*

already spoken". Whilst not clear what they had spoken about, the message tends to support the conclusion that Mr McCormick was involved in the disciplinary process, or was at least kept informed about its progress, with access to those more immediately involved.

419. On the following day, 29 August 2020, Mr McCormick and Ms Jones exchanged WhatsApp messages in the following terms:

> Mr McCormick: "*I might text Dave later. If there was a problem he would let us know, but would be good to know what did or didn't happen though*"
>
> Ms Jones: "*It would as dependant on the outcome, we could be in the firing line*"
>
> Mr McCormick: "*That's what I was thinking*"

420. Mr McCormick and Ms Jones were expressing concern about their own positions in the event that the anticipated dismissal of Mr Seneschall had failed to materialise.

421. In fact, the result of the hearing was Mr Seneschall's dismissal. On 7 September 2020, he was told by Ms Fleming by email that further to the disciplinary hearing, he had been dismissed without notice with effect from 7 September 2020.

422. That decision was upheld by Mr Marshall. By letter of 1 October 2020, he wrote as follows:

> "*After all due consideration, I find no other alternative but to uphold the decision to terminate your employment.*

Surrounding the allegation of your behaviour, namely, your foul language and comments made about noted employees, I take your points on board. These things happen due to stress and work pressures. You recognise the behaviour was not appropriate, and you regret it. This in isolation could have easily been dealt with through a dignity at work training course or effective commination's workshop.

On the other allegations concerning whether or not you instigated the ET1 claim made by Emma Tucker; the conversations around how things unfolded was inconsistent and seems disingenuous. I have no doubt, based on reasonable probability, and your own statements and accounts, that you instigated or fuelled this matter. You had advance knowledge of a situation developing and it is my view that you were not working in the Company's best interest and at minimum encouraged instead of tried to defuse this issue.

This was further compounded by an orchestrated attempt to implicate a fellow director. On viewing the evidence around this allegation, I found that you had very early conversations with Tetrapack employees, these actually took place prior to raising them with Rue. During those conversations, your aim was to gain support from these employees as clout to your allegations which were still to be made. Some of these discussions happen prior to the ET1 being received. On many of the other examples given by you, the stories were half-truths which painted a picture that you wished us to see. Your intention from the outset was indeed to orchestrate a basis on which to remove your colleague Lynne Jones.

Finally, my view of this intention was crystallised and made clear from your first interview with Rue Harries, Thursday 11th June 2020 @ 10:30am where you stated for the record:

'She is a saboteur and that she will lose nothing, she can walk away after working to destroy things.'

and

'She needs to be removed.'

Regarding the financial misrepresentations made by you noted in the original allegations, looking only at the legal due diligence questionnaire dated 11th June 2019, you confirmed the financial matters as being a true representation of the liabilities. There is no plausible way you did not know about several of the funds that were not included.

I feel these breaches of trust and negligence displayed in your fiduciary duties were as noted by the original chair, Karen Fleming, and as such her decision to dismiss you is upheld.

This decision is final and there is no further right is appeal."

423. Mr McCormick's evidence was that by about August 2020, he was, "*for want of a better word "broken"*", and that "*this period of time was undoubtedly the worst experience of* [his] *life*", which he described as "*managing the fallout from the financial deception and constant lies of Mr Seneschall, the animosity and vindictiveness Mr Seneschall developed towards Ms Jones*", combined with "*the fear for my job because I had introduced Mr Marshall (who would lose £1.8m) to Mr Seneschall. I was the middleman on everything* …". Mr McCormick said that directly as a result of Mr Seneschall's behaviour, he was, he believed, taken "*to the edge of a nervous breakdown*"; in any event, he said that he was not the decision maker in respect of either Mr Seneschall's suspension, or his subsequent dismissal – both being "*above his pay grade*".

424. I do not accept that evidence as describing accurately Mr McCormick's role. Whilst it is quite possible that he was by August 2020 under very significant pressure, that fact did not, as the documents show, prevent him from continuing to participate in the business, and in the steps taken to suspend and dismiss Mr Seneschall. Although correct to say that he was not the immediate "decision maker" in respect of either the suspension or dismissal of Mr Seneschall, he was plainly involved, in that: (i) it was at his original suggestion that the allegations of gross misconduct were instigated and pursued; (ii) it was with his direct involvement that those allegations were formulated; (iii) he was involved in deliberately delaying Mr Seneschall's suspension in order to allow the Reward Loan to be executed (secured on the Seneschalls' home) in ignorance of that fact; (iv) for the same reason, he was involved in deliberately delaying the end of Ms Jones' suspension period; (v) his involvement is wholly consistent with the plan which he himself set down, and of which he was very likely the source,

in his 4-Step Plan email in November 2019. Mr Seneschall's suspension and dismissal were pursuant to that plan, albeit certain elements of its execution were outside Mr McCormick's control.

425. The final chapter concerns events following Mr Seneschall's suspension and dismissal, and proceeding separately from them. It is important to bear in mind that notwithstanding his suspension, Mr Seneschall was still a Company shareholder, a *de jure* director and board member, and also contractually entitled to certain rights of participation under the ISHA, which provided, by Clause 9: (i) that "*All decisions to be taken by the board of directors may not be passed unless there is a unanimous vote by the Shareholder Directors*", and (ii) for the reservation of particular categories of decision to the board of directors, including decisions about the Company's financing, and thus including decisions in respect of additional loans and borrowings.

426. That right and correlative restriction transpired to be important. Mr Seneschall alleged that despite being willing to attend and participate at board meetings (and making that willingness explicit in correspondence with the Company) the Respondents, as part of their continuing strategy, deliberately prevented him from doing so in any meaningful way, by failing to give him adequate notice of meetings, and failing to give him sufficient information to make proper decisions.

427. The Respondents denied that allegation – their argument was that Mr Seneschall continued to enjoy active involvement in the Company's affairs (or at least, that they did not restrict the exercise of those rights) and furthermore, that it was his refusal to co-operate in the business that eventually caused the Company to go

into liquidation – that he himself brought about its collapse. They say that Board Meetings were called on 26 August 2020, 12 January 2021, 27 January 2021, 4 March 2021 and 5 March 2021, but that Mr Seneschall refused to attend all but one, at which he then abstained from voting.

428. Central to these events was that the Company continued to need significant financial support from Market Fresh (or from elsewhere, but there were no other obviously available alternatives) but had exceeded that which Market Fresh had agreed to invest under the HoTs. In the circumstances, Market Fresh simply decided for a period to pay sums to the Company for its use, but without formal agreement or Board approval. The reason for failing to get (or seek) Board approval was that there was a wish to avoid the need for any formal act of the Board whilst the gross misconduct dispute with Mr Seneschall was continuing. This emerges from the documents. For example, on 28 July 2020, Mr McCormick emailed Ms McKendry-Gray:

> "*Appreciate you looking at this and agreeing. You are right, addressing how it is treated needs looking at. Recognising it as a business loan for now would be ok, however we might need to avoid anything relating to board approval just now.*"

429. Similarly, on 10 August 2020, Mr McCormick sent a message to Mr Marshall, "*We need to talk about further investment, what you get for it and when and how we do it. We desperately need some cash for ingredients and payment plan for Tetra Pak.*"

430. The problem ("*what you get for it and when and how we do it*") was that because Market Fresh had exhausted its rights (and any obligations) under the HoTs, any further money paid to the Company would not, in the absence of a further agreement, be in return for equity. However, any new agreement concerning the

Company's financing - whether in return for shares or otherwise - was not only a matter for the Board, but for a unanimous decision of the Board; it required the involvement and agreement of the recently suspended, and patently aggrieved Mr Seneschall.

431. As I have said, in the first instance, without the approval of the Company's Board, and not pursuant to any form of written or formal agreement, Market Fresh seems simply to have paid the Company certain sums urgently required.

432. As to the amounts involved, on 14 October 2020, about a fortnight after Mr Marshall had upheld Mr Seneschall's dismissal, Tees, the solicitors for Market Fresh, sent Mr Seneschall a letter before claim seeking damages of £2,054,095.58, essentially on grounds similar to those contained in its counterclaim in the present proceedings. In that letter, in addition, it was said that "*Our Client in an effort to mitigate its loss has advanced by way of loan a further sum of £254,095.58...*" Receipt of this letter appears to have been when Mr Seneschall learned of the additional sums paid to the Company since his suspension.

433. On 25 January 2021, Nicola Marshall wrote, on behalf of Market Fresh, to the Company's directors, asking for their "*proposals for repayment of this loan as soon as possible, if not immediately*", and referring to an alleged loan in the sums of £519,704.15. Plainly, by that time, further sums had been paid (albeit still informally).

434. On the same day, 25 January 2021, just over an hour after the letter sent by Market Fresh, Mr Marshall emailed Mr Seneschall and Ms Jones and requested

an emergency Board Meeting, to be held on Wednesday 27 January. The email read, in part:

> *"It is a one item agenda Administration or funding options and implications on Reward Capital and Market Fresh loans. There is a very short window in which to see a way out of this as so please make yourself available...*
>
> *...please understand that this is not posturing, my business is under pressure on a number of fronts and should we not see a way through this week I suspect the company will be in administration by Friday."*

435. On 26 January, Mr Seneschall's solicitors at that time, Collyer Bristow, responded. Amongst other things, they said that Mr Seneschall had not known of the alleged borrowing before the letter before action dated 14 October 2020, and in any event that it had not been agreed. However, they also said that Mr Seneschall might agree to a "*further small loan*" to the Company but on condition, first, that certain information (as to the need and purpose of the loan) be provided, and second, that the loan "*is only as much as is needed to get to the week following the proposed mediation date*."

436. That mediation was eventually arranged for 5 March 2021, and it is passably apparent, and not unexpected, that in advance of that date, on both sides of the burgeoning dispute, steps were being taken to protect or establish a more powerful bargaining position (or weaken that of their opponent). Part of Market Fresh's strategy - opposed by Mr Seneschall - was to bring about formal recognition of the character of the sizeable sums which it had injected since July 2020 without Mr Seneschall's consent (and therefore, in plain breach of the ISHA); both sides faced the threat of loss.

437. Thus, on 4 February 2021, Tees sent an email to Collyer Bristow in which they said, of the sums paid to the Company, that "*such sums are a de jure debt*

whether formally ratified by the board of Trisant or not" and that Market Fresh would only be willing to support the Company if the "*status of its debt is resolved (recognition of the debt by all directors of Trisant, securing the debt and/or converting it into equity and amending the shareholder's agreement*."

438. Similarly, on 15 February 2021, Tees wrote again, that Market Fresh was "*prepared to continue funding until 5th March on the basis that the funding by* [Market Fresh] *is now formally agreed. This concession is solely on the basis that mediation occurs on 5th March and will not be further extended*."

439. Collyer Bristow replied on the same day, and agreed, but to a limited extent:

> "*...We note your client's offer to provide the interim funding, for which all parties will be appreciative. We reiterate that any approval for any future loan(s) is only for future loans, and any consent will not be in relation to past lending. That will have to be an issue to be discussed in mediation. As requested our client will need up to date and complete management accounts before he can agree to the further funding but as Market Fresh will be in the trenches producing the financial data for the independent expert, that should not be onerous..."*

440. Mr Seneschall's approach was to hope to maintain the Company's existence, supported by Market Fresh, but without conceding the argument about sums paid previously.

441. That argument continued in correspondence, and Collyer Bristow continued to request information (unsuccessfully) in order that Mr Seneschall (still a *de jure* director, and so entitled to financial information) could reach an informed decision:

> "*...Your clients cannot expect a director to agree a loan without the Board being presented with full and proper financial information, and if the company does go into administration we will draw the attention of the administrators to the poor financial management since Market Fresh came on board. Further, the Board is inquorate without Mr Seneschall and the*

Board cannot therefore pass a resolution to put the company into administration."

442. The argument continued unresolved: on 2 March 2021, Tees emailed Collyer Bristow and said that the Company "*is insolvent and unable to pay its debts without support from Market Fresh. This is the reason that historic debts are included and need to be paid ... We would ask you now to confirm your client's express agreement to the loan by 12 noon on 3rd March. If we do not receive this agreement, Market Fresh will not be able to advance more money to Trisant and, in order to fulfil their duty to creditors, the Directors of Trisant will have little choice but to put the company into immediate administration*."

443. On the following day, 3 March, they wrote again, attaching draft minutes for a Board Meeting to take place on 4 March 2021 at 8am. Those draft minutes said:

"*...The Chairperson reported that the purpose of the Meeting was to approve a loan facility from Market Fresh to the Company covering payments required to be made by the Company during the period from and including 25 January 2021 up to the maximum amount of £339,720.00 (Loan)*

...IT WAS THEREFORE RESOLVED that the Company's acceptance of the Loan be fully ratified and approved without reservation.."

444. Later that day, Collyer Bristow replied to say that the minutes "*cannot be approved*" as Tees had said previously that they would (but they did not) note Mr Seneschall's abstention and the reason for it, and note the reservation of his rights.

445. On 4 March 2021, the Board nonetheless seems to have approved or purported to approve receipt of a loan from Market Fresh to the Company in respect of the period from 25 January 2021, up to the maximum amount of £339,720.00.

446. Friday 5 March 2021 passed, with or without a mediation, and certainly without compromise.

447. Subsequently, Market Fresh simply stopped paying or investing any further sums in the Company. Thus, on Monday 8 March 2021, at 10.22am, Mr Marshall emailed Mr Seneschall and Ms Jones (subject: "*Administration"*) and said:

> *"...Due to the continued uncertainty of the future of the company Market Fresh is not prepared to provide any further funds to Trisant.*
>
> *Bank balance: -15k with the following payments due immediately:*
>
> *• Hampshire Trust £1,869*
>
> *• Reward Capital £9,000*
>
> *• Tetra £64,500*
>
> *• Tetra £20,000*
>
> *• Rates £15,836*
>
> *By the end of the month there will be a further £178,363 which creates a total of £289,568. Trisant has no funds and is therefore unable to meet these payments.*
>
> *Accordingly, unless either of you have a solution for funding that is acceptable to the Board, we have no alternative but to place the company into administration in line with our duties as directors. Please provide any solution or comment by 4pm today."*

448. Collyer Bristow asked how the Company could be without funding given the previous week's Board resolution regarding lending. Tees explained that although the Company had approved borrowing, Market Fresh was not obliged to provide it, and had decided, on Friday 5 March 2021, not to do so: "*As such, there are no funds within Trisant and no third party with any obligation to make payment of Trisant's debts falling due this week.*" The result of that decision was reasonably inevitable.

449. On 16 March 2021, Ms Jones sought a Board Meeting, at short notice, to discuss matters, including the possibility of administration.

450. On 17 March 2021, these proceedings were started by Mr Seneschall.

451. Subsequently, in May 2021, administration was again suggested. Collyer Bristow rejected the suggestion, it not being accepted that "*alternative options*" had been explored. In any event, it is reasonably plain on the evidence that Market Fresh and Mr Marshall had decided against further funding, possibly, apart from anything, because Market Fresh could not afford it. Thus (albeit I acknowledge the possibility that Mr Marshall's response was driven by other considerations) on 20 May 2021, Mr McCormick wrote to Mr Marshall about his outstanding pay, and Mr Marshall replied, "*Not in the near future. Trisant is going into administration as we speak and the damage is an untold amount to us. MF may even struggle to survive this so I can't do any funds to anyone at the moment*."

452. In June 2021, by agreement between the parties, Stephen Cork of Cork Gulley was appointed to advise about the Company's options. He recommended creditors voluntary liquidation or otherwise, compulsory liquidation. As I have said, on 24 June 2021 a winding-up petition was presented, and on 9 November 2021 an order was duly made.

453. In the circumstances, I do not agree that Mr Seneschall drove the Company into liquidation, as alleged by the Respondents. It went into liquidation because it was in fact insolvent and wholly dependent on Market Fresh for its survival. After 5 March 2021, Market Fresh decided to withdraw further support, as it was free to do; it was under no obligation to pay anything more. From that point,

the Company's liquidation was probably inevitable (or at any rate, some form of insolvency regime was probably unavoidable).

[F6] <u>November 2019 to March 2021: Conclusions</u>

454. First, drawing together my findings of fact.

i) There was a plan, as stated in the 4-Step Plan email, originated by Mr McCormick in about November 2019 which involved, as a principal aim, the end or reduction of Mr Seneschall's involvement in the Company's affairs. At the point of its inception, the plan did not necessarily entail unlawfulness, or even, necessarily, loss to Mr Seneschall.

ii) Each of Mr McCormick, Mr Marshall and (from about the end of 2019) Ms Jones, knew about the plan, agreed to it, and in different respects, each according to his/her position, participated in it. That is so notwithstanding that certainly from about the beginning of June 2020, Ms Jones had her own independent reason to see to Mr Seneschall's removal, since he himself was acting to bring about her dismissal (whether or not, which is possible, he was assisting or encouraging Ms Tucker in pursuit of her claim, later withdrawn).

iii) The plan entailed, or was, from time to time, more or less intended by each protagonist to entail the eventual purchase of Mr Seneschall's shares in the Company by Market Fresh (or perhaps another entity directed by Mr Marshall) albeit I infer, from a position of relative bargaining strength. On any view, Mr Marshall was, ultimately, the person upon whom the entire plan depended, as the ultimate owner of Market Fresh, the majority shareholder in the Company, and the only

real source of funding. Mr McCormick was neither shareholder nor *de jure* director of either Market Fresh or the Company. He had the least to gain, but to the extent Market Fresh suffered losses, was exposed to the risk of blame.

iv) Mr Seneschall was unaware of the plan.

v) The plan was conceived and pursued by Mr McCormick, Mr Marshall and Ms Jones in breach of their duties owed as directors to the Company. That is because: (a) it comprised a concealed plan to advance the interests of one shareholder (possibly two) at the expense of the other; (b) ultimately, it entailed the directors causing the Company to act in breach of its contractual duties to Mr Seneschall; and (c) causing the Company to act dishonestly, by deliberately delaying the communication to him of the decisions taken about his own and Ms Jones' suspensions in July 2020.

vi) The termination of the lease of the Flat on about 7 February 2020 was pursuant to the plan, intended to make Mr Seneschall's involvement less practically straightforward; it was not a decision or act taken in the undiluted best interests of the Company.

vii) Although it might have been right and sensible to furlough both Mr Seneschall and Ms Jones in March 2020, that circumstance was exploited as the context in which Mr McCormick and Ms Jones communicated privately, to the deliberate exclusion of Mr Seneschall, about matters of importance to the Company.

viii) Having previously considered and discussed various means of achieving Mr Seneschall's removal (but in particular, his redundancy) the decision to allege gross misconduct against Mr Seneschall in June 2020 (prompted by Ms Tucker's allegations against Ms Jones) was not taken because of a genuine belief that his conduct justified that allegation, or his suspension, or his dismissal. It was taken, motivated and pursued by a desire to see to Mr Seneschall's removal, according to a pre-existing, articulated plan, in which the Company's two other directors participated.

ix) Furthermore, the disciplinary process in fact undertaken was in breach of Mr Seneschall's employment contract and was based to a substantial extent on grounds that did not justify his suspension or dismissal. I expand on this below, at paragraphs 455-458

x) Although Mr Seneschall's financial position may not have been damaged by the refinancing, the decisions to suspend Mr Seneschall and to end Ms Jones' suspension, were both deliberately delayed (at least, their communication to Mr Seneschall was deliberately delayed) in order to allow Mr Seneschall to complete the Reward Loan, secured on his house, in ignorance of what was planned and what would very soon happen. Ms Jones agreed to the execution of the Reward Loan, in order to retrieve legal title to shares held in Mr Seneschall's name before his suspension, and in order to facilitate the plan, which depended on the refinancing (without which the Company was apparently at very serious risk of receivership).

xi) After his suspension, Mr Seneschall was deliberately excluded, in breach of the ISHA, from participation in the Company's financial affairs (in particular, the decision to accept informal funding from Market Fresh) and was refused information about the Company's affairs to which he was entitled, as a director.

xii) During the whole period, the Company was insolvent but for the support of Market Fresh, which it was under no obligation to provide or continue. It ceased to give support on about Monday 8 March 2021, a mediation having apparently been arranged to take place on Friday 5 March 2021, and whether or not it took place, no resolution of the parties' continuing dispute having been reached.

455. As to the disciplinary process itself, I add as follows.

456. First, I do not accept that the process was conducted fairly, or in good faith, given that the ultimate decision was taken by Mr Marshall who was, as I have found, a participant in a pre-existing plan to end Mr Seneschall's participation in the Company and its business, and that the allegations on which it was based were in large measure raised by Mr McCormick and Ms Jones, who were also participants in the plan.

457. Second, the integrity of the process and of the outcome is further undermined by the fact of certain of the allegations made at the outset. For example, despite the caution expressed by Ms Harries, the suspension letter included reference to various events which were by then historic, and which had not, at the time of their occurrence, prompted the reaction or attracted the consequences attached to them in July 2020. For example, the incident of 4 November 2019, and the

email sent to Mr Williams on 13 November 2019, which, whatever its meaning, had been raised, considered and dealt with at the Board Meeting of 18 December 2019, after the plan to remove Mr Seneschall had been articulated, but without it being thought that allegations of gross misconduct might justifiably be made as a result.

458. Third, Mr Marshall's eventual decision, upholding that of the hearing before Ms Fleming and Ms Harries, was in significant part based on the allegation that Mr Seneschall had made "*the financial misrepresentations … noted in the original allegations, looking only at the legal due diligence questionnaire dated 11th June 2019, you confirmed the financial matters as being a true representation of the liabilities. There is no plausible way you did not know about several of the funds that were not included*." Not only was that "finding" completely unparticularised (and difficult to understand, or therefore oppose) but it was, as I have held below, not correct. In that respect:

i) The Disciplinary Investigation Form dated 16 July 2020, which was effectively Mr McCormick's evidence as part of the disciplinary investigation, alleged that Mr Seneschall failed to inform Market Fresh of £177,000 worth of creditor invoices. Specifically, he said that, at the meeting on 2 August 2019, Mr Seneschall "*was specifically asked to share exactly what money was needed to get the business operational as additional cost were* [sic] *constantly coming to our intention* [sic]. *He stated there was nothing else, yet we later discovered a further £177,000 of invoices that were not on the system*."

ii) The same allegation was repeated, as found, in the dismissal letter of 7 September 2019: "*You also failed to inform the board and the investor of £177,000 worth of outstanding and some cases overdue creditor invoices putting the company under strain*."

iii) No breakdown of that sum was ever provided to Mr Seneschall (who could not therefore answer it, even in principle) and neither was it explained to the Court.

iv) Furthermore, in these proceedings, the Market Fresh counterclaim is quite different. It is that as at the date of the ISHA, the Company had debts undisclosed and outstanding of £327,493.22. The difference between the two allegations casts some doubt on both incarnations, but in any event, as I have said, (a) the allegation as advanced and found in the disciplinary proceedings was unfairly unparticularised and effectively Mr Seneschall rendered incapable of response, and (b) the counterclaim (in the larger sum) fails, undermining the finding on which the dismissal was based.

v) In any event, if it had been genuinely thought that the financial position of the Company in August 2019 justified Mr Seneschall's immediate, summary dismissal, I assume that some such step might have been at least considered at that time (and if not then, certainly before June 2020).

459. In my judgment, those findings taken together compel the conclusion that from about the end of 2019, the Company's affairs were conducted in a manner unfairly prejudicial to Mr Seneschall's interests as a member. As to that:

i) First, plainly, the relevant conduct was conduct of the Company's affairs. The principal acts in question were taken by and on behalf of the Company itself.

ii) Second, that conduct was unfair, because it entailed breaches of directors duties, breaches of the ISHA, breaches of Mr Seneschall's employment contract, and a failure to respect his rights as a director to the provision of information.

iii) Third, it was unfairly prejudicial to him in his capacity as a member of the Company, and moreover, his interests as a member provide a further basis of unfairness.

iv) As to that, a concealed plan, materially executed, to exclude Mr Seneschall from participation in the business, and from knowledge about its affairs, whilst at the same time exploiting his home as security, in order only then, from a position of enhanced bargaining power, to purchase his shares, was inherently prejudicial to him as a member; it was a plan ultimately directed at his membership. Mr Seneschall was in any event entitled to expect the Company's affairs to be conducted in accordance with the other directors' duties, which they were not.

v) Even if, by the end of 2019, the relationship between the parties was such that some management or other change was justified, or even necessary, that fact would not justify (or render fair) the Respondents' concealed plan, or the terms on which, in effect, Mr Seneschall was excluded from the business, given the Company's continuing reliance on his property as security, and given the absence of an offer of any sort to

buy his shares, or to relieve him of his obligations as guarantor or mortgagor.

vi) I accept that for the purposes of s.994, this is a case in which Mr Seneschall's interests as a mortgagor/guarantor, and his capacity in those respects, should be treated as an aspect of his interests as a member. As explained above, that element of the action "… *should not be too narrowly or technically construed*": *per* Lord Hoffmann in O'Neill v Phillips [1999] 1 W.L.R. 1092 at 1105; R&H Electric Ltd v Haden Bill Electrical Ltd [1995] B.C.C. 958 Ch D (Companies Ct). On the contrary, it is sufficient if a petitioner has suffered prejudice "*in some capacity connected with his shareholding, such as that of a lender under a loan made as part of the same investment as the acquisition of shares*": Re Tobian Properties [2013] Bus. L.R. 753 at [11]–[12]; Gamlestaden v Baltic Partners [2007] Bus. L.R. 1521. In the present case, Mr Seneschall agreed from the outset to the use of his own home as security, and to the personal risks thereby created, only as an aspect of his initial and continuing membership; the two were "*part of the same investment*", inextricably connected.

vii) I also accept that Mr Seneschall had a right of participation in the business, as a further incident of his membership. To end or curtail his participation in a manner or in circumstances that were unfair (as was the case) was unfair to him as a member. As to that, there was further disagreement between the parties, as follows.

460. Mr Seneschall's pleaded case was that Mr Seneschall held various "*legitimate expectations*" as a member, including an entitlement to be employed in an executive capacity. In O'Neill, Lord Hoffmann expressed some regret ("*it was probably a mistake*") about his own use (in Re Saul D. Harrison & Sons Plc [1995] 1 B.C.L.C. 14, 19) in the context of unfair prejudice claims, of the term *"legitimate expectations"*, and it is an expression that can cause confusion, best avoided. As Lord Hoffmann said, "*The concept of a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application*", and "*The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J. said in In re J.E. Cade & Son Ltd. [1992] B.C.L.C. 213 , 227: "The court ... has a very wide discretion, but it does not sit under a palm tree".*"

461. In the present case for example, Mr Seneschall may well have expected, in some senses "*legitimately*" that Market Fresh would invest more and more quickly than it did. But the problem – rather like that encountered by Mr O'Neill – was that Market Fresh had not actually agreed in those terms. As Lord Hoffmann said, in terms that have a particular bearing on the present case: "*...the Court of Appeal said that Mr. O'Neill had a legitimate expectation of being allotted more shares when the targets were met. No doubt he did have such an expectation before 4 November and no doubt it was legitimate, or reasonable, in the sense that it reasonably appeared likely to happen. Mr. Phillips had agreed in principle, subject to the execution of a suitable document. But this is where I think that the Court of Appeal may have been misled by the expression "legitimate expectation." The real question is whether in fairness or equity Mr.*

O'Neill had a right to the shares. On this point, one runs up against what seems to me the insuperable obstacle of the judge's finding that Mr. Phillips never agreed to give them. He made no promise on the point. From which it seems to me to follow that there is no basis, consistent with established principles of equity, for a court to hold that Mr. Phillips was behaving unfairly in withdrawing from the negotiation. This would not be restraining the exercise of legal rights. It would be imposing upon Mr. Phillips an obligation to which he never agreed."

462. Nonetheless, turning back to the question of Mr Seneschall's rights of executive participation in the business, the issue was whether Mr Seneschall's membership entitled him to "*expect*" to be employed in an executive capacity, subject, it was accepted, to the proper performance of his duties, and a right to remove him for good cause, in good faith and fairly.

463. The Respondents denied any such entitlement. Their argument was that (certainly following the introduction of Market Fresh as an investor and member): (i) the Company was operated on a purely commercial basis, and the terms of association and business were therefore to be found exclusively in the articles of association, the law generally, and any relevant contracts; and (ii) in any event, Mr Seneschall had no expectation of continuing employment in fact.

464. In Closing, Mr Northall expanded upon these arguments, submitting that, as a member, or arising out of his membership in this case, Mr Seneschall was entitled to participate in management, and that there was a restraint on his exclusion without offering to buy his shares at fair value, and a restraint on his disenfranchisement (without also releasing him from liability in respect of the

Nucleus Loan, or its replacement) at a time when the Company's success would affect his rights and obligations in that regard; overall, a restraint on unfair exclusion from the business, the unfairness residing in the circumstances of exclusion and/or possibly the terms.

465. The basis of the submission was:

i) First, that the Company began as a collaboration between two parties, Mr Seneschall and Ms Jones, and was a paradigm example of a company established on personal dealings formed by a small number of individuals, on the basis of participation by all or some of them in the company's management and depending upon a relationship of trust and confidence between them; formal employment was a natural incidence of directorship and shareholding. I agree with that submission. One effect, for example, would have been, at the outset, a restraint on Mr Seneschall's power to use his 75% ownership to exclude Ms Jones, by removing her as a director, without good reason.

ii) Second, that the position did not materially alter on Market Fresh's introduction and investment; that the agreement of the ISHA did not eliminate the role of equity; that the Company still involved a small number of shareholders and continued to be dependent on personal relationships; and that the ISHA did not seek to place Mr Seneschall's involvement "*on a different footing*". He submitted that there was no attempt to disassociate Mr Seneschall's shareholding, directorship and employment, and if anything, the ISHA "*underscored the fact that the Petitioner's interests as shareholder, director and employee were bound*

up with each other and equity should act to protect the Petitioner's rights in the event that the other parties attempted to divest him of one or more of his three interests".

466. I agree with Mr Northall that:

i) one aspect of Mr Seneschall's membership, and of his interests and character as a member, was his right of executive participation in (and influence over, and responsibility for) the Company's business and affairs; it would, in this case, in my judgment, be wholly unrealistic (in respect of the period in question) to draw a distinction between his membership and his participation in running the business; it was a company of which he was a joint founder, and in which he had "invested" economically; it was a business which was in very significant measure created and developed by him, with Ms Jones, in order to profit from its increased capital value; the fruits of his ideas and labour were to be reflected in the value of his stake; the two aspects were inseparable; at the outset, the Company was undoubtedly in the nature of what is often called a "*quasi-partnership*", and I do not accept that the introduction of Market Fresh changed the nature of Mr Seneschall's position.

ii) his right to participate was enshrined in the ISHA, together with his contract of employment; breach of those contracts in this regard was therefore capable of being both unfair and prejudicial to Mr Seneschall as a member of the Company.

467. It therefore follows that:

i) I reject the submission made by the Respondents that Mr Seneschall's dismissal as employee, affected only his interests as an employee (as in Re London School of Electronics Ltd [1986] Ch 178); whilst that is no doubt true in some cases, it depends on the circumstances;

ii) neither is it relevant that Mr Seneschall planned to "*exit*" the Company in due course (as he said in evidence, "*selling* [his] *entire stake in the business within 5 years*"); that future possibility did not affect the nature of his interests in 2019-2021, and if anything, underlined the conclusion that his executive involvement in developing the business was intermingled with his rights of ownership as a member;

iii) neither is it relevant that Mr Seneschall himself suggested that his role might change in his email of 11 January 2020. The suggestion was not that he should not be involved as an employee or in an executive capacity; neither was it an invitation to act in breach of his contract of employment or the ISHA, or any other duty or restraint.

468. In conclusion therefore, I agree with Mr Northall on this issue, that Mr Seneschall's interests as a member included an equitable right of executive participation in the business, and that to act in breach of that right was capable of being (and was) unfair to Mr Seneschall as a member for the purposes of s.994 of the 2006 Act.

[F7] Unfair Prejudice: Remedy

469. The form of the appropriate, fair remedy, and against whom it should be ordered, is a question for a further hearing, evidence and submissions, in accordance with the Order of Chief ICCJ Briggs made on 16 August 2021.

Plainly, as I have described, each of the Respondents participated in a different capacity, and not each to the same end or extent. Moreover, each of them was differently affected by the surrounding circumstances, and by Mr Seneschall's own conduct, which whilst not necessarily depriving him of a remedy, is potentially material to its form.

[G] Unlawful Means Conspiracy

470. Having set out the facts, and dealt with the case under s.994, the case in conspiracy (in effect, differently characterised, the foundation of the case under s.994) is comparatively straightforward.

[G1] The Control Conspiracy: June to November 2019

471. Mr Seneschall's case was that there was an agreement or combination between Market Fresh, Mr Marshall and Mr McCormick from June 2019 to "*seize control*" of the Company with a view to operating it as a *de facto* subsidiary of Market Fresh.

472. The unlawful means alleged were:

i) that in taking control, the conspirators were acting in "*direct conflict*" with the terms of the ISHA; and,

ii) that in "*preferring and advancing the sectional interests of Market Fresh to the detriment of the Petitioner*" Mr Marshall, Mr McCormick, and later Ms Jones, acted in breach of their duties owed to the Company as directors.

473. Mr Northall submitted that the intention to cause injury to Mr Seneschall, in respect of the Control Conspiracy, was established because harm to Mr

Seneschall was "*undoubtedly part of the means by which*" the conspirators achieved their desired end (being control of the Company), or in respect of that end, the "*obverse side of the coin*".

474. He further submitted that this was "*most vividly illustrated by the Petitioner's relinquishing of shares (including 10% of the equity in Trisant from his personal shareholding) in order to give Market Fresh the majority ownership which it represented was necessary to lending from Barclays to facilitate the further investment.*"

475. The loss suffered was said to include "*losses attributable to the reduction in Mr Seneschall's shareholding and the diminution of his retained shareholding*."

476. My findings and conclusions summarised above at paragraph 351 are sufficient to deal with this allegation, which I therefore reject; between June and November 2019 there was no conspiracy.

[G2] <u>The 2020 Control (& Exclusion) Conspiracy: November 2019 to March 2021</u>

477. Mr Seneschall's case was that from about the end of 2019, there existed an unlawful means conspiracy between all of the Respondents (apart from the Company itself) to "exclude" him from full participation in the affairs of Company, in accordance with his rights. The conspirators' unlawful means were said to comprise:

i) A breach of the ISHA by Market Fresh and/or Ms Jones. The allegation was that it was an "*implied term of the ISHA*" that Mr Seneschall's right to participate as a director in the business of the Company's Board "*further entitled him to assume employment with Trisant in an executive*

capacity", and that therefore, the Respondents "*were not … entitled to terminate* [his] *employment without just cause*".

ii) A breach of Mr Seneschall's contract of employment by the Company itself, although not acting as a conspirator, as set out above.

iii) Breaches of fiduciary duty (owed to the Company, but not Mr Seneschall) by Mr Marshall, Mr McCormick and Ms Jones, in causing the Company to dismiss Mr Seneschall, and acting in connection with his dismissal, and beforehand, for improper purposes, in order to prefer the interests of Market Fresh, rather than to advance those of the Company itself.

iv) The tort of deceit: that the conspirators deliberately and dishonestly withheld from Mr Seneschall the decision to dismiss him until 13 July 2020, after the Reward Loan had been drawn down, and his home provided as security (and therefore by omission deceived him), and during that period, to the same end, as part of the deceit, pretended that Ms Jones had been suspended, in order to trick Mr Seneschall into thinking that his concerns about her conduct were being considered genuinely.

478. The allegation at sub-paragraph (i) of the preceding paragraph can be dealt with summarily.

i) I am not persuaded (and little if anything was said to justify the submission) that there was an implied contractual term to the effect contended for. No such term was necessary to the operation of the ISHA.

ii) In any event, the allegation was little developed. It was, as I understood it, to the effect that Market Fresh and Ms Jones were in breach of contract (the ISHA) in causing the Company to breach Mr Seneschall's contract of employment (and presumably, also, to breach the ISHA). Whether that argument could be substantiated would depend on the terms of the implied obligations allegedly owed by Market Fresh and Ms Jones, and indeed by the Company – as to which the case was not clearly articulated. It was not alleged that the Respondents, or any of them, had committed the tort of inducing breach of contract. No remedy was sought directly in respect of breach of contract. In any event, to a considerable extent, the allegation was mirrored by the allegation of breach of fiduciary duty (although I accept that it was made against Market Fresh rather than the Company's directors, and that it was made in respect of duties said to have been owed to Mr Seneschall himself, rather than the Company).

479. I can also deal with the allegation at sub-paragraph (ii) of paragraph 477. The Company was not one of the alleged conspirators. In order to establish the alleged conspiracy by reference to the Company's breach of contract, Mr Seneschall would have to show how the conspirators themselves used unlawful means, and therefore, how the conspirators were in law responsible for or participated in the Company's breach of contract. That allegation, based on breach of fiduciary duty, was made, and was open to Mr Seneschall, but in itself the allegation at paragraph 477(ii) adds nothing; it is part of what must be proved to make out the allegation at sub-paragraph (iii).

480. As to an intention to injure, Mr Seneschall's case was that his wrongful dismissal was a necessary part of the Exclusion Conspiracy, causing him loss (of wages and salary) and that in addition, the deceit (and thus the Conspiracy) caused him loss because it caused him to provide security in support of the Reward Loan (and therefore caused him loss equivalent to his financial exposure).

481. As to the latter aspect, in respect of the security provided for the Reward Loan, the Respondents submitted that there was no loss, because the Reward Loan was for a lesser sum than the borrowing it replaced, and at a lower rate of interest.

482. In response to that argument, Mr Seneschall's case was that he was entitled to rely upon the terms of the Redemption Agreement, and that absent the deceit, that is what he would have done. However, as I have held, there was no Redemption Agreement, and so that response is not open to Mr Seneschall.

483. As to the case at paragraph 477(iv) above, in respect of the alleged deceit, I reject it for the following reasons.

i) First, it was, it any event, an allegation of a different or new variety of conspiracy from those pleaded: the alleged plans to "control" and "exclude" were not effected by means of the deceit; the purpose of the deceit, if made out, was to persuade Mr Seneschall to provide his property as security; his exclusion was brought about otherwise.

ii) Second, whilst I accept that it is possible to commit the tort of deceit by omission, the particulars and legal foundation of that allegation were not developed.

iii) Third, in any event, to the extent that the allegation of loss caused by the alleged deceit was said to depend on proof of the Redemption Agreement, and the fact that Mr Seneschall would have enforced his contractual right against Market Fresh had he been told of his imminent dismissal, it fails, because as I have said, there was no Redemption Agreement.

484. Accordingly, in respect of the Exclusion Conspiracy (or the Control Conspiracy in the course of 2020) the central remaining allegation is that the conspirators, by means of breaches of fiduciary duty, excluded Mr Seneschall from participation in Company's affairs, including by causing the Company to break his contract of employment.

485. In my judgment, based on the findings set out above at paragraph 454, there was, from about June 2020, an unlawful means conspiracy (albeit based on an agreement previously conceived, and in certain respects acted upon) between Mr Marshall, Mr McCormick, Market Fresh and Ms Jones to exclude Mr Seneschall from executive participation in the Company's affairs, effected by means of breaches of fiduciary duties in connection with Mr Seneschall's dismissal from employment, and which thereby caused him loss (despite the fact that he continued in office as a director subsequently, and as a member of the Company). In consequence of my findings:

i) First, there was a combination between Market Fresh, Mr Marshall, Mr McCormick and Ms Jones, each acting pursuant to a shared, mutual understanding and intention to remove Mr Seneschall from executive participation in the business of the Company.

ii) Second, albeit not their sole or predominant purpose, the Respondents intended harm to Mr Seneschall, if for no other reason than that his suspension and dismissal were an inseparable part of the Respondents' intended end.

iii) Third, the Respondents acted on their agreement: Mr Seneschall was suspended, dismissed and excluded, and as I have explained above, those acts involved unlawfulness because they entailed breaches of fiduciary duty by Mr Marshall, Mr McCormick and Ms Jones. Those breaches were not incidental or collateral to Mr Seneschall's alleged loss; they were the means, or inherently part of the means, by which it was inflicted.

iv) Fourth, as to loss sufficient to comprise the tort at this stage: Mr Seneschall's contract of employment was breached; he took and (I assume) paid for legal advice about that, and was deprived of and lost his income. As to this element however, I shall say no more at this point, because in the circumstances, as in connection with the claim under s.994, the precise form and extent of the remedy for conspiracy (and therefore the extent of attributable, recoverable loss) is a matter for further evidence and submissions at a further hearing.

[H] <u>The Market Fresh Counterclaim: the Allegations</u>

486. Market Fresh's pleaded counterclaim was that it had invested in the Company "*in faith of and relying upon the truth of*":

> Mr Seneschall's response to Question 3.3.5 of the Due Diligence Questionnaire as set out above at paragraph 50; and,

i) the warranties at Clause 5.1(e) and (k) of the ISHA; and that,

ii) it "*would not have invested in* [the Company] *had* [Mr Seneschall] *given truthful answers* [to Question 3.3.5] *and/or not given the* [warranties]".

By reason of those matters, it was pleaded that Market Fresh had invested £2,054,095.58, which sum has been "*wholly lost*".

487. The claim was thus put on two bases:

i) first, that contrary to the response to Question 3.3.5 of the Due Diligence Questionnaire, it was not true that the Company had "*not stopped payment of its debts, become unable to pay its debts as they* [fell] *due or … otherwise become insolvent*"; in fact, it was alleged, the Company was at all material times cashflow and balance sheet insolvent; and,

ii) second, that contrary to the terms of Clause 5 of the ISHA, it was not true, as at 7 August 2019, that no indebtedness of the Company was due and payable and/or that the Company had not received notice from any of its creditors requiring payment of such indebtedness and/or that all outgoings in respect of the Factory premises and rent, insurance and service charge payments had been paid on the relevant due date.

488. By Clause 21.2 of the ISHA, each party acknowledged that in making the ISHA, it did not rely on and would have no remedies in respect of "*any statement, representation, assurance or warranty that is not set out in this agreement*". To avoid the effects of that provision, Market Fresh advanced its counterclaim, certainly in respect of the response to Question 3.3.5, in fraudulent (rather than negligent) misrepresentation, that Mr Seneschall knew that the response was not

true, or was reckless as to its truth, and knew that in fact, the Company "*is and was at all material times cashflow and balance sheet insolvent*", and had "*undisclosed outstanding creditors of £327,493.22 and without external investment had no prospect of surviving*".

489. The debts pleaded to have been overdue and payable were as follows, and were taken mainly from the Company's own internally recorded (SAGE) Aged Creditors Analysis:

AJ & C Services (sello filling)	£28,000
Baldwins (tax advice)	£1,494
Carter Llewellyn Recruitment	£5,760
Dragon Fire & Security	£506.90
Ellab UK	£4,237.20
Haraled Consultancy	£3,600
Houseman Environmental	£1,712
HSS Hire	£815.40
Jelf	£374.45

LD Packaging	£35
Pneumatic Solutions	£28,937.08
Rhondda Cynon (rates)	£28,902.23
SWC Technical	£135
Tetra Laval	€192,166.94
Thimmonier	£1,430
Ultimate Finance	£1,838.21
Watkins Hire	£4,036
HMRC	£30,000
Unpaid employee salaries	£8,567.88
Unpaid employee pension contributions	£1,500

490. As to the warranties, it was also pleaded that rent was overdue as at 8 July 2019 in the sum of £16,037.38, and as at 19 August 2019 in the sum of £27,023.97

(not included in the above table) and that as at 19 August 2019, £28,902.23 was due in respect of rates (which was included).

491. It was not clear on the face of the pleading, or from Counsel's Closing, how exactly the sum of £327,493.22 had been calculated, and how it related to the sums in the above table (one of which was expressed in €). Moreover, there was no pleading about when each sum had fallen due, or in what circumstances, or when Market Fresh alleges that it came to know of each such sum.

492. Furthermore, it was not clear whether the pleaded claim was made in both contract (in respect of the warranties) and tort (in respect of the Due Diligence Questionnaire) or only as having been made in tort, given that loss was pleaded in terms of sums invested (and lost) as a result of having been misled, rather than losses incurred as a result of the Company not being as warranted. One of Mr Northall's submissions was that the claim based on the warranties must fail because the warranties were not made until the ISHA was executed and therefore could not have been pre-contractual misrepresentations. As to that (in common with Mr Northall) I have treated the allegation in the terms in which it was pleaded, that Market Fresh would not have made its investment had it not been for the responses and warranties "*in faith of*" which it invested and lost £2,054,095.58.

493. In Closing, in respect of the Company's solvency, Professor Watson-Gandy relied on the fact that the Company was dependent on Market Fresh to pay its debts, and could not otherwise do so. He referred to:

i) the inability and failure of the Company to meet direct debit obligations shortly before 7 August 2019, for example, on 29 July 2019, its failure to make payment of £6,674.80 in respect of the Alfandari Loan; and,

ii) the inability and failure of the Company to meet direct debit obligations shortly after 7 August 2019, for example, of £1,498.82 to B&CE Holdings Ltd on 19 August 2019, and (in large part) of £14,097.74 to Ultimate Asset Finance on 22 August 2019.

494. As to the (very closely connected) issue of indebtedness due and payable, he relied on various examples:

i) the outstanding part of the deposit owed to Tetra Pak explained above at paragraphs 333-343.

ii) the debt owed to HMRC, which as at 7 October 2019, according to the demand referred to above at paragraph 329, was £42,004.81, of which elements had been due in June, July and August 2019;

iii) wages overdue since January 2019;

iv) overdue rent and rates, as to which, (a) in respect of rent, on 5 August 2019, Mr Seneschall had received an email from Richard Morgan & Company, which said: "*Rhys Morgan asked me to check that the balance of the account for Trisant Foods had been paid in full by the end of July, as was promised. I note that £10,000 was paid on 2 August, however a balance of £6,037.38 still remains unpaid. Is there any chance that the remaining amount will be paid by the end of the day tomorrow, so that the full balance has been cleared before he returns, as he asked me to*

proceed with a commercial debt recovery if it had not been paid"; and (b) in respect of rates, Mr Seneschall's evidence was that the rates as claimed were overdue, but that the Company was "*in discussions with*" the authority concerning a reduction.

495. Mr Seneschall's case was:

i) that as a matter of its construction and meaning, the Due Diligence response and Clause 5.1(e) were not about whether the Company "had debts" (since practically all trading companies have debts at any given time) but about whether agreed terms for payment had expired and the creditor had made a demand for payment;

ii) that in any event, that is how he understood the Due Diligence question and Clause 5.1(e), and his understanding was shared by Mr Williams who recalled that it was collectively agreed that Clause 5.1(e) was about whether "*anyone was about to make a claim against the Company for an overdue debt, e.g. presenting a petition*" because it was assumed that the repeated use of the word "*and*" in Clause 5.1(e) meant that <u>all</u> elements in the paragraph had to be present (rather than simply, that "*no indebtedness* [was] *due and payable*");

iii) that in any event, Market Fresh was well aware that these sums specifically, or many of them, were due, and was well aware that the Company's solvency was wholly dependent on the negotiated investment; it was not induced to invest by the alleged misrepresentations, or caused any loss;

iv) that, as mentioned, the warranties were not made until the ISHA was made, and cannot comprise pre-contractual representations;

v) that as at 7 August 2019, no or very little rent was due, and the Company's rates liability was being negotiated;

vi) that in the circumstances, there was no dishonesty;

vii) that as explained above, when Mr Seneschall was dismissed (in October 2020) the allegation made against him and "found" to be true was that Mr Seneschall had failed to inform Market Fresh, before it made the ISHA, about £177,000 worth of creditor invoices. No explanation was given of the difference between that amount and the amount referred to in the counterclaim. Given the circumstances, those facts cast further doubt on the counterclaim.

496. Turning to the surrounding events and correspondence, some of which has been described above.

497. I have found that Mr Seneschall brought to the meeting on 2 July 2019, and showed Mr Marshall and Mr McCormick, updated costs forecasts, which contained specific reference to certain debts pleaded as having been concealed, including unpaid salaries, rent and sums owed to SWC Technical, Ultimate Finance, Haraled and Watkins Hire.

498. As I have described elsewhere, Mr Seneschall made numerous requests for payment by Market Fresh to support the Company. For example, on 10 July 2019, he emailed Mr McCormick a list of the Company's requirements in respect of the two following weeks (to the end of the week beginning on

Monday 22 July) amounting to about £100,000 (including the sum of £28,000 owed to "Leepack", and £9,000 owed to HMRC). By the end of that period however, Market Fresh had paid only a further three sums to the Company, of £5,813.80, £38,500 and £24,500 (£68,813.80 in total). Simple mathematics and a modicum of common sense dictated that the Company's debts were accumulating, and Market Fresh must have known that.

499. On 23 July 2019, Ms Sarah Prosser, a Legal Assistant at NWIG, sent ("*as requested*") a spreadsheet entitled "*Trisant – Summary of Outgoings*" to Ms McKendry-Gray, Ms Coyne and Mr Farrell. Amongst other things, the spreadsheet included payments for the Thimmonier SF 102 machine and the remaining part of the Tetra Pak deposit (also mentioned previously, for example, in Mr Seneschall's email to Mr McCormick sent on 25 June 2019, "*Tetra we have paid £60,000 already, we will need to pay another £80,000 at some point*").

500. On 31 July 2019, Mr McCormick emailed recipient/s (whose names were redacted) and stated:

> *"All...*
>
> *I have spoken to Dave (albeit the call was very broken up) and John respectively a short time ago... For info — Final payment of rent was due today in line with the proposal put to the landlord and Alfandari direct debit has bounced back twice this week. I understand John has had to speak to them twice."*

501. Later on the same day, 31 July 2019, he emailed again (and again the recipients have been redacted) and said:

> *"All...*

Trisant have a number of payments due once the shareholders agreement is completed. These are listed below.

We may need to prioritise but Rent and Alfandari are critical and if not paid can bring it to a close very quickly. Rent was due today as part of the payment plan agreed with the landlord and Alfandari is the regular monthly payment, that they are already chasing, forcefully. If we are to pay anything while the revision on the shareholder agreement is being considered again, it would be these two."

502. On 2 August 2019, Mr McCormick emailed Ms McKendry-Gray, Mr Marshall and Ms Coyne (copying in Mr Farrell, Ms Prosser and Ms Tamsin Hall) and said:

> *"Hi all,*
>
> *A positive meeting with John earlier...he has now signed the shareholder agreement, Lynne will do so on Monday. Can we pay the rent and Alfandari? £16,000 and £6,674.8?"*

503. It is clear form these emails that Mr McCormick knew, as did Market Fresh and Mr Marshall, and Ms McKendry-Gray, its legal advisor, that the Company had debts that were overdue, and which it could not pay, and which furthermore, "*if not paid can bring it to a close very quickly*". It invested in the Company armed with that knowledge and understanding. I do not accept Mr Marshall's evidence that Market Fresh "*wanted a turnkey factory*".

504. On 5 August 2019, Mr McCormick emailed Ms Coyne, Mr Marshall and Ms McKendry-Gray, as follows:

> "*it appears that the shareholders documents are now signed... below is the immediate list that I would like Will and I to pick up in the morning.*

Watkins Boiler Hire	*£4,500*
Builder	*£60,000.00*
Pension contributions	*1,500.00*

Leepack Second Half	*28,000.00*
...	
RCT rates	*3,000.00*
...	
PSL (steam etc)	*4,000.00*
...	
Recruitment	*6,000.00*
	126,000.00

...can we proceed to start to make these payments to the remaining 20%? This of course is not proposed to be a full transfer of £200k but a measured approach. As always builder is key at this stage, although I do want to speak to him to agree a deal on payment schedules."

505. Thus, two days before the ISHA was executed by Market Fresh, it knew that at least £126,000 had to be paid immediately. I do not accept Mr Marshall's evidence that as a result of the Due Diligence responses, he had "*understood that the advances from Market Fresh had allowed Trisant to remain fully up to date with its liabilities so that Market Fresh would not discover any unforeseen problems following the conversation of* [its] *advances into equity"*, and even if that is what he believed when those responses were received, it was not what he believed (and knew) immediately before the ISHA was executed.

506. On 6 August 2019, the Company paid £4,000 in respect of outstanding rent for the Factory.

507. On 8 August 2019, Mr McCormick sent Mr Marshall a WhatsApp message which forwarded a text from Mr Seneschall which read:

"*Good morning. Any news? It's all getting a little difficult now. Timings are going out the window and I've run out of things to say to people who are expecting payment. With everything signed I don't get the hold up. Let me know when you can. Thanks. Very Best J.*"

508. Mr McCormick and Mr Marshall were well aware there were unpaid debts; neither could have been dismayed by this message.

509. On 9 August 2019, Trisant paid the final £2,036.37 to the landlord for rent at that time outstanding. From that point, the next payment of rent was not due until September 2019. To the extent that any part was outstanding as at 7 August 2019, it was of no material effect on the investment, or the Company's value.

510. On 11 August 2019, Mr Williams emailed Mr Seneschall attaching "*3 YR FORECAST – REV6 – Combined Reports.xlsx*" and stated:

> *"The key assumptions are...*
>
> *3. All other costs paid for in month incurred – except Rent which is quarterly in advance*
>
> *4. All overdue payments as at 31 August settled and bank balance set to zero – that way any plusses or minuses can be set against the cash balance to see the effect."*

511. Accordingly, for the purposes of the document, the Company's debts and bank balance were "*set to zero*".

512. On 12 August 2019, Mr Seneschall sent the spreadsheet he had been sent by Mr Williams on the previous day to Mr Marshall, Mr McCormick and Ms Jones (and Mr Williams) and said: *"As discussed, please find attached a full set of forecast figures from September as required. If you have any questions, drop*

me a line or of course you can talk direct to Andrew. All pretty straightforward, conservative but sensible."

513. On 20 August 2019, Mr Farrell and Mr Williams corresponded regarding the assumptions underlying the spreadsheet sent on 12 August 2019. Mr Williams told Mr Farrell that "*the principal working capital assumptions are 60 days customers with 75% invoice finance, 30 days ingredients — all other costs paid as incurred with the exception of rent being paid quarterly in advance."*

514. I do not accept that the spreadsheet was intended to mislead. I accept that it was intended to show the Company's immediate future trading prospects, that as stated by Mr Seneschall in evidence, it was a "*demonstration of how the Company could perform in a normal operating environment in the absence of having to catch up with any liabilities*".

515. Moreover, in the circumstances, that is how it must have been understood (and if not, the position was very soon afterwards clarified). For example, on 22 August 2019, Mr Seneschall emailed Mr McCormick with a list of payments required to be made "*over the next few days to get things back on an even keel."* He said:

> "*... Moving on, these are all the things that are urgent, I'm not doing the pence on things, as that seems unnecessary.*
>
> *So from the top;*
> *HMRC £20,277.00*
> *Haraled £3,600.00*
> *Watkins Hire £4,037.00*
> *Baldwins £1,494.00*
> *CL recruitment £5,760.00*
> *Houseman environmental £1,712.00*

Thimmonier £1,432.00
PSL/Bibby £27,108.00
Dragon Fire £507.00
Selo machine £28,000.00
Rycon £82.00
HSS Hire £1,139.00
Rasanco £697.00
Thimonnier £1,230.00
Holchem £662.00
HSS Hire £264.00
Europest £46.80
Ultimate Asset Finance £4,086.00
Alfandani/Blackrock £6,675.00
Pensions £1,500.00
RCT £3,000.00

.... All the above are either over due or due. Clearly there is a little flexibility here with some of them, but we need them cleared in the very near future.

There's a couple of other things, like wages for January where Lynne, Sally, Andrew and myself weren't paid. Plus loans from my brother which I need to pay off, totalling £30,000. But let's start with the above, plus some cash in our account so we can operate and buy ingredients etc so we can run trials..."

516. Moreover, by this stage, Mr Marshall and Market Fresh had a right of access to the Company's records, both under the ISHA and (in the case of Mr Marshall) by virtue of his directorship.

517. Similarly, on 4 September 2019, Mr Williams emailed Mr Farrell and attached an annotated arrears list as at 31 August reconciled to the Company's SAGE records for Mr Farrell's "*info*". He told Mr Farrell that there was "*an immediate requirement of about £128k to clear the backlog*".

[H1] <u>The Market Fresh Counterclaim: Conclusions</u>

518. In conclusion, the counterclaim fails for the reasons relied on by Mr Seneschall and explained above at paragraph 495. Centrally, I do not accept that Market Fresh invested because of, and "*in faith of*", the alleged representations. In common with other aspects of the case, the counterclaim was based on a wish to blame another for the consequences of one's own acts.

519. First, it was abundantly clear to Market Fresh as at 7 August 2019, that the Company had debts which were due imminently or overdue, and which it could or would only be able to pay by virtue of the investment being negotiated. I refer, for example, to Mr McCormick's emails of 31 July 2019 ("*Final payment of rent was due today in line with the proposal put to the landlord and Alfandari direct debit has bounced back twice this week*", and "*Rent and Alfandari are critical and if not paid can bring it to a close very quickly*") and of 2 August 2019 ("*Can we pay the rent and Alfandari? £16,000 and £6,674.8?* (sic)").

520. Second, Market Fresh was told specifically about certain of the debts which it now claims to have been dishonestly concealed. On 5 August 2019, two days before the execution of the ISHA, Mr McCormick emailed Mr Marshall and others an "*immediate list*" of debts payable ("*that I would like* [Mr Farrell] *and I to pick up in the morning*") including for example, £28,000 due to "Leepack", in the total sum of £126,000. Even if Market Fresh did not know specifically about some or all of the debts referred to at paragraph 489 above, it knew enough to know that the Company had substantial debts due or imminently due.

521. Third, more generally, Mr Seneschall's regular requests for payment made the Company's financial dependency on Market Fresh obvious (which it was in any event, since Market Fresh knew that the Factory was not operational, and knew

that there were no other investors). For example, I refer to the requirements explained in Mr Seneschall's email of 10 July 2019, and what, as a result, Market Fresh must have known about the Company's condition. Moreover, the fact of the Company's dependency was plain from the forecasts that I have found were brought to the meeting on 2 July 2019, and shown to Mr Marshall and Mr McCormick. In addition, those documents contained specific reference to certain debts pleaded as having been concealed.

522. Fourth, in the context, I agree that Question 3.3.5 and Clause 5.1(e) were not about the (mere) existence of some outstanding debts, but whether the Company was, notwithstanding the contemplated investment, insolvent and likely to enter an insolvency regime.

523. Fifth, in relation to Clause 5.1(k) of the ISHA, at most, very little rent was overdue and unpaid as at 7 August 2019, and I accept Mr Seneschall's evidence that the business rates were subject to ongoing negotiation with the council such that no sum had been finally assessed.

524. Sixth, on 22 August 2019, Mr Seneschall emailed Mr McCormick a list of payments to be made "*over the next few days to get things back on an even keel*". That list included a number of those pleaded as having not been disclosed. Nonetheless, Mr McCormick and Market Fresh did not react with surprise. On the contrary, this was shortly before agreement was reached in respect of the greatly expanded transaction ultimately reflected in the HoTs, and before any further sums had been paid in addition to those paid before the execution of the ISHA. By this stage, Market Fresh had contractual rights to information, and

Mr Marshall was a *de jure* director; there is no evidence that information about debts outstanding was at that point sought and refused.

525. Sixth, the representations were not fraudulent:

i) because Mr Seneschall regularly communicated urgent requests for significant payment, and information about the existence of debts, some of which are now said to have been concealed; and,

ii) because I accept that it was his understanding in the circumstances, shared by Mr Williams (and it was said, by Darwin Gray also, albeit without evidence from Darwin Gray, or documentary evidence) that Question 3.3.5 and Clause 5.1(e) had the meaning expressed at paragraph 522 above. In the circumstances, that construction would have made sense, given that Market Fresh knew of the Company's essential condition.

526. Finally, I refer to the evidence of Mr Marshall set out above, that he paid no or little attention to the Due Diligence responses and the draft ISHA. In any event, the Due Diligence Questionnaire was described as "*basic*", when it was sent by Ms McKendry-Gray in June 2019, and "*light-touch*" in the letter before action sent on 14 October 2020. In all the circumstances, it was not what brought about the investment, and not what caused its loss.

527. In conclusion therefore, the counterclaim fails.

Dated: 3 May 2023