Neutral Citation [2023] EWHC 3232 (Ch).
Claim No: CR-2019-BHM-001027

IN THE HIGH COURT OF JUSTICE

BIRMINGHAM DISTRICT REGISTRY

BUSINESS AND PROPERTY COURTS IN BIRMINGHAM

INSOLVENCY AND COMPANIES LIST

IN THE MATTER AB PRODUCE TRADING LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

BETWEEN:

ANDREW JAMES BRIDGEN

Petitioner

-and-

(1) PAUL JULIAN BRIDGEN
(2) PETER JOHN ELLIS
(3) DEREK WILLIAM TOMKINSON
(4) ALAN WILLIAM BRIDGEN
(5) ANN BRIDGEN
(6) JLT TRUSTEES LIMITED
(7) AB PRODUCE TRADING LIMITED

Respondents

Hearing 5/9/23 - 8/9/23
Counsel for the Petitioner – Mr Zaman KC
Counsel for the First Respondent – Mr Auld KC
Handed down 15 December 2023

INTRODUCTION

1. On 30 November 2018 Andrew James Bridgen MP ("Andrew") presented three petitions, in reliance on Section 994 of the Companies Act 2006 ("CA 2006") asserting that the affairs of: (a) A.B. Produce Trading Limited ("ABPT"); (b) Bridgen Investments Limited ("BIL"); and (c) AB Farms Limited ("ABF") are being or have been conducted in a manner which is unfairly prejudicial to the interests of Andrew as a member of those companies. The petition for ABPT relates to the manner in which the affairs of its wholly owned

subsidiary, AB Produce PLC ("PLC") have been conducted. The petitions for BIL and ABF related to the way in which their affairs have been conducted.

2. On 15 November 2019 Insolvency and Companies Judge Jones directed that there would be a trial first to determine whether Andrew's claim that the affairs of ABPT and/or BIL and/or ABF are being or have been conducted in a manner which is unfairly prejudicial to the interests of Andrew, as a member of those companies were well founded. If and to the extent that they were found to be well founded there would then be a further hearing to determine what relief, if any, should be granted to Andrew under Section 996 CA 2006.

3. The shareholders of ABPT are:
   (a) Andrew - 37,000 shares;
   (b) Paul Julian Bridgen, Andrew's brother ("Paul") (First Respondent to the ABPT Petition) - 37,000 shares;
   (c) Peter John Ellis ("Mr Ellis") (Second Respondent to the ABPT Petition) - 500 shares;
   (d) Derek Tomkinson ("Mr Tomkinson") (Third Respondent to the ABPT Petition) - 667 shares; and
   (e) the Managing Trustees of AB Produce SSAS Retirement and Death Benefit Scheme ("the SSAS") - 8,185 shares. The trustees of the SSAS are, or were (in the case of JLT): Andrew, Paul, Alan Bridgen (Andrew and Paul's father) (Fourth Respondent to the ABPT Petition) Ann Bridgen (Andrew and Paul's mother) (Fifth Respondent to the ABPT Petition) and JLT Trustees Limited ("JLT") (Sixth Respondent to the ABPT Petition).

4. The shareholders of BIL are:
   (a) Andrew - 37,000 shares;
   (b) Paul - 37,000 shares;
   (c) Mr Ellis - 500 shares;
   (d) Mr Tomkinson - 667 shares; and
   (e) the SSAS – 8,185 shares.

5. The First- Sixth Respondents to the BIL Petition are the same as for the ABPT Petition.

6. The shareholders of ABF are:
   (a) Andrew - 49 shares;
   (b) Paul – 49 shares;
   (c) Mr Ellis – 1 share; and
   (d) Mr Tomkinson – 1 share.

7. Paul, Mr Ellis and Mr Tomkinson are the first three Respondents to the ABF Petition.

8. The remaining respondents to each of the Petitions were ABPT, BIL and ABF, joined as nominal respondents to the petition presented in respect of the conduct of their respective affairs.

9. Whilst Alan, Ann and JLT, as trustees of the SSAS were not, unlike ABPT and BIL, nominal respondents to the petitions presented in respect of their affairs, bound to adopt a neutral stance, none of them were alleged by Andrew to be in any way involved in the conduct of which Andrew complained and all have adopted a neutral position.

10. The trial to determine whether Andrew's allegations of unfair prejudice were well founded took place at the end of 2021 before me ("the Liability Hearing"). In a judgment which I handed down on 29 March 2022 ("the Liability Judgment") I determined that (a) the petitions presented by Andrew against ABF and BIL were not well founded and should be dismissed; (b) the allegations of unfair prejudice on the part of Mr Ellis and Mr Tomkinson in relation to ABPT were not well founded and should be dismissed; and (c) some of the allegations of unfair prejudice on the part of Paul in relation to ABPT that referred to Paul's conduct in relation to ABPT's wholly owned subsidiary, PLC were well founded.

11. In this judgment I have to decide what, if any, remedy to grant in respect of the elements of the ABPT Petition which I found to be well founded.

<u>BACKGROUND</u>

12. Full details of the background to the presentation of the three petitions by Andrew are contained in paragraphs 12 - 110 of the Liability Judgment and I do not propose to repeat them here (paragraphs 12 - 43 contain a history of "the Group" as that term is defined in the Liability Judgment; paragraphs 44 - 163 set out the allegations of unfair prejudice for all three petitions; and paragraphs 52 - 110 relate to Paul's conduct in relation to the affairs of PLC, ABPT's subsidiary).

13. In my order dated 30 June 2022 ("the Order") which I made following the handing down of the Liability Judgment, I declared that certain allegations made in the ABPT Petition against Paul were well-founded. The basis upon which I did so and the relevant paragraphs of the Liability Judgment dealing with those findings, in summary are:

    (a) PLC had a contract with 4R for the removal of lime from a site at Cemex ("the Cemex Subcontract"). PLC sub-contracted the work to both PJ & CL Bridgen ("the Partnership") and to Gilbert Transport. The Partnership agreed to charge the same as Gilbert Transport and PLC did not agree to bear any of the costs incurred by the Partnership in performing that subcontract. In breach of his duties, as director of PLC, Paul alone decided what the Partnership would charge PLC and failed to disclose to the board of PLC the nature and extent of the Partnership's interest in the Cemex Subcontract (Liability Judgment paragraphs 441 – 470). I found that Paul: failing to disclose to the board of PLC the nature and extent of the contract between the Partnership and PLC and deciding what the Partnership should charge PLC was <u>not</u> however unfair or prejudicial to Andrew, unless the Partnership

charged PLC materially more than Gilbert Transport for the same work (paragraphs 658 – 686 of the Liability Judgment);

(b) PLC had two contracts with Biffa, one for the disposal of solid waste ("the Biffa Solids Subcontract") and one for the disposal of liquid waste ("the Biffa Liquids Subcontract"). PLC subcontracted to the Partnership the removal of the solid waste and the Partnership in turn subcontracted all of the actual disposal work to Gilbert Transport, but agreed, I found, to charge PLC the same price as Gilbert Transport charged it. As for spreading the Biffa liquid waste, PLC employed Prestons, and later Prestons and the Partnership to spread the Biffa liquid waste. The Partnership agreed to charge PLC £7 - £8.50 per tonne of Biffa liquid waste spread by the Partnership, and had the free use of a boom and tanker owned by PLC to carry out that work. Paul breached the duties that he owed to PLC as its director by deciding, on behalf of the Partnership and PLC, what the Partnership would charge PLC for performing each subcontract and by failing to disclose the nature and extent of the Partnership's interest in either subcontract to the board of PLC (paragraphs 472 – 489 of the Liability Judgment). I found that Paul deciding what the Partnership should charge PLC and failing to disclose the nature and extent of the Biffa subcontracts between the Partnership and PLC was not however unfair or prejudicial to Andrew unless: (i) for the disposal of Biffa solid waste, contrary to Paul's evidence, the Partnership charged PLC materially more than Gilbert Transport charged the Partnership for disposing of the Biffa solid waste (paragraph 693 of the Liability Judgment); and (ii) for the spreading of Biffa liquid waste, if the Partnership charged PLC materially more than Prestons charged PLC, for the same amount of work, taking into account the free use of PLC's tanker and boom by the Partnership (paragraph 695 of the Liability Judgment);

(c) The Partnership made use of the following resources of PLC without: (i) Paul disclosing the nature and extent of that use to the board of PLC; (ii) proper records being kept of that use; and (iii) PLC being properly reimbursed for their use (paragraphs 494 - 531 of the Liability Judgment) (I found that the use of these resources was both unfair and prejudicial to Andrew paragraphs 698 – 700 of the Liability Judgment):

   (i) PLC employees:
      - Mr Whetton 20 days driving lorries and 2 days working at Home Farm;
      - Mr Elliott-Dickens 15 days working at Home Farm and 9 months on the Cemex subcontract;
      - Mr Miller 6 weeks for 91 hours a week for the 6 years 2016 – 2021 inclusive harvesting potatoes and a further 91 hours in 2017 a week for 6 weeks, planting potatoes;
      - Mr Ward 4 weeks;
      - Samuel Bridgen 50% of his time 15/3/13 – 28/2/16 and 75% of his time from 1/3/16 – 23/3/19; and
      - William Bridgen 80% of his time 1/9/16 – 29/3/19;

   (ii) PLC incurred the cost of repairing Partnership trailers but not cabs used on the Cemex Subcontract and from January 2009 some, but not all of the cost of maintaining and repairing Partnership vehicles, machinery

and equipment not used on the Cemex subcontract (paragraphs 535 - 536 of the Liability Judgment);

(iii) The Partnership has used PLC fuel (paragraphs 537 - 541 of the Liability Judgment) to fill up:
- Partnership lorries used on the Cemex Subcontract on 72 occasions;
- Partnership tractors spreading liquid digest on the Biffa Liquids Subcontract, from late 2014 to late 2015;
- Partnership tractors engaged in carrying out husbandry services for ABF, from early 2016; and
- Partnership vehicles engaged in the Partnership's own business activities, from early 2016; and

(iv) Partnership vehicles which were added to PLC's Operator's Licence were taxed and insured at the expense of PLC for the period that they were added to that licence (paragraph 540 of the Liability Judgment).

14. In the Order I made the following relevant directions for the remedies hearing ("Remedies Hearing"):

(a) Andrew and Paul had permission to adduce evidence from their expert forensic accountants (respectively, Mr Bell for Andrew and Mr Lewis for Paul) on the following issues:

(i) the profits made by the Partnership on the Cemex Subcontract;

(ii) the profits made by the Partnership on the two Biffa Subcontracts;

(iii) any loss suffered by PLC as a result of using the Partnership rather than a 3rd party contractor to transport waste from the Cemex site on the basis that:
- what Gilbert Transport charged would be treated as what a 3rd party contractor would charge;
- prices charged by the Partnership and Gilbert Transport per tonne should be compared; and
- deduct from what the Partnership charged the occasions on which it transported waste from the Cemex site without charging PLC;

(iv) the difference between what Gilbert Transport charged the Partnership for removing solid waste from the Biffa site and what the Partnership charged PLC, deducting from what the Partnership charged PLC, the value of the occasions upon which the Partnership did not charge PLC for transporting Biffa solid waste from the Biffa site;

(v) the difference between what the Partnership charged PLC and what Prestons charged PLC for spreading Biffa liquid waste on the Biffa Liquids Subcontract, taking into account that the Partnership was using PLC's tankers and boom when it did so;

(vi) at their normal salaries, the cost to PLC of employing the following employees for the periods specified:
- Mr Whetton - 22 days;
- Mr Elliott-Dickens - 9 months and 15 days;

- Mr Miller for each year 2016 – 2021, 13 hours a day, 7 days a week, for 6 weeks and for 2017, a further 13 hours a day, 7 days a week, for 6 weeks;
- Mr Ward - 4 weeks
- Samuel Bridgen - 50% of his time for the period 15/3/13 – 28/2/16 and 75% of his time for the period 1/3/16 – 23/3/19;
- William Bridgen - 80% of his time during the period 1/9/16 – 29/3/19

(vii) the cost of maintaining and repairing the Partnership vehicles, machinery and equipment from January 2009 to date which would not be covered by manufacturers/suppliers warranties, including pre-paid maintenance;

(viii) the loss caused to PLC by it paying to tax and insure Partnership vehicles, included on PLC's Operator's Licence during 2010 and 2011;

(ix) PLC's fuel used by the Partnership on the Cemex subcontract on the basis that one lorry was refilled with PLC fuel on a total of 72 occasions;

(x) PLC's fuel used by the Partnership tractors spreading liquid waste on the Biffa Liquids Subcontract, late 2014 – late 2015; and

(xi) PLC's fuel used by Partnership vehicles, equipment and machinery for planting cultivation and harvesting crops from 2016 calculated on the basis of one Partnership tractor using PLC fuel on those operations for 5 days a week from February 2016 (I will refer to issues (a) (i) – (xi) hereafter as the 11 Issues");

(b) Andrew and Paul had permission to adduce expert evidence on the equity value of ABPT and the value of Andrew and Paul's shareholdings in ABPT at the date of their reports with adjustments in the valuation of Paul's shares for any loss that may have been suffered by ABPT as a result of the 11 Issues;

(c) Paul was given permission within 14 days to issue an application for permission to adduce evidence from a corporate finance expert in relation to valuation and marketability of ABPT's shares (that application was made and permission subsequently granted to both parties to adduce expert evidence from a corporate finance expert on 8 August 2022); and

(d) witnesses of fact were limited to the ability of the parties to fund the purchase of the ABPT shares held by the other party.

REPRESENTATION

15. Andrew was represented at the Remedies Hearing by Mr Zaman KC and Paul by Mr Auld KC, as they were at the Liability Hearing at the end of 2021.

EVIDENCE FOR THE REMEDIES HEARING

FACTUAL EVIDENCE

16. Andrew relied on a witness statement signed by himself and a witness statement signed by Jeremy John Hosking ("Mr Hosking"). The witness statements are confined to Andrew's ability to purchase Paul's shares in ABPT. Mr Hosking says that he has substantial resources and will lend to Andrew the money to purchase Paul's shares.

17. Mr Hosking attended for cross examination, but Andrew did not.

18. Paul relies upon four witness statements (his 3rd, 4th and 5th witness statements) and one witness statement made by Mr Sharratt. Those witness statements go well beyond Paul's ability to fund the purchase of Andrew's shares in ABPT, dealing with matters such as, the steps taken by the directors of PLC to instruct a separate firm of solicitors to advise the directors upon proper corporate governance of PLC/ABPT, the steps they have taken to implement that advice and the conduct of Andrew, all after the Liability Hearing at the end of 2021. I ruled (for the reasons given in that ruling) that Paul could only rely, as evidence of fact, upon those parts of his fourth witness statement which dealt with his ability to fund the purchase of Andrew's shares in ABPT and could not rely upon Mr Sharratt's witness statement, which only deals with issues other than the ability of Paul to fund the purchase of Andrew's shares in ABPT.

19. Paul and Mr Sharratt attended for cross examination, but consistent with my ruling, Mr Sharratt was not cross examined and Paul was only cross examined as to his ability to fund a purchase of Andrew's shares in ABPT.

EXPERT EVIDENCE

20. Andrew relies upon the expert evidence of Mr Bell both as to the value of the profits made by the Partnership and losses suffered by PLC as a result of the 11 Issues (see paragraph 14 (a) above) and as to the value of ABPT and the shares of Paul and Andrew in ABPT (both 44.4% of its issued share capital). Mr Bell has prepared reports on both matters dated 3 March 2023.

21. Paul relies upon the expert evidence of Mr Lewis upon the same matters and Mr Lewis has also prepared reports dated 3 March 2023 on them both.

22. Mr Bell and Mr Lewis have produced joint reports on profits/losses dated 12 May 2023 and valuation, dated 25 May 2023. In addition, Mr Bell and Mr Lewis prepared, after the Remedies Hearing taking place between 5 and 8 September 2023, at my invitation, supplemental reports providing revised figures, in accordance with directions I gave to them at the end of the Remedies Hearing.

23. In the event Paul did not produce a report from a Corporate Finance expert on the marketability of ABPT's shares. Andrew relied on a Corporate Finance expert report from Ian Barton dated 3 March 2023.

24. All three experts attended for cross examination.

CREDIBILITY OF FACTUAL EVIDENCE

25. The factual evidence went only to the issue of the ability to purchase the shares of Andrew/Paul in ABPT.

26. As I have already said, Andrew did not attend for cross examination, his ability to fund the purchase of Paul's shares in ABPT depends upon the ability and willingness of Mr Hosking to fund that purchase. I am satisfied that Mr Hosking gave honest evidence confirming both his ability and willingness to provide funds, to Andrew on loan, to purchase Paul's shares in ABPT (and as I will explain, to purchase the shares of all the shareholders of ABPT and BIL, other than Andrew).

27. Paul says, in his witness statement dated 6 July 2023, that he does not have the means, from his own resources or those of his family to fund the purchase of Andrew's shares in ABPT. Paul goes on to say that he has approached potential funders to see if they would be prepared to advance funds to ABPT to enable it to fund the buyback of Andrew's shares in ABPT but in summary no one he had approached at the date of that witness statement had been willing to confirm that they would, in principle, be prepared to fund such a purchase. Paul also says that Roy Farmer, a Corporate Finance Partner at Dains Accountants has been engaged to advise on raising the funds to buy out Andrew's shares in ABPT. In cross examination, Paul said that he was confident that, if the court fixed the value of Andrew's shares in ABPT and gave him time to raise the finance, finance could be raised to enable ABPT to buy back Andrew's shares. I have no reason to doubt that what Paul says in his witness statement about approaching potential funders and instructing Mr Farmer is not true. As to Paul's optimism that funds could be raised for ABPT to buyback Andrew's shares, once their value is fixed, whilst I accept that Paul is genuinely optimistic that this could be done, I have doubts about whether this optimism is justified. I will deal with this issue in more detail later.

CREDIBILITY OF EXPERT EVIDENCE

28. As for the expert accountancy and valuation evidence of Mr Bell and Mr Lewis, I do not consider that either expert landed what might be termed "a knockout blow" upon the validity of the other's opinions generally, or that either of their opinions on any of the issues that they have dealt with was so poorly reasoned or supported that I have been driven to the view that either expert's opinion is always or generally to be preferred to that of the other. As will become apparent I have dealt with the expert opinions of Mr Bell and Mr Lewis on an issue by issue basis, sometimes preferring the opinion of Mr Bell and sometimes the opinion of Mr Lewis.

29. Mr Barton was the only Corporate Finance Expert, his evidence was not seriously challenged in cross examination by Mr Auld and I accept it, although it is of little assistance in helping me to determine the issues that I have to resolve, I will refer to it, when relevant to those issues.

ISSUES FOR DETERMINATION

30. The issues that I need to determine in order to decide what, if any, remedy or remedies to grant are:
    (a) what profits were made by the Partnership and losses incurred by PLC in relation to the 11 Issues, in summary:
        (i) the profits made by the Partnership from the Cemex Subcontract (although for reasons I will explain, it is not necessary for me to determine this issue);
        (ii) the profits made by the Partnership from the Biffa subcontracts (although for reasons I will explain, it is not necessary for me to determine this issue);
        (iii) any loss suffered by PLC as a result of using the Partnership rather than a 3rd party contractor to transport material from Cemex;
        (iv) the difference between what Gilbert Transport charged the Partnership for removing solid waste from the Biffa site and what the Partnership charged PLC for removal of that waste;
        (v) the difference between what the Partnership charged PLC and what Prestons would have charged PLC for spreading Biffa liquid waste on the Biffa Liquids Subcontract;
        (vi) at their normal salaries, the cost to PLC of employing the following employees for the periods specified:
            - Mr Whetton - 22 days;
            - Mr Elliott-Dickens - 9 months and 15 days;
            - Mr Miller - for each year 2016 – 2021, 13 hours a day for six weeks and for 2017, a further 13 hours a day for six weeks;
            - Mr Ward - 4 weeks;
            - Samuel Bridgen - 50% of his time for the period 15/3/13 – 28/2/16 and 75% of his time for the period 1/3/16 – 23/3/19;
            - William Bridgen - 80% of his time during the period 1/9/16 – 29/3/19
        (vii) the cost to PLC of maintaining and repairing Partnership vehicles, machinery and equipment from January 2009 to date;
        (viii) the loss incurred by PLC in taxing and insuring Partnership vehicles which were included on PLC's Operator's Licence during 2010 and 2011;
        (ix) PLC's fuel used by the Partnership on the Cemex Subcontract, on the basis that one lorry was refuelled using PLC fuel on a total of 72 occasions;
        (x) PLC's fuel used by the Partnership tractors spreading liquid waste on the Biffa liquids subcontract in late 2014 – late 2015; and
        (xi) PLC's fuel used by Partnership vehicles, equipment and machinery, from 2016 for the purposes of the Partnership's own business, calculated on the basis of one Partnership tractor using PLC fuel on those operations for five days a week from February 2016;
    (b) what if any relief I should grant in respect of my findings, in the Liability Judgment, that Paul had acted in ways which were unfairly prejudicial to Andrew, taking into

account my findings as to losses incurred by PLC when determining Issues (a) (iii) – (xi); and

(c) if I find that the appropriate remedy is an order that Paul should buy Andrew's shares in ABPT or Andrew should buy Paul's shares in ABPT (or ABPT should buy back Paul or Andrew's shares in it) what is the value of:
    (i) Andrew's ABPT shares;
    (ii) Paul's ABPT shares disregarding losses incurred by PLC from Issues (a) (iii) – (ix); and
    (iii) Paul's ABPT shares including any appropriate adjustment for issues (a) (iii) – (xi).

31. As I will explain in due course, I have made findings as to the basis upon which ABPT's equity value (that is the value of all its shares) is to be calculated, but I will need further assistance from the experts in calculating ABPT's equity value, based on those findings. What I determine the value of Andrew and Paul's shares in ABPT to be (Issue (c)) might have an effect on my determination of what the appropriate remedy (if any) is (Issue (b)). I have, however estimated, at the end of this judgment the value of Andrew and Paul's ABPT shares (in the case of Paul's ABPT shares after adjustment for the losses made by PLC, as a result of issues (a) (iii) – (xi)). I consider those estimates to be sufficient for determining what (if any) remedy to grant.

THE 11 ISSUES (a) (i) – (xii)

PRELIMINARY POINTS REGARDING THE 11 ISSUES

32. In paragraph 13 above I have summarised my key findings in the Liability Judgment. Those findings set out in paragraphs 13 (a) and 13 (b) are relevant to Issues (a) (i) – (v) and in summary are:
    (a) at 14 (a) I confirm that I found, in the Liability Judgment, that Paul deciding for the Partnership and PLC, what the Partnership would charge PLC for performing the Cemex Subcontract and failing to disclose details of the Cemex Subcontract to the PLC board was not unfair or prejudicial to Andrew, unless the Partnership charged PLC materially more than the third party contractor (Gilbert Transport) for the same work; and
    (b) at 14 (b) I confirm that there were two subcontracts between PLC and the Partnership concerned with removing waste from the Biffa Site: (i) the Biffa Solids Subcontract; and (ii) the Biffa Liquids Subcontract. I also confirm that I found, in the Liability Judgment, that Paul deciding, for the Partnership and PLC, what the Partnership would charge PLC, for the removal of Biffa solid waste and Biffa liquid waste and failing to disclose details of those subcontracts to the board of PLC was not unfair or prejudicial to Andrew unless: (i) for the Biffa Solids Subcontract, the Partnership charged PLC materially more than Gilbert Transport (to whom the Partnership subcontracted the removal of solid waste from the Biffa Site) charged it for the same work; and (ii) for the Biffa Liquids Subcontract, the Partnership

charged PLC materially more for spreading the liquid digests than the third party contractor used by PLC (Prestons) would have charged for the same amount of work.

33. As I will explain below, without further assistance from the experts, I am unable to make a final determination of the profit made by the Partnership from the Cemex Subcontract and the Biffa Liquids Subcontract. It is not however necessary for me determine precisely what profit the Partnership made from the Cemex Subcontract (Issue (a) (i)) or the Biffa Subcontracts (Issue (a) (ii)), given that I have found, in the Liability Judgement that the entry by the Partnership into the Cemex Subcontract and Biffa Subcontracts with PLC was not unfair or prejudicial to Andrew if, in each case: (a) the Partnership did not charge PLC materially more than Gilbert Transport would have charged for the disposal of the Cemex waste; (b) the Partnership did not charge PLC materially more than Gilbert Transport charged it for the disposal of the Biffa solid waste; and (c) the Partnership did not charge PLC materially more than Prestons would have charged PLC for the spreading of Biffa liquid waste. I will determine Issues (a) (iii) – (v) which relate to the differences between what PLC was charged by the Partnership for the three subcontracts and what would have been charged by Gilbert Transport/Prestons for the Cemex and Biffa Liquids Subcontracts and what the Partnership was charged by Gilbert Transport for the Biffa solid Waste Subcontract and if there was a difference, whether that difference was material.

ISSUE (a) (i) THE PARTNERSHIP PROFIT FROM THE CEMEX SUBCONTRACT

PROFITS BASED UPON THE EXPERTS REPORTS AND JOINT REPORT

34. Having said that I need not determine what profit the Partnership made from the Cemex Subcontract, out of deference to the work undertaken by the experts and in case for any reason it is relevant, I will take the calculation of the profit made by the Partnership from the Cemex Subcontract as far as I can and indicate where further assistance from the experts would be required, in order to arrive at a precise calculation of that profit.

35. In information provided by Paul to the experts he asserted that the Partnership made a loss from the Cemex Subcontract of £76,475 (£821,063 in costs incurred by the Partnership in performing the Cemex Subcontract, less revenue received of £744,588).

36. Mr Bell was clear in his report that, in his opinion, the Partnership made a profit. Mr Lewis expressed "surprise" in his report at Paul's assertion that Partnership made a loss. During his cross-examination, I asked Mr Lewis whether, when he said he was surprised by Paul's assertion, what he really meant was that he did not believe it. Ultimately Mr Lewis confirmed that he believed that the Partnership had made a profit from the Cemex Subcontract.

37. Mr Jefferies (Paul's solicitor) sent an email to the experts on 24 February 2023 in which he said that the experts should calculate the aggregate value of the invoices that Paul had sent to them, rather than relying on the calculation of that aggregate value previously provided by Paul and that the cost of fuel used by the Partnership on the Cemex Subcontract, as previously provided by Paul, should be reduced by £67,332.

38. Mr Bell calculated that the aggregate value of Partnership invoices addressed to PLC, provided to the experts by Paul, was £831,128. Mr Bell said that, prior to the Partnership entering into the Cemex Subcontract it had made an overall loss, but thereafter it had been profitable. Mr Bell provided an estimate of the profit made by the Partnership on the Cemex and Biffa subcontracts by calculating the average profit made by the Partnership from 2011 to 2016 (the period during which all three subcontracts were performed) after removing items appearing in the Partnership accounts that did not relate to the Cemex/Biffa Subcontracts. On this basis he calculated the Partnership's average profit margin at 18.7% during that period and he applied that profit margin to his figure of £831,128 to arrive at the Partnership profit from the Cemex Subcontract of £155,330.

39. Mr Lewis calculated the Partnership profit from the Cemex Subcontract on two bases:

    (a) a profit of £45,883 calculated by using Paul's figure, but adjusting for a £67,322 reduction in fuel costs notified by Mr Jefferies; and
    (b) a profit of £176,207 based upon what he calculated to be the average Partnership profit margin of 23%, from the Partnership accounts for the financial years ending 2011 to 2014 the period of the Cemex Subcontract (23% of £779,163, Mr Lewis's figure for the Partnership's revenue from the Cemex Subcontract)

40. In their joint report, Mr Bell and Mr Lewis provided an explanation of the differences between Mr Bell's figure of £155,330 and Mr Lewis's figure of £176,207:

    (a) Mr Bell had included in his figures invoices totalling £51,096 addressed by the Partnership to Ketton which Mr Lewis had excluded from his figures and other items totalling £864 were not included in Mr Lewis's figure (total difference £51,964). Mr Bell explained that Partnership invoices addressed to Ketton had been sent to the experts, by Paul, along with Partnership invoices addressed to PLC and that Mr Jefferies had confirmed to the experts that the Ketton invoices sent by Paul should be treated as part of the Partnership's Cemex Subcontract. Mr Bell therefore treated them as part of the Partnership's revenue from the Cemex Subcontract. Mr Lewis explained that he had not included the Ketton invoices because he understood them to be from a separate contract; and
    (b) Mr Bell explained that he had calculated the Partnership's profit margin at 18.7% by taking the figures from the Partnership's accounts, excluding from them farming related income and expenditure and calculating the average profit margin over the period 2011 – 2016, the period during which the Partnership was performing the Cemex and Biffa Subcontracts. Mr Lewis calculated his profit margin of 23% by dividing total Partnership annual sales before subsidies, by the

profit before finance costs for the financial years ending 5 April 2011 to 5 April 2014.

41. I do not accept that the Partnership made a loss from the Cemex Subcontract or that Mr Lewis's alternative figure of £45,883 for profit made by the Partnership from the Cemex Subcontract, based on the figures provided by Paul, is a fair reflection of the profit made by the Partnership from the Cemex Subcontract for the following reasons:

    (a) both Mr Bell and Mr Lewis regarded the figures provided by Paul as unreliable and neither of them believed that the Partnership had made a loss from the Cemex Subcontract;
    (b) the conclusion of both experts, that Paul's figures were unreliable, is supported by the email sent by Mr Jefferies on 24 February 2023 to both experts which: (i) invited the experts to make their own calculations of the aggregate value of invoices that Paul had supplied, rather than relying on Paul's figures; and (ii) confirmed that £67,332 should be deducted from the figure provided by Paul, for fuel costs incurred by the Partnership, in carrying out the Cemex Subcontract; and
    (c) the conclusion of both experts, that the Partnership made a profit rather than a loss from the Cemex Subcontract, is supported by the fact that the Partnership business as a whole, was loss-making before it commenced work on the Cemex Subcontract, but profitable thereafter.

42. I find that the profit made by the Partnership from the Cemex Subcontract was (subject to the adjustments which I will mention next) £191,159.44, for the following reasons:

    (a) The Partnership invoices to Ketton are included in Mr Bell's calculation, but not in Mr Lewis's calculation. I prefer Mr Bell's approach because the Ketton invoices were amongst those sent to both experts by Paul as part of the invoices relating to the Partnership's Cemex Subcontract and because Mr Jefferies (Paul's solicitor) confirmed that they should be included. I will also include the £864, which Mr Bell includes in his figure for invoices supplied by Paul for the Cemex Subcontract, which Mr Lewis excludes from his figure, for reasons that are not explained by Mr Lewis. I find that the total value of Partnership invoices for the Cemex Subcontract is £831,128; and
    (b) I prefer Mr Lewis's calculation of the Partnerships profit margin at 23% to Mr Bell's calculation of the Partnership margin at 18.7% because Mr Lewis calculated the Partnership's profit margin, for the financial years ending 5 April 2011 and 5 April 2014, this more closely matches the financial years in which the Cemex Subcontract was performed by the Partnership, than the Partnership accounts for the years 2011 to 2016, used by Mr Bell.

RECALCULATION BY THE EXPERTS TO TAKE ACCOUNT OF THE USE OF PLC's RESOURCES BY THE PARTNERSHIP

43. At the conclusion of the Remedies Hearing I asked the experts to calculate the effect on their calculations of the Partnership profit, made from the Cemex Subcontract, of the

Partnership being treated as having reimbursed PLC for the cost to PLC of the resources which the Partnership used, during the period that the Cemex Subcontract was being performed, without reimbursing PLC.

44. As I have preferred Mr Lewis's calculation of the profit margin to be applied (23%). It is his profit margin which would need to be adjusted.

45. Mr Lewis, in a supplemental report, prepared in accordance with the directions I gave at the end of the Remedies Hearing, suggests that his figure for the profit made by the Partnership, from the Cemex Subcontract should be reduced from £176,207 to £150,159, to take into account adjustments to his average profit margin of 23% to reflect losses made by PLC from issues (a) (vi); (vii); (ix) and (x). However I cannot use Mr Lewis's figure of £150,159 as representing the Partnership profit from the Cemex Subcontract because:

    (a) it is based upon the Partnership turnover from the Cemex Subcontract being £779,163 (Mr Lewis's figure for that turnover) but I have accepted Mr Bell's figure for the turnover of £831,128; and
    (b) Mr Lewis has, understandably (because he did not have a draft of this judgment when providing his revised figures) used his own figures for the losses incurred by PLC, as a result of issues (a) (vi), (vii), (ix) and (x) rather than the losses that I have determined, in this judgment, that PLC incurred as a result of those issues.

46. In his supplemental report, Mr Bell calculated the combined profits for the Cemex and Biffa Subcontracts at £156,739, of which the profit on the Cemex Subcontract would be £119,124. Mr Lewis criticises the approach adopted by Mr Bell, in his supplemental report of using the absolute average of the Partnership's profits for the financial years 2011 to 2016, rather than the approach taken by Mr Lewis in his supplemental report (and as Mr Bell did in his original report) of calculating the profit margin for each year and then calculating an average profit margin from those profit margins.

47. I could ask the experts to carry out further calculations, but given that, for the reasons I have already explained, I will not be taking into account the profit made by the Partnership from the Cemex Subcontract, in deciding on the appropriate remedy (or if the remedy includes a purchase of Paul's shares, in determining the value to be paid or those shares) I do not consider that any purpose would be served by requesting that they do so. For present purposes I merely observe that, after adjustments to take into account the additional costs that the Partnership would have incurred, had it discharged the expenses which were instead met by PLC, as set out by me in response to issues (a) (vi); (vii); (ix) and (x), the Partnership profits from the Cemex Subcontract would be in the range £119,124 - £156,739.

ISSUE (a) (ii) PROFITS FROM THE BIFFA SUBCONTRACTS

48. As already noted in paragraph 13 (b) above, PLC had two contracts with Biffa, one for the disposal of solid waste and one for the disposal of liquid waste.

THE BIFFA SOLIDS SUBCONTRACT

49. At the Liability Hearing, Paul gave evidence that PLC employed the Partnership to arrange the removal and disposal of solid waste from the Biffa site but he said the actual work was done by Gilbert Transport. Gilbert Transport invoiced the Partnership and the Partnership invoiced PLC. Paul also gave evidence about what he agreed the Partnership would charge PLC, compared with what Gilbert Transport charged the Partnership for the same work. Having considered that evidence I concluded, in the Liability Judgment that the agreement (which Paul agreed on behalf of the Partnership and PLC) was that the Partnership would charge PLC the same price as Gilbert Transport charged the Partnership for the same work.

50. Issue (a) (iv) requires me to determine what the difference (if any) is between what Gilbert Transport charged the Partnership for removing solid waste from the Biffa Site and what the Partnership charged PLC. Whilst it is not necessary for me to determine what profit the Partnership made from the Biffa Solids Subcontract (for the reasons explained in paragraph 33 above) the experts agree that any amount by which the Partnership charged PLC more than it was charged by Gilbert Transport for removing solid waste from the Biffa site represents a profit for the Partnership, which is obviously right. I will therefore calculate the amount (if any) by which the Partnership charged PLC more than it was charged by Gilbert Transport for removing solid waste from the Biffa site, which will also determine issue (a) (iv).

51. The calculation of the overall difference between what Gilbert Transport charged the Partnership and what the Partnership charged PLC, for the removal and disposal of the same solid waste from the Biffa site is complicated by the fact that Paul accepts that the Partnership charged PLC more than Gilbert Transport charged it for the same loads of solid waste removed from the Biffa site and disposed of by Gilbert Transport, but he says that this difference is more than offset by the value of loads of solid waste which Gilbert Transport invoiced the Partnership for, but the Partnership did not invoice to PLC. As a result of that offset, Paul says that, overall the Partnership incurred a loss by charging PLC less than Gilbert Transport charged the Partnership for the collection and disposal of solid waste from the Biffa site.

52. Paul supplied to the experts his own calculations (purporting to show a loss for the Partnership) and copies of invoices from Gilbert Transport to the Partnership and from the Partnership to PLC for the collection and disposal of solid waste from the Biffa Site.

53. Mr Lewis calculated that the Partnership charged PLC £31,731 more than it was charged by Gilbert Transport for the same loads and Mr Bell calculated the difference at £29,875. Mr Lewis's figure was therefore £1,856 higher than Mr Bell's figure.

54. Mr Lewis calculated the value of invoices sent by Gilbert Transport to the Partnership, for work which was not in turn invoiced by the Partnership to PLC at £19,500. Mr Bell calculated the figure as £14,375, a difference of £5,125.

55. Overall Mr Lewis calculated the difference between what Gilbert Transport charged the Partnership and what the Partnership charged PLC as £12,231 and Mr Bell calculated it as £15,500. Contrary therefore to Paul's assertion that overall, the Partnership charged PLC less than Gilbert Transport charged it for the work carried out by Gilbert Transport, both experts found that, overall, it charged more.

56. In their joint report, Mr Bell and Mr Lewis concluded that the difference of £1,856 between what Mr Bell and Mr Lewis calculated to be the aggregate margin charged by the Partnership to PLC, above the value of the invoices sent by Gilbert Transport to the Partnership for the same work, was so small that it did not justify the costs of further investigation. I am unable, therefore, to decide, as between Mr Bell and Mr Lewis's figure, whose is to be preferred (or whether any other figure is the right one). In those circumstances I determine that the aggregate amount charged by the Partnership to PLC, above the value of the invoices sent by Gilbert Transport to the Partnership, for the same work is £30,803 being half way between Mr Lewis and Mr Bell's figures.

57. As for the difference of £5,125, between Mr Bell's figure of £14,375 and Mr Lewis's figure of £19,500 for the value invoiced by Gilbert Transport to the Partnership, but not invoiced by the Partnership to PLC:

    (a) Paul said, "it appears" that 11 skip loads of solid waste invoiced by Gilbert Transport to the Partnership in the sum of £1,375 were not invoiced to PLC. Mr Bell did not regard Paul's comment and the absence of an invoice from the Partnership to PLC (all such invoices having been supplied by Paul) as reliable evidence that the 11 skip loads had not been invoiced to PLC. In contrast Mr Lewis accepted that the 11 skip loads apparently invoiced by Gilbert Transport to Partnership were not invoiced by the Partnership to PLC and he pointed to a gap in the Partnership invoices to PLC, which I will explain further below, and which he felt supported the conclusion that the Partnership had not invoiced PLC for the 11 skip loads; and
    (b) as to the balance of £3,750, Mr Lewis noted that Paul's position was that he had supplied to the experts all of the Partnership invoices to PLC for the Biffa Solids Subcontract. If that were true, said Mr Lewis, then it would support Paul's assertion that the £3,750 had not been invoiced to PLC, but to confirm the position would require a detailed analysis of the sales ledger, which had not been undertaken. Mr Bell pointed out that, if the Partnership had not invoiced PLC it was difficult to see how PLC could have invoiced Biffa, but Mr Lewis thought that there may be other documents which could have been produced, which enabled PLC to invoice Biffa.

58. I find that the value of invoices sent by Gilbert Transport to the Partnership, which the Partnership did not invoice to PLC, for the disposal of Biffa solid waste amounts to £15,732, that is Mr Bell's figure of £14,357 and an additional £1,375.

59. I am satisfied that £1,375 should be added to Mr Bell's figure because Mr Lewis does not only rely upon Paul's comment that "it appears" that the 11 skip loads of solid waste were not invoiced to PLC and the absence of invoices from the Partnership to PLC for those loads, but also on the fact that there is a gap in the Partnership's invoices to PLC for disposal of solid waste from the Biffa site, for the period from 22 November 2014 to 30 November 2014 and the Gilbert Transport invoices to the Partnership for the 11 skips of solid waste cover the period 24 - 28 November 2014, which tends to support the conclusion that the Partnership did not invoice PLC for those loads.

60. I have not added the sum of £3,750 to Mr Bell's figure, because Mr Lewis relies solely upon Paul not having disclosed an invoice or invoices from the Partnership to PLC which appear to cover loads included in Gilbert Transport's invoices to the Partnership for £3,750. I am not satisfied that the mere fact that Paul has not produced an invoice or invoices from the Partnership to PLC which cover these loads proves, on the balance of probabilities, that they were not invoiced by the Partnership to PLC, bearing in mind the inconsistencies and contradictions in the information and documents submitted by Paul and his solicitor, Mr Jefferies, to the experts which I have already referred in paragraph 41b) above.

61. The difference overall taking into account: (a) the difference of £30,803, between what Gilbert Transport charged the Partnership and the Partnership charged PLC for the same work; and (b) work invoiced by Gilbert Transport to the Partnership, but not invoiced by the Partnership to PLC of £15,732 is £15,071.

THE BIFFA LIQUIDS SUBCONTRACT

62. Mr Bell calculates the total value of the Partnership's invoices to PLC for spreading Biffa liquid waste at £116,471. He applies a profit margin of 18.7%, calculated in the manner set out in paragraph 38 above and thereby arrives at a total profit for the Partnership from the Biffa Liquids Subcontract of £20,649.

63. Mr Lewis calculates the total value of the Partnership's invoices to PLC for spreading Biffa liquid waste at £109,979 and he calculates the Partnership profit for the Biffa Liquids Subcontract at £1,771, being the total value of the invoices (£109,979) less the aggregate value of costs identified by Paul as having been incurred by the Partnership in performing the Biffa Liquids Subcontract (£108,200).

64. The difference of £6,492 between Mr Bell's figure for the total value of Partnership invoices to PLC and Mr Lewis's figure is primarily accounted for by Mr Bell including in his figure, invoices for £5,985 sent by the Partnership to PLC for the hire of a Volvo lorry registration number YB06 UBJ ("the Volvo"). For the reasons that follow I do not consider that the hire of the Volvo should be included in the Partnership sales to PLC for the Biffa Liquids Subcontract:

(a) the Volvo was not used by the Partnership in performing its work under the Biffa Liquids Subcontract, which required it to spread liquid waste on farmland using the Partnership's tractors. It appears that PLC may have used the Volvo to transport liquid waste from the Biffa Site to farms where it was spread, initially by Prestons and then by Prestons and the Partnership. The hire of the Volvo by the Partnership to PLC did not therefore form part of the Partnership's subcontract with PLC to spread Biffa liquid waste on farmland; and

(b) in paragraph 644 of the Liability Judgment I said that no account was to be taken, in calculating any difference between what the Partnership charged PLC and what Preston's charged PLC for spreading liquid waste, of the Partnership charging PLC for the hire of the Volvo. The reasons I gave were that I was not satisfied that: (i) the allegation that the Partnership made a profit from the hire of the Volvo to PLC formed part of the allegations made by Andrew in the ABPT Petition; or (ii) that PLC was overcharged by the Partnership for the hire of the Volvo. Whilst that direction was not given to the experts specifically in relation to their calculation of the profit made by the Partnership from the Biffa Liquids Subcontract, in my judgment (i) and (ii) are also reasons why any profit made by the Partnership from hiring the Volvo to PLC should not be taken into account, in calculating the profit made by the Partnership from the Biffa Liquids Subcontract.

65. Mr Lewis accepts that no contemporaneous note was made in the Partnership's accounting records of the costs incurred by the Partnership in performing the Biffa Liquids Subcontract, the accuracy of the figures used by Mr Lewis for those costs depends therefore upon the reliability of Paul's identification now, from the Partnership's nominal ledger, of costs incurred by the Partnership, in performing the Biffa Liquids Subcontract.

66. Mr Bell regards the information provided by Paul as to costs incurred by the Partnership in performing the Biffa Liquids Subcontract as unreliable, which is why he applies the average Partnership profit margin of 18.7% to his calculation of the value of invoices to PLC, for the spreading of Biffa liquid digest.

67. I do not consider that Paul's identification of costs incurred by the Partnership in performing the Biffa Liquids Subcontract is reliable for the following reasons:

(a) the Biffa Liquids Subcontract was performed by the Partnership in 2015/2016, some 7-8 years ago. Paul does not say how he was able now, to identify those costs incurred by the Partnership 7 - 8 years ago in performing the Biffa Liquids Subcontract, as opposed to anything else, which he has marked as such, in the Partnership nominal ledger; and

(b) for the reasons noted in paragraph 41 above, both experts regarded Paul's assertion that the Partnership had incurred a loss in performing the Cemex and Biffa Subcontracts as unlikely to be correct and the information that he provided in relation to the Cemex Subcontract more generally as unreliable. In particular, Mr Jefferies wrote to the experts on 24 February 2023 to confirm that the details of fuel costs that Paul had provided, as having been incurred by the Partnership in performing the Cemex Subcontract should be reduced by £67,332. That is a

substantial error and gives me further reason to doubt that Paul has correctly identified, from the Partnership's historic nominal ledgers, the costs incurred by the Partnership in performing the Biffa Liquids Subcontract.

68. As already noted, Mr Bell's profit margin of 18.7% is calculated by taking an average of the Partnership profit margin for its financial years 2011 - 2016. The Biffa Liquids Subcontract (spreading Biffa liquid digest) was only performed by the Partnership from late 2014 to late 2015 and therefore the average of the Partnership profit margins from 2011 - 2016 would not, in my judgment represent a reasonable basis for calculating the profit made by the Partnership from the Biffa Liquids Subcontract. At Appendix 3A to his report dated 3 March 2023, Mr Bell sets out his calculation of the Partnership's profit margin for each of the financial years 2011 - 2016. As the Partnership's financial year ended on 5 April in each year, the Partnership accounts which relate to the period of the Biffa Liquids Subcontract would be those for the years ending 5 April 2015 and 5 April 2016. Appendix 3A to Mr Bell's report shows a profit margin for the Partnership of -8% in the financial year to 5 April 2015 and 27% in the financial year to 5 April 2016. On the basis that the Biffa Liquids Subcontract ran from 1 December 2014 to October 2015, it was carried out for 4 months in the financial year to 5 April 2015 and 6 months in the financial year to 5 April 2016. On that basis I calculate the average profit margin of the Partnership over that period at around 16% (the experts could produce a more accurate figure but 16% is accurate enough for present purposes).

69. In estimating the profit made by the Partnership on the Biffa Liquids Subcontract I will therefore apply a profit margin of 16% to the Partnerships invoices for spreading the Biffa Liquid waste. If I remove from Mr Bell's calculation of the total value of those invoices, the hire invoices for the Volvo totalling £5,985, then the difference between Mr Lewis's figure for the total value of those invoices (£109,979) and Mr Bell's figure (£110,486) is £507. The experts have not explained the difference between those two figures and I will therefore use the figure of £110,232.50 being half way between the two figures as the aggregate value of invoices sent by the Partnership to PLC for the Biffa Liquids Subcontract. Applying a profit margin of 16% to that figure produces a figure of £17,637.20.

70. As I have explained at paragraph 43, I asked the experts at the conclusion of the Remedies Hearing to recalculate their figures for the profit made by the Partnership from the Cemex and Biffa Subcontracts to take account of what I determined to be the value of PLC's resources used by the Partnership during the currency of those subcontracts.

71. I have preferred Mr Bell's method of calculating the profit that the Partnership made from the Biffa Liquids Subcontract (although I have not accepted his proposed profit margin of 18.7% based upon the Partnership's accounts 2011 – 2016, preferring instead to only use those of the Partnership's accounts that relate to the period during which the Partnership was performing the Biffa Liquids Subcontract). Adjustments need to be made to Mr Bell's profit calculation for: (a) my determination of the difference between what the Partnership charged PLC and what Prestons charged PLC for spreading liquid waste on the Biffa Liquids Subcontract (Issue (a) (v)); (b) the cost to PLC of employing

those employees specified in issue (a) (vi) employed during the currency of the Biffa Liquids Subcontract; (c) the cost borne by PLC of maintaining and repairing the Partnership's vehicles, machinery and equipment during the currency of the Biffa Liquids Subcontract (Issue (a) (vii)); and (d) PLC fuel used by the Partnership tractors spreading liquid waste in late 2014 to late 2015 (Issue (a) (x)).

72. Mr Bell, in his supplemental report adjusted his profit margin figure of 18.7% to take into account Issues (a) (v) – (vii), (ix) and (x). He considered that his profit margin of 17.8% would reduce by 1.6%, to 16.2%, on the basis that I found (as I have, see paragraph 146 below regarding Issue (x)) that only one tractor was used at any one time for spreading Biffa liquid digest. I cannot however rely upon Mr Bell's recalculations because:

    (a) they are based upon a profit margin of 18.7% whereas (before adjustment for issues (a) (v) – (vii), (ix) and (x)) for the reasons I have explained, a figure of around 16% would appear to be a more accurate calculation of the Partnership profit margin when the Biffa Liquids Subcontract was being performed; and
    (b) Mr Bell has, understandably (because he did not have a draft of this judgment when providing his revised figures) used his own figures for the losses incurred by PLC, as a result of issues (a) (v) - (vii), (ix) and (x) rather than the losses that I have determined, in this judgment, that PLC incurred as a result of those issues.

73. Mr Bell's revised figures suggest a profit of £37,615 for both Biffa Subcontracts, but that has been calculated at a higher profit margin than I have accepted should be applied and includes the invoice for the Volvo and the profit on the Biffa Solids Subcontract. The final figure could be calculated by the experts with the information provided in this judgment and a suitable direction from me. However, as already mentioned (see paragraph 32 (b) above) I have found in the Liability Judgment that Paul deciding the terms of the Biffa Liquids Subcontract and not informing the PLC board of its terms, was not unfairly prejudicial to Andrew, unless the Partnership charged PLC materially more than Prestons for the same amount of work (taking into account that the Partnership used PLC's tanker and boom, to spread Biffa liquid waste) and it is that difference that would represent a loss to PLC. No purpose would therefore be served by asking the experts to calculate the precise amount of profit made by the Partnership from the Biffa Liquids Subcontract, for present purposes it suffices for me to say that the profit made by the Partnership from the Biffa Liquids Subcontract would appear to be in the region of £15,000.

ISSUE (a) (iii) LOSS SUFFERED BY PLC AS A RESULT OF USING THE PARTNERSHIP RATHER THAN A 3RD PARTY CONTRACTOR TO TRANSPORT MATERIAL FROM CEMEX

74. The experts agree that, based upon the available evidence, PLC did not suffer a loss as a result of using the Partnership, rather than a 3rd party contractor to transport material from the Cemex Site. It follows that, in accordance with paragraphs 658 – 686 of the Liability Judgment, Paul deciding what the Partnership should charge PLC for

transporting waste from the Cemex Site and failing to disclose the nature and extent of the Cemex Subcontract to PLC's board was not unfair or prejudicial to Andrew, because the Partnership did not charge PLC materially more than a third party contractor would have charged for the same work.

ISSUE (a) (iv) DIFFERENCE BETWEEN WHAT GILBERT TRANSPORT CHARGED THE PARTNERSHIP FOR REMOVING SOLID WASTE FROM THE BIFFA SITE AND WHAT THE PARTNERSHIP CHARGED PLC

75. I have already determined that the difference is £15,071, see paragraph 61 above.

76. In paragraph 693 of the Liability Judgment I found, for reasons explained in that paragraph, that Paul deciding what the Partnership should charge PLC and failing to disclose the nature and extent of the Biffa Solids Subcontract to the PLC board was not unfair or prejudicial to Andrew unless, contrary to Paul's evidence, the Partnership charged PLC materially more that Gilbert's charged the Partnership, for the same work.

77. Whilst the difference of £15,071 might on one view be regarded as not material, in the context of the total value of invoices sent by the Partnership to PLC amounting to over £210,000, a profit of only around 7.2 – 7.3 %, I nonetheless consider the difference to be material, to represent a loss to PLC and to be unfair and prejudicial to Andrew because:

    (a) In the Liability Judgment I confirm that the reason why Paul caused the Partnership and PLC to enter into the arrangement by which Gilbert Transport did all the work of transporting the Cemex waste, but Gilbert Transport charged the Partnership for doing so and the Partnership then charged PLC, was so that the Partnership could make a profit from the arrangement, even though it undertook no work itself (see paragraph 693 of the Liability Judgment);
    (b) it is clear from the experts' reports that initially the Partnership did charge PLC more (around £30,000 more) than it was charged by Gilbert Transport, even though the Partnership was adding no value (from PLC's perspective) to the work which Gilbert Transport was carrying out;
    (c) the only reason why the Partnership only made £15,071 from the Biffa Liquids Subcontract, rather than a little in excess of £30,000 is that in the later stages of the subcontract it did not charge PLC on some occasions when Gilbert Transport carried out work and charged the Partnership for that work. It is unclear why this happened, perhaps it was a deliberate attempt by Paul to reduce PLC's loss from the arrangement; and
    (d) in circumstances where the Partnership interposed itself between Gilbert Transport and PLC, purely so that it could make a profit, at PLC's expense, with PLC obtaining no advantage from it doing so, £15,071 is a material difference and that difference is both unfair and prejudicial to Andrew.

ISSUE (a) (v) THE DIFFERENCE BETWEEN WHAT THE PARTNERSHIP CHARGED PLC AND WHAT PRESTONS CHARGED PLC FOR SPREADING LIQUID WASTE ON THE BIFFA LIQUIDS SUBCONTRACT

78. In the evidence that he gave at the Liability Hearing, Paul said that the Partnership charged PLC less than Preston's for spreading liquid digest from the Biffa Site on farmland, to take account of the fact that the Partnership had used PLC's tanker and boom to do so.

79. Mr Bell calculated that the difference between what Prestons would have charged PLC for spreading the liquid digests that the Partnership spread and what the Partnership charged as £6,691, Mr Lewis calculated the difference as £9,547. The experts agreed that they would not investigate further the difference of £2,856. I will therefore assess the difference at £8,119, being half way between Mr Bell and Mr Lewis's figures.

80. Mr Bell suggested that the allowance for the use by the Partnership of PLC's tanker and boom should be a commercial rate of hire and based on his research, that would be £2,240 per week. Paul told the experts that the Partnership had used PLC's tanker and boom for around 25% of the time that it was spreading the Biffa liquid waste. Based upon the Partnership using PLC's tanker and boom for 25% of the time, Mr Bell calculates that the Partnership used them for 7 weeks and 5 days. This would amount to a charge of £17,388, at £2,240 per week.

81. Mr Lewis relied upon Paul informing the experts that he believed that he could have hired a similar tanker and boom for around £70 a week (Mr Bell rejected this on the basis that Paul had produced no evidence that he could have hired a tanker and boom for £70 per week). Relying on Paul's assertion that the Partnership used PLC's tanker and boom for around 25% of the time, when it was spreading Biffa Liquids, Mr Lewis calculated that the Partnership using PLC's tanker for 8.5 weeks would mean a total charge or allowance of £595, using the figure of £70 per week that Paul had provided.

82. In the experts Joint Report, Mr Lewis says that, according to PLC's records, it paid £37,000 for the tanker and boom and if Mr Bell's figure of £2,240 per week were correct, then, the hirer would recover the total costs paid for the tanker and boom in 16.5 weeks, which he considered indicated that £2,240 represented an excessive charge, even for a commercial hirer. Mr Bell pointed out that, at the rate of £70 per week it would take 10 years to recover the cost of the equipment hired, even if it were hired out for 52 weeks a year, which he considered would be wholly uncommercial, for a commercial hirer.

83. At the end of his cross-examination, I asked Mr Lewis what he would consider to be a reasonable "payback" period, for a commercial hirer. Mr Lewis suggested that a reasonable "payback" period would be five years. Based upon a cost for the tanker and boom of £37,000 and assuming that it was hired out for 52 weeks of each year for 5 years, according to my calculations, the amount of the weekly charge, necessary to enable the hirer to recover its £37,000 outlay would be £142.21.

84. I think that it is unlikely that a commercial hirer would be prepared to hire out equipment costing that commercial hirer £37,000 for £142.31 per week so that the £37,000 was recovered in five years. A commercial hirer would incur the costs of administration and the repair and maintenance of the tanker and boom and would also wish to recover a profit. It is also unlikely that a commercial hirer could be confident of hiring out the tanker and boom for 52 weeks each year for 5 years (in fact the Partnership only used the tanker and boom for 7 weeks and 5 days (Mr Bell) or 8.5 weeks (Mr Lewis) according to the experts). On the other hand I bear in mind that the arrangements between the Partnership and PLC, for the Partnership to use PLC's tanker and boom to spread liquid digests did not represent a commercial hire arrangement, but rather PLC putting the Partnership into a position where it could spread liquid digest from the Biffa Site on farmland, so that PLC could perform its contract with Biffa. I consider that a fair allowance, in all the circumstances, for the Partnership's use of PLC's tanker and boom would be £150 per week.

85. Both experts calculate the period of use of PLC's tanker and boom on the basis of Paul's assertion that the Partnership used the tanker and boom for approximately 25% of the time that it was spreading Biffa liquid digest, but based upon different conclusions as to the total number of days spent by the Partnership spreading Biffa liquid digest. The difference between those calculations is not explained and therefore I have no basis for preferring one calculation over the other. I will assess the allowance for the use of PLC's tanker and boom by the Partnership at 8 weeks and one and a half days being half way between the periods specified by Mr Bell and Mr Lewis which, at £150 per week is £1,232.

86. The difference between what the Partnership charged PLC and what Prestons would have charged PLC for the same work (£8,119) plus an allowance for use of PLC's tanker and boom (£1,232) in aggregate amount to a loss to PLC of £9,351.

87. In paragraph 695 of the Liability Judgment I found, for the reasons explained in that paragraph, that Paul deciding for the Partnership and PLC what the Partnership should charge PLC for spreading Biffa liquid digests and failing to disclose the nature and extent of that arrangement to the board of PLC was not unfair or prejudicial to Andrew, unless the Partnership charged PLC materially more than Prestons for the same work, taking into account the free use of PLC's tanker and boom by the Partnership.

88. The total value of invoices sent by the Partnership to PLC for spreading Biffa liquid digest is £109,565 according to Mr Lewis's report. The difference of £9,351, between what I find that Prestons would have charged PLC and what the Partnership charged (including an allowance for the use of the PLC trailer and boom) for the same work is about 8.5% of the total value of the invoices. Although I have found that a profit of 7.2 – 7.3% made by the Partnership for the Biffa Solids Subcontract was material and the value of Paul's shares should be adjusted accordingly, that was in the context of the Partnership doing no work and simply adding a margin to Gilbert Transport's invoices for its own benefit, at the expense of PLC. The Biffa Liquids Subcontract is different. I accept Paul's evidence that once PLC took over the entire contract for spreading Biffa Liquids, more Biffa liquid

digest had to be spread and that Prestons did not have capacity to take on the additional spreading work. It is not clear that PLC could have arranged for a 3rd party to take on the additional spreading work required (and certainly not at a lesser cost than the Partnership charged PLC). The Partnership profit from the Biffa Liquids Subcontract must therefore be seen in the context that: (a) PLC was earning more profit by taking over the spreading of all Biffa liquid digest; (b) Prestons did not have the capacity to undertake the additional spreading work required; and (c) it is not clear that PLC could have employed a 3rd party, rather than the Partnership, to undertake the additional spreading work at a lesser cost than the Partnership charged PLC. In that context, I do not consider that the difference of 8.5% between what, on the evidence, Prestons would have charged PLC (if it had the capacity to take on the work) and what the Partnership did charge PLC, is material. The Partnership profit from the Biffa Liquids Subcontract is therefore to be disregarded, in calculating the value of Paul's shares in ABPT.

ISSUE (a) (vi) THE COST TO PLC OF EMPLOYING STAFF USED BY THE PARTNERSHIP

89. With the exception of Mr Miller, the experts calculations of the cost to PLC of employing those of its employees that were used by the Partnership, for the periods specified by me in the Liability Judgment were very similar (£126,566 as calculated by Mr Lewis and £127,119 as calculated by Mr Bell, a difference of £553). Given the small difference in relation to the employees (other than Mr Miller) Mr Bell and Mr Lewis agreed not to investigate the difference.

90. There was however a significant difference between the figures calculated by Mr Lewis and Mr Bell for the cost to PLC of employing Mr Miller when he was harvesting potatoes for the Partnership for 13 hours a day, 7 days a week for 6 years and planting potatoes for the Partnership for 13 hours a day, 7 days a week for 1 year (see paragraph 518 of the Liability Judgment).

91. Mr Bell calculated a day rate for Mr Miller on the assumption that he worked 5 days a week on average and then applied that day rate for the 7 days a week specified in the Liability Judgment. Mr Lewis calculated the cost of employing Mr Miller on average each week and then multiplied this by the number of weeks specified in the Liability Judgment.

92. At the end of the Remedies Hearing, as I have already mentioned, each expert was tasked by me with carrying out further calculations. When asking them to carry out those calculations I asked whether it would be proportionate to calculate the average hourly rate of pay of Mr Miller from PLC's records and apply that to the hours specified by me. The experts both expressed the view that it would not be proportionate to undertake that exercise and I did not therefore ask them to undertake it.

93. In the process of discussing and carrying out the re-calculations which I did ask the experts to undertake at the end of the Remedies Hearing, Mr Bell and Mr Lewis

discussed the calculation of the cost to PLC of the time which I found that Mr Miller had spent working for the Partnership. In those discussions, Mr Bell conceded that his method of calculation may overstate the cost to PLC of the time spent by Mr Miller working for the Partnership and Mr Lewis accepted that his method of calculation may understate it. Mr Bell and Mr Lewis agreed that a sensible and proportionate way of estimating the cost to PLC of employing Mr Miller, whilst he was engaged in harvesting potatoes and planting potatoes for the Partnership, and to resolve the small difference between their respective figures for the remaining employees would be to calculate the figure that falls half way between the respective figures of Mr Bell and Mr Lewis for the overall cost to PLC of time spent by its employees in working for the Partnership. They calculated this figure as £174,973. I propose to adopt this approach and find that the overall cost to PLC of time spent by its employees in working for the Partnership is £174,973.

ISSUE (a) (vii) THE COST TO PLC OF MAINTAINING AND REPAIRING THE PARTNERSHIP'S VEHICLES, MACHINERY AND EQUIPMENT ("VME")

94. In the Liability Judgment, at paragraph 536, I found that:

    (a) the trailers owned by the Partnership used on the Cemex Subcontract, but not the cabs, were repaired by PLC, at PLC's expense, for which the Partnership did not reimburse it; and
    (b) from January 2009, PLC carried out some, but not all of the repair and maintenance work which was required to Partnership VME, for which the Partnership did not reimburse it.

95. I asked the experts to attempt to estimate the likely cost of maintaining and repairing the Partnership's VME, from January 2009 which would not be covered by manufacturers/suppliers warranties. I said that I would then decide what proportion of those costs should be regarded as a loss to PLC, on the basis that PLC had discharged the cost and not been reimbursed by the Partnership for that cost.

96. Mr Bell and Mr Lewis took very different approaches to estimating the cost of maintenance and repair work carried out at PLC's expense, to the Partnership's VME.

97. Mr Bell's approach was:

    (a) to calculate the total cost to PLC of its employees being involved in repairing and maintaining the Partnership's VME, Mr Bell used the time recorded by Jarek Marczak ("Mr Marczak") (who was employed by the Partnership to repair and maintain the Partnership's VME from 2019 to 2022). Mr Bell calculated that Mr Marczak spent one hour repairing and maintaining the Partnerships VME for every £910 of Partnership turnover in the years 2019 to 2022. Mr Bell then applied that ratio to the Partnership's turnover in the years 2009 - 2018 to calculate the

amount of time spent by PLC's employees in those years in repairing and maintaining the Partnership's VME. On that basis Mr Bell calculated the cost to PLC of its employees being used to repair and maintain the Partnership's VME at £43,406; and

(b) to calculate the cost to PLC of materials, parts and equipment ("MPE") purchased by PLC for the repair and maintenance of the Partnership's VME, Mr Bell calculated the value of MPE recharged by PLC to the Partnership during the years 2019 - 2022 through the recharge account, which operated in those years ("the Recharge Account") as a percentage of the repair and maintenance costs entered in the Partnership accounts for the same years (11.8%). Mr Bell then applied the 11.8% to the repair and maintenance costs entered in the Partnership accounts for the years 2009 to the date of his report and deducted from the resulting figure the costs recharged to the Partnership in the Recharge Account, arriving at a figure of £63,481 for MPE paid for by PLC, but used for the maintenance and repair of the Partnership's VME and not reimbursed by the Partnership to PLC.

98. Mr Lewis noted that in the Liability Judgment I had identified Mr Miller, Matthew Parker, Carl Woolrich and Richard Baldwin, all employees of PLC ("the Named Employees") as having spent time repairing and maintaining the Partnership's VME. Mr Lewis calculated the cost to PLC of employing the Named Employees (from PLC's payroll records) based on them spending 0, 1, 2 or 3 hours per week on repairing and maintaining the Partnerships VME, giving a range for the costs to PLC of its employees engaging in repairing and maintaining the Partnership's VME of £0 - £81,937.

99. Mr Lewis did not produce any figure for MPE purchased by PLC and used in the repair and maintenance of the Partnerships VME, on the basis that there were no documents or information available, which would enable him to make that calculation.

100. In their joint report:

(a) both experts agreed that the task of assessing the cost to PLC of its employees and MPE paid for by PLC being used for the repair and maintenance of the Partnerships VME, carried with it a high degree of uncertainty;

(b) Mr Lewis criticised Mr Bell's approach on the basis that there was a substantial change in the Partnership's business activities from 2016, when the Partnership began to farm potatoes. Mr Lewis noted that Paul had confirmed that the activity of farming potatoes was far more machine intensive than the activities of the Partnership carried out up to that point, which Mr Lewis noted was reflected in increase in the value of VME in the Partnership's accounts, from 2016;

(c) Mr Bell considered that Mr Lewis's approach to calculating time spent by PLC's employees in repairing and maintaining Partnership VME was not as accurate as his method of using time actually spent by Mr Marczak in repairing and maintaining the Partnership's VME, 2018 – 2022 and applying that time to previous years, according to the relative turnover of the Partnership in those years; and

(d) Mr Lewis was unable to calculate a figure for MPE purchased by PLC for the repair and maintenance of Partnership VME, but he noted that Paul had only accepted

that £9,000 of MPE purchases made by PLC, shown in a spread sheet produced by Mr Bell (which MPE, Mr Bell suggested, by its description indicated that it was purchased for repair and maintenance work on the Partnership's VME) related to the Partnership's VME.

101. As already noted (see paragraph 95 above) in the Liability Judgment, I asked the experts to estimate the likely cost of maintaining and repairing the Partnership's VME from January 2009, not covered by manufacturers/suppliers warranties and I indicated that I would decide what proportion of those costs should be reimbursed by the Partnership to PLC. In fact both experts have attempted to calculate the cost to PLC of employing its employees who were used to repair and maintain the Partnership's VME and Mr Bell has attempted to calculate the value of MPE purchased by PLC for that use, for which, in each case, PLC was not reimbursed.

102. There is no evidence that PLC was ever reimbursed by the Partnership for the cost to it of employing those employees who were involved in the repair and maintenance of the Partnership's VME, so I am satisfied that all of that cost, is a loss incurred by PLC.

103. As for MPE purchased by PLC and used in the repair and maintenance of the Partnership's VME, as noted, Mr Lewis provides no calculation. Mr Bell calculates what was recharged by PLC to the Partnership for MPE, purchased by PLC for use by the Partnership in the years 2019 -2022 at 11.8% of all maintenance costs entered in the Partnership accounts for those years. Mr Bell then applies that percentage to the Partnership's total maintenance costs entered in its accounts for the years 2009 to the date of his report to calculate the value of MPE purchased by PLC for Partnership's VME in those years.

104. To the extent, if any, that I accept either of the experts' figures, it will not therefore be necessary for me to decide what proportion of the costs represent a loss to PLC.

105. Subject to one caveat, I prefer Mr Bell's opinion as to the cost to PLC of its employees maintaining and repairing the Partnership's VME, for the following reasons:

(a) Mr Bell's figure is based on actual time spent on the repair and maintenance of the Partnership's VME, in the years 2019 – 2022, which is then used by Mr Bell to estimate the cost to PLC of its employees carrying out that repair and maintenance work, in the previous years, 2009 - 2018 (adjusted to reflect the turnover of the Partnership in those years relative to the Partnership turnover 2019 – 2022); and
(b) Mr Lewis's approach is based on time being spent by the Named Employees of PLC who I identified in the Liability Judgment as having spent time carrying out repair and maintenance work to the Partnership's VME. However, other employees of PLC may have been (and likely were) engaged in such repair and maintenance work and Mr Lewis only provides a range of possible hours spent by the Named Employees in carrying out repair and maintenance work for the Partnership. Mr Lewis accepted, in response to a question that I asked him, that he has no means of determining (and therefore nor do I) how many hours in his range 0 – 3 hours should be attributed to any or all of the Named Employees that I found worked on

the repair and maintenance of the Partnership's VME. Further, there is no reason to suppose that the amount of time spent by any or all of the Named Employees actually falls in the range 0 - 3 hours per week, as opposed to any other range.

106. Mr Lewis criticises Mr Bell's approach of taking figures from the Recharge Account for 2019 - 2022 because he says that there was a significant increase in the Partnership's VME from 2016 onwards and therefore the figures from the Recharge account for 2019 - 2022 are not a reliable basis for calculating MPE purchased by PLC for the repair and maintenance of the Partnership's MPE in prior years.

107. As for the value of MPE purchased by PLC and used for the repair and maintenance of the Partnership's VME, which was not recharged to Partnership by PLC, again (subject to the same caveat) I prefer Mr Bell's approach. Mr Lewis has not provided any figure, on the basis that there are no records which would enable him to calculate the value of MPE purchased for the repair and maintenance of the Partnership's VME. Mr Lewis's only comment on value is that Paul has only identified £9,000 of MPE purchased by PLC (from a list of expenditure PLC incurred that Mr Bell has produced, which he thinks, from its description, may relate to the Partnership's VME) which Paul considers was used in the repair and maintenance of the Partnership's VME.

108. The caveat to my accepting Mr Bell's approach to calculating the cost to PLC of its employees and MPE purchased by PLC being utilised in repairing and maintaining the Partnership's VME, is Mr Lewis's criticism that, from 2016, the Partnership started farming potatoes and the Partnership's VME increased as a result of that, substantially from 2016 onwards. This means, says Mr Lewis, that Mr Bell's calculation of the percentage of 11.8% for 2009 - 2018, has been wrongly inflated, because the amount of money spent on the repair and maintenance of the Partnership's MPE will have risen significantly from 2016 onwards. In order to take account of this criticism (which I consider is justified) I asked the experts to recalculate Mr Bell's figures by reference to the value of the Partnership's VME entered in its accounts, rather than its turnover in the relevant years.

109. Mr Lewis and Mr Bell agreed, in their supplemental reports that Mr Bell's figures, when adjusted to reflect movements in the Partnerships VME, result in Mr Bell's figures for: (a) MPE purchased by PLC being used in the repair and maintenance of the Partnership's VME reducing from £63,481 to £53,323; and (b) the cost to PLC of its employees being engaged in the repair and maintenance of the Partnership's VME reducing from £43,603 to £22,595.

110. Mr Lewis also points out, in his supplemental report, that, whilst Mr Bell gives credit for amounts repaid by the Partnership to PLC, during the operation of the Recharge Account (2019 - 2022) he gives no credit for the Partnership reimbursing PLC for anything during the years 2009 - 2018, before the Recharge Account was in use. Mr Lewis says that if it were assumed that the Partnership made repayments to PLC in the years 2009 - 2018, in the same proportions as it did from 2019 – 2022, when the Recharge account was in use, then the figure for MPE, used in the repair and

maintenance of the Partnerships VME, paid for by PLC, for which it was not reimbursed, would reduce by £45,235, to £8,088.

111. In further reports from both experts, prepared after conclusion of the Remedies Hearing, which I allowed Andrew and Paul to rely on:

(a) Mr Bell said that there is no evidence to support the contention that MPE purchased by PLC and used in repairing the Partnership's VME, was recharged by PLC to the Partnership prior to 2019, when the Recharge Account started being used, other than in invoices totalling £16,609, from PLC to the Partnership which, from their descriptions, may relate to PLC invoicing the Partnership for MPE purchased by PLC, for the Partnership's VME prior to 2019; and
(b) Mr Lewis says that entries in the Recharge Account, 2019 – 2022, have been used by Mr Bell to estimate the amount of MPE purchased by PLC for the Partnership's VME. It is logical, says Mr Lewis, to also calculate how much the Partnership paid back to PLC, to reimburse it during the period 2009 – 2018, by reference to how much the Partnership reimbursed to PLC through the use of the Recharge Account 2019 – 2022. By using that approach, he estimates, as already noted that the Partnership would have reimbursed £45,235 to PLC.

112. The burden is on Paul to show that the Partnership reimbursed PLC for the costs it incurred in paying for the purchase of MPE used in the repair and maintenance of the Partnership's VME.

113. Mr Zaman refers to the judgment of Lord Reed in *Morris – Garner v One Step Support Ltd [2018] UKSC 40* where, at paragraph 38, Lord Reed says *"Evidential difficulties in establishing the measure of loss are reflected in the degree of certainty with which the law requires damages to be proved. As is stated in Chitty, para 26-015 "Where it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence." In so far as the defendant may have destroyed or wrongfully prevented or impeded the claimant from adducing relevant evidence, the court can make presumptions in favour of the claimant."* Mr Zaman says that the point about presumptions being made in the claimant's favour applies when Paul has kept no records of the resources of PLC which were being used by the Partnership or of the extent to which the Partnership reimbursed PLC for their use.

114. It is common ground that the Partnership failed to record, prior to the operation of the Recharge Account, what MPE was purchased by PLC for use on the Partnership's VME and what payments the Partnership made to PLC in respect of those costs. In those circumstances I am satisfied that it is right not to credit the Partnership with reimbursing PLC for any of the costs that PLC incurred, before 2019, on the basis of what the Partnership reimbursed to PLC, between 2009 and 2018, as recorded In the Recharge Account. However, Mr Bell does acknowledge that invoices addressed by PLC to the Partnership in the period 2009 - 2018 totalling £16,609 appear from their description to be invoices raised by PLC to the Partnership for the cost of MPE purchased by PLC but used on the Partnership's VME. Both experts suggest that it is wrong in principle to

estimate the amount of MPE purchased by PLC for the Partnership's VME, but then deduct from that figure the value of invoices apparently actually raised by PLC to the Partnership to reimburse PLC for those purchases. Notwithstanding those opinions, I consider it right to deduct the sum of £16,609 from Mr Bell's estimate of £53,323 to arrive at the figure for MPE purchased by PLC, for the Partnership's VME, for which PLC was not reimbursed, because:

(a) the failure of Paul to ensure that proper records were kept of what resources of PLC were being used by the Partnership has led to the need to estimate the value of those resources (including for MPE purchased by PLC for the Partnership's VME, prior to 2019);
(b) the same failure to keep records has resulted in the inability of the experts to calculate what the Partnership repaid to PLC for that use (including for MPE purchased by PLC for the Partnership's VME, prior to 2019);
(c) it is right therefore that I should apply the best estimate of the value of MPE purchased by PLC for the Partnership's VME, prior to 2019 and I have determined that the Recharge Account provides the best means of enabling that estimate to be made; and
(d) the position is different in relation to the value of repayments made by the Partnership to PLC for MPE purchased by PLC for the Partnership's VME, prior to 2019. For reasons I have already explained, I do not consider it appropriate to estimate the extent to which the Partnership repaid PLC, during the period 2009 – 2018 by reference to what it repaid to PLC (as recorded in the Recharge Account) from 2019 - 2022. Given however that Andrew's expert, Mr Bell accepts that descriptions in PLC invoices addressed to the Partnership, totalling £16,609, suggest that they represent PLC raising invoices to the Partnership to reimburse itself for MPE purchased by PLC for the Partnership's VME, it is right to accept, on the balance of probability, that those invoices do in fact show that the Partnership reimbursed £16,609 to PLC, between 2009 and 2018, for MPE that it purchased for the Partnership's VME. I consider it appropriate, in those circumstances to deduct the value of those invoices from the estimate of the value of MPE purchased by PLC for the Partnerships VME, 2009 – 2018, even though I am deducting what I have found, on the balance of probabilities, to be an actual figure, from an estimate.

115. I find that: (a) the cost to PLC of providing its employees to repair and maintain the Partnership's VME, for which it has not reimbursed PLC is £22,595; and (b) the costs to PLC of MPE purchased by it which was used for the repair and maintenance of the Partnership's VME, for which PLC has not been reimbursed is £36,714 (£53,323 - £16,609). The aggregate cost to PLC of providing its employees to repair and maintain the Partnership's MPE, for which it has not reimbursed PLC and the costs to PLC of MPE purchased by it which was used for the repair and maintenance of the Partnership's VME, for which PLC has not been reimbursed, is therefore £59,309.

ISSUE (a) (viii) THE LOSS INCURRED BY PLC IN TAXING AND INSURING PARTNERSHIP VEHICLES INCLUDED ON PLC'S OPERATOR'S LICENCE DURING 2010 AND 2011

116. The experts agree that no loss was incurred.

ISSUE (a) (ix) – THE VALUE OF PLC's FUEL USED BY THE PARTNERSHIP ON THE CEMEX SUBCONTRACT ON THE BASIS THAT ONE LORRY WAS USED ON A TOTAL OF 72 OCCASIONS

117. In the Liability Judgment (paragraph 539 (a)) I estimated that Partnership vehicles, used on the Cemex Subcontract filled up with PLC's fuel on a total of 72 occasions and I asked the experts to calculate the value of that fuel.

118. Mr Bell calculated the value of the fuel at £33,334 and Mr Lewis calculated the value of the fuel at £37,529.

119. In their joint report, the experts agreed that the calculation to be carried out is: 72 x tank size in litres x % of tank refilled on each occasion x average fuel price per litre.

120. The differences between the experts are:

(a) Mr Bell calculated a weighted average of tank sizes listed in Paul's third witness statement at 454 litres and Mr Lewis calculated a simple average of those tank sizes at 462.5 litres. The difference is 8.5 litres;
(b) Mr Bell calculated the average price per litre to be 112p based on an average of the prices charged to PLC, in invoices from 2011 to 2014 supplied to the experts. Mr Lewis calculated the average fuel prices at 113p per litre, in accordance with the Agricultural and Horticultural Development Board's ("AHDB") published average fuel prices for each year. In doing so, Mr Lewis justified using the AHDB figure on the basis that he could not be sure that the experts had received copies of all fuel invoices addressed to PLC for the relevant period. The experts did not investigate the difference of 1p per litre; and
(c) Mr Bell assumed that the tanks which were refilled would still contain some fuel in them and he estimated this fuel as 10% of the average tank size. Mr Lewis assumed that the average tank size would be refilled from empty.

121. I am unable to choose between Mr Bell and Mr Lewis's calculation of the average tank size. The difference is 8.5 litres and I will therefore proceed on the basis that the average tank size is 458.25 litres, halfway between the two expert figures.

122. I prefer Mr Bell's calculation of 112p per litre based upon the average price shown in invoices addressed to PLC, for fuel during the relevant period, rather than the AHDB average price used by Mr Lewis. Notwithstanding Mr Lewis's point that he could not be

sure that the experts had received copies of all invoices paid by PLC for fuel during the relevant period, it seems to me that an average figure based on invoices addressed to PLC, rather than the AHDB average, is likely to be more accurate, because it reflects the price actually charged to PLC by its suppliers, rather than an average price calculated by the AHDB according to the price charged by multiple suppliers to multiple customers.

123. In estimating that the Partnership's vehicles used on the Cemex Subcontract filled up with PLC fuel on 72 occasions, I was estimating the actual number of occasions on which this occurred. When the Partnership's vehicles used on the Cemex Subcontract, refilled their tanks with PLC fuel, this will not have been happened when the tanks were completely empty. I asked Mr Lewis whether he considered that Mr Bell's estimate that the tanks of the Partnership's vehicles would still have had fuel in them equivalent to 10% of their volume was a reasonable estimate of what in reality was likely to have been left in the tanks when they were refilled. Mr Lewis confirmed that he considered Mr Bell's estimate to be reasonable. For that reason I prefer Mr Bell's estimate that, on average, each of the 72 tanks would refill 90% of their volume with PLC fuel. The correct calculation is therefore 90% of the average tank size.

124. I find that the total value of PLC fuel used in filling up Cemex vehicles on 72 occasions is therefore: 72 x 458.25 x 90% x 112p = £33,257.95.

ISSUE (a) (x) THE VALUE OF PLC's FUEL USED BY THE PARTNERSHIP'S TRACTORS IN SPREADING LIQUID WASTE FOR THE BIFFA LIQUIDS SUBCONTRACT LATE 2014 - LATE 2015

125. The experts agree that the calculation is: total number of hours spent spreading Biffa liquids x average fuel price per litre x litres of fuel consumed per hour x number of tractors in use.

126. Mr Bell calculated the value of PLC's fuel used by Partnership tractors which were spreading Biffa liquid waste from late 2014 to late 2015 to be £69,133 and Mr Lewis calculated it to be £22,503.

127. Mr Bell calculated the total number of hours spreading to be 2,916 hours and Mr Lewis 2,920 hours. The experts did not investigate or comment on the difference of 4 hours.

128. Mr Bell calculated average price per litre, based on the average price charged in copy invoices supplied to the experts addressed to PLC for fuel, for the financial years 2015 - 2016 at 46p. Mr Lewis calculated the average fuel price in accordance with the average fuel price for those years published by the AHDB at 57p per litre (as for issue (ix) on the basis that he could not be sure that the experts have been provided with all of the invoices to PLC for fuel for the relevant period).

129. Mr Bell calculated fuel consumption per hour at 17.53 litre, based on telematics data published by John Deere for its tractors, the average of which was 17.53 litres.

130. In his report dated 3 March 2023 Mr Lewis calculated average consumption per hour at 9.5 litres. This figure was based upon information provided by Paul as to how long a tank of fuel would last, depending upon the operation being carried out by the tractor and the size of the tanks of the tractors involved in spreading Biffa liquid digest.

131. In the Joint Report dated 12 May 2023, Mr Lewis adopted Mr Bell's approach of using the John Deere Telematics data. Mr Lewis noted however that Paul had confirmed that the Partnership tractors actually used to spread the Biffa liquid digests were comparable to the John Deere 6175R tractor, being one of the tractors for which John Deere had provided Telematics data. Mr Lewis compared the horsepower ("BHP") of tractors that Paul said were used in spreading Biffa liquids to the BHP of the John Deere 617R tractor noting that the BHP of the tractors identified by Paul were 135 and 180, the John Deere 6175R tractor had a BHP of 175, but the other tractors included in the John Deere Telematics data had a BHP of 215 or 310. Mr Lewis considered that this supported Paul's assertion that the John Deere 6175R tractor was the most comparable John Deere tractor for which telematics data was provided, to those tractors actually used by the Partnership, for the Biffa Liquids Subcontract. Mr Lewis calculated, using the John Deere telematics data for the John Deere 6175R tractor only, that the fuel consumed by the Partnership tractors spreading Biffa liquid digests was 13.60 litres per hour.

132. As for the number of tractors in use each day, Mr Bell assumed that three tractors were used each day, based upon information provided by Paul before 24 February 2023. Mr Bell noted that on 24 February 2023 Paul's solicitor, Mr Jefferies had sent an email to the experts which said that during the period that the Partnership undertook the spreading of Biffa liquids, between late 2014 and late 2015, only one Partnership tractor was in use at any one time. The email went on to say that on occasions two or even three Partnership tractors were in use to spread Biffa liquid digest from 2016 onwards, when that work was undertaken by the Partnership without charging PLC or 4R. Mr Bell said that it was not clear what had prompted the note in the email 24 February 2023, or why, during the period from late 2014 to late 2015, for which fuel use was to be calculated, only one tractor would be in use at any one time, but immediately thereafter two or even three tractors were used at the same time. Mr Bell made his calculations based upon three Partnership tractors being used at all times to spread Biffa liquid digest, because he considered that the information provided in the email of 24th February 2023 was unreliable and inconsistent with previous information provided by Paul, which he considered suggested that all three tractors were used at the same time.

133. Mr Lewis based his calculation upon one tractor being in use at any one time, relying on the information contained in the email of 24 February 2023 (a draft of which had been sent to him on 22 February). Mr Lewis also said that Paul's second witness statement had referred to Prestons and the Partnership's tractors towing PLC's tankers and boom, collecting the Biffa liquid digest either from Biffa or a PLC lorry and tanker and spreading it on small and inaccessible fields. Mr Lewis considered that this information was consistent with only one Partnership tractor being in use at any one

time (that is to collect the liquid digests from Biffa or from a PLC tanker and spread it on the fields).

134. The number of tractors in use is the main difference between Mr Bell's figure of £69,133 and Mr Lewis's figure of £22,503. I will resolve that issue after dealing with the other minor differences between Mr Bell and Mr Lewis's calculations.

135. I have no means of choosing between Mr Bell's total figure of 2,916 hours spreading and Mr Lewis's figure of 2,920 hours spreading, I will therefore split the difference at 2,918 hours spreading.

136. I prefer Mr Bell's average price of 46p per litre, based upon actual fuel invoices addressed to PLC, for the financial years 2015 - 2016, to Mr Lewis's average fuel price of 57p, based upon the AHDB figures, for the same reason as I preferred Mr Bell's approach to that of Mr Lewis for the average price of fuel used to fill the Partnership's Cemex lorries (see paragraph 122 above).

137. I prefer Mr Lewis's figure of 13.60 litres per hour to Mr Bell's figure of 17.53 litres per hour of fuel consumption. Both Mr Bell and Mr Lewis, in the Joint Report, use the John Deere Telematics data. Mr Lewis has used the data for the John Deere 6175R tractor, which Mr Lewis explains is the nearest John Deere tractor, in BHP, for which Telematics data is provided, to the BHP of those tractors that Paul says were actually used to spread Biffa liquid digest. Mr Bell's figure for fuel consumption per hour is calculated as the average fuel consumption per hour of all the John Deere tractors included in the John Deere telematics data provided. Mr Lewis's figure, in my judgment, is likely to be more accurate as it is based upon the John Deere tractor with the engine size which most closely resembles the engine size of the Partnership tractors actually used to spread Biffa liquid digests, rather than an average of the fuel consumption of John Deere tractors, most of which, Mr Lewis says (based upon the information provided by Paul) have much larger engines (and therefore higher fuel consumption) than the tractors actually used by the Partnership to spread Biffa liquid digest. Including tractors with higher fuel consumption than the tractors actually used to spread the Biffa liquid digest would produce an over estimate of the hourly consumption of the tractors actually used, as is apparent from the difference between Mr Bell's calculation of hourly consumption based upon that average of 17.53 litres per hour, compared to Mr Lewis's 13.60 litres per hour, based on the John Deere 617SR tractor alone.

138. As for the number of tractors in use at any one time, Mr Zaman cross-examined Mr Lewis on his opinion that only one tractor was in use at any one time. During his cross-examination, Mr Lewis's initial position was that he had always thought that only one tractor was in use but he then accepted that, prior to the receipt of Mr Jefferies' email of 22 February 2023 (sent to him as a draft of the email subsequently sent by Mr Jefferies to both experts on 24 February 2023) he had no reason to believe that anything less than three tractors was in use, on the information provided to the experts before that date.

139. Mr Zaman pointed out that Mr Bell had been very clear, from the start that the information provided on 24 February 2023, that only one tractor was in use at any one time, was new information which contradicted, in Mr Bell's view, the information which had been given to the experts up to that point.

140. I do not consider that the evidence of the experts as to the information that they believe they were given before 22 February 2023 (in the case of Mr Lewis) and before 24th February 2023 (in the case of Mr Bell) is of much assistance to me in deciding whether one, two or three tractors were in use at the relevant time. The issue I need to decide is whether the information provided by Mr Jefferies in the emails of 22 and 24 February 2023 is reliable and to determine that I need to look, amongst other things, at what information was provided to the experts before those emails were sent and why the emails of 22 and 24 February 2023 were sent.

141. Paragraph 53 of Paul's third witness statement of 8 November 2022 is an answer to a request for information from the experts concerning Partnership tractors used to spread Biffa liquid digest. The experts asked for: "Details of the make and model of [the Partnership] tractors used on the contract including tank size and type of fuel used". In paragraph 53, Paul says: "The make and model of [Partnership] tractors used on the Biffa Liquids Subcontract, including tank size and type of fuel used, were as follows:". Details of three different tractors are then given.

142. Paragraph 57 of Paul's third witness statement then provides information in response to the experts' request for details of: "The total number of tractors used for a day's spreading and the total number of hours/days incurred by each tractor spreading liquid waste on the Biffa contract". In paragraph 57 Paul says that "Spreading records were kept to record what happened to digest on its removal from Biffa, either going into a storage lagoon or being spread on fields. Spreading records weren't kept to record the spreading of digestate from storage lagoons. No records were kept of how spreading was carried out or which tractor carried out which operation. I do not believe that there was a material difference between the rates at which these tractors used fuel. It is impossible to say the total number of hours or days incurred by each tractor spreading liquid waste on the [Biffa Liquids Subcontract]."

143. The experts then raised further questions on the information contained in Paul's third witness statement. These questions were responded to by Paul's solicitor on 1 February 2023. One question said: "paragraph 53 of the third witness statement of PJB set out the vehicles used on the Biffa Liquids Subcontract. Is there any further detail you can provide with regards to how often each type of vehicle was used? The response was: "no further details can be provided as to how often each type of vehicle was used".

144. During his cross-examination, Mr Lewis accepted that a draft of his report dated 3 March 2023 was likely to have been sent to Paul's solicitor before Mr Jefferies sent his draft email to Mr Lewis on 22 February 2023, clarifying that only one tractor was in use in spreading Biffa liquid digests at any one time, during the period late 2014 to late 2015. I infer that the draft email sent to Mr Lewis on 22 February 2023 (largely repeated in the content of the email sent to both experts on 24 February 2023) was sent as a

result of Paul/his solicitor Mr Jefferies considering the content of Mr Lewis's draft report. I do not know what that draft report said about how many Partnership tractors were used to spread Biffa liquid digest at any one time, but I infer that the content of that report caused Paul's solicitor to wish to clarify that only one tractor was in use at any one time.

145. Whilst Mr Zaman submitted (and Mr Bell expresses the view) that the information contained in the emails of 22 and 24 February 2023 (that only one Partnership tractor was spreading Biffa liquid digest at any one time in the period late 2014 - late 2015) was inconsistent with information previously provided to the experts, I do not consider that it was:

(a) In paragraph 53 of Paul's third witness statement (see paragraph 141 above) Paul provides details of three Partnership tractors used to spread Biffa liquid digest in response to the request that he identify the Partnership tractors engaged in this work. The paragraph does not however say whether just one of those tractors was used at any one time, or two or all three and in paragraph 57 of that witness statement, Paul says that "…It is impossible to say the total number of hours or days incurred by each tractor spreading liquid waste on [the Biffa Liquids Subcontract]." This at least suggests that the number of hours or days each tractor was engaged in spreading Biffa liquid digest was different, which they would not be, if all three tractors were in use at the same time, all the time;
(b) the response of 1 February 2023 that "no further details can be provided as to how often each type of vehicle was used" again does not suggest that the three tractors were used simultaneously to spread Biffa liquid digest all the time (it does not include a suggestion that each type of vehicle was used the same number of times, if anything, it suggests that they were not); and
(c) the fact that Mr Jefferies felt it necessary, I infer, having read Mr Lewis's draft report, to provide clarification that only one tractor was in use at any one time may mean that Mr Lewis was uncertain on the point or even that the information provided in paragraph 53 of Paul's third witness statement and the information provided on 1 February 2023, had led him to believe that all three tractors were used simultaneously, but that does not mean that, on a fair reading of paragraph 53, with or without taking into account the e mail of 1 February 2023, that that is what Paul and then his solicitor were saying.

146. I have agreed with the experts that Paul's assertion that the Partnership made a loss from the Cemex and Biffa subcontracts is unreliable and that his identification, from the Partnership's ledgers of expenses that he said were incurred by the Partnership in performing the Biffa Liquids Subcontract is also unreliable and for those reasons I have not accepted that information as accurate. As with those issues, the real question, for this issue (a) (x), is whether the information provided in the emails of 22/24 February 2023 (the content of which must have originated from Paul) can be regarded as reliable, or sufficiently reliable for me to find that only one Partnership tractor was spreading Biffa liquid digest at any one time, from late 2014 to late 2015. By a small margin I find that it is reliable, for the following reasons:

(a) Paul was asked which tractors were used for spreading the Biffa liquid digest and he identified three tractors as having done so. On a fair reading of paragraph 53 of Paul's third witness statement, he does not say that the three tractors were used simultaneously for spreading Biffa liquid digest. So the clarification of 22/24 February 2023, that only one tractor was in use at any one time was not inconsistent with information previously provided in paragraph 53 of Paul's third witness statement;

(b) I agree with Mr Lewis that the content of Paul's second witness statement, that he relied upon at the Liability Hearing, suggests that only one tractor was in use at any one time (see paragraph 133 above);

(c) the email of 1 February 2023 merely says that Paul is unable to say how often each tractor was used. This may suggest that the assertion that only one tractor was used at any one time is unreliable, however there is a great deal of difference between Paul trying to recall, without records, when each of the three tractors was used and recalling that no more than one tractor was used at any one time. The former would, I accept, not be possible, but the later, in my judgment is possible; and

(d) there is some substance to Mr Bell's point that no reason was given, in the email to the experts of 24 February 2023, as to why only one tractor was used at any one time during the period late 2014 to late 2015, when use of PLC fuel by the Partnership is being calculated, but at least on occasions more than one tractor was being used from 2016 onwards. How then could Paul distinguish those two periods in his recollection? However Paul says that PLC/4R were not charged by the Partnership for spreading Biffa liquid digest after the end of 2015 and it may be that Paul recalls more than one Partnership tractor being used on occasions as part of the arrangement from 2016, that the Partnership would not or did not charge for that period (ie there was a change in the basis of the relationship, coinciding with an increase in the number of Partnership tractors used). I also note that there is no apparent reason or motive as to why the emails of 22 and 24 February said that two or even three Partnership tractors, on occasions, were in use spreading Biffa liquid digest from 2016 (a period not relevant to the experts' calculation) unless that was Paul's honest recollection.

147. I find that the cost to PLC of fuel used by the Partnership's tractors to spread Biffa liquid digest is 2,918 x 46p x 13.60 x 1 = £18,255.01.

ISSUE (a) (xi) PLC's FUEL USED BY THE PARTNERSHIP VEHICLES, EQUIPMENT AND MACHINERY FOR THE PURPOSES OF THE PARTNERSHIP BUSINESS

148. In the Liability Judgment I found that the Partnership had used PLC fuel for the Partnership's own business operations (paragraph 539 (e)). I went on, at paragraph 539 (e) (vi) to say that "The Partnership making use of PLC fuel, beyond merely using it for contracting work for ABF or work that benefited PLC (principally collecting and spreading liquid digests from Enterprise House) would be consistent with Mr Brain's evidence that

PLC's fuel was being used on an almost daily basis, given that cultivation work carried out for ABF was seasonal and carting away and spreading liquid digests from Enterprise House, whilst it may happen at regular intervals, would not be a daily occurrence".

149. Finally at paragraph 656 I stated "I have found that PLC incurred a loss as a result of the Partnership using its fuel, since February 2016, when not working for either ABF, or PLC (see paragraph 539 (e) above). There is no assistance in the evidence as to what the quantity of fuel involved is and I will ask the experts to calculate fuel use for one Partnership tractor five days a week from February 2016. I accept that this is a largely arbitrary (although I hope reasonable) means of estimating such use, but given the state of the evidence it is, I think, the best I can do."

150. In the Order dated 10 June 2022, at paragraph 4 (11) I gave permission to Andrew and Paul to adduce expert evidence on the issue of "The [PLC] fuel used by Partnership vehicles, equipment and machinery in planting cultivating and harvesting of potatoes from 2016, with the use of fuel calculated on the basis of one Partnership tractor using [PLC] fuel on those operations, for 5 days a week from February 2016".

151. The experts agree that the required calculation, to calculate the amount of fuel which would be used by one Partnership tractor, from 1 February 2016, is: Total weeks x total hours per day x number of days per week x average fuel price per litre x litres of fuel consumed in an hour.

152. Mr Bell calculates the cost to PLC of the fuel used by the Partnership at £222,729 and Mr Lewis calculates it as being in the range £30,757 to £46,136. There is therefore a very substantial difference between the two experts' figures.

153. Both experts base their calculation on a 12 hour day.

154. As for the Cemex and Biffa Subcontracts, Mr Bell calculated his figure for the average price of fuel per litre (48p) by calculating the average price charged in copy invoices addressed to PLC for fuel supplied between 2016 and 2021. Mr Lewis based his average price of fuel per litre (57p) on the average price published by the AHDB for those years.

155. Mr Bell calculated fuel consumption per hour at 17.53 litres, based on a weighted average across the three activities of a tractor idling, working and transporting. Mr Lewis calculated fuel consumption at 19.64 litres per hour, based on fuel consumed when a tractor is working.

156. Mr Bell calculated the total number of weeks as 52 weeks a year, 5 days a week for 7 years from 1 February 2016 to 24 February 2023 (a date just before he signed his report on 3 March 2023). Mr Lewis calculated the number of weeks at between 8 and 12 weeks per year for 5.25 years from 1 February 2016 to 31 October 2021, the day before the commencement of the Liability Hearing.

157. As for the Cemex and Biffa Subcontracts fuel calculations, I prefer Mr Bell's calculation of the average price of fuel per litre based upon fuel prices actually paid by

PLC during the relevant period, rather than average fuel prices published by the ADHD for the same reasons (see paragraphs 122 and 136 above).

158. I prefer Mr Bell's calculation of the average consumption rate per hour of 17.53 litres to Mr Lewis's average consumption rate of 19.64 litres, because Mr Bell's approach of calculating fuel usage when tractors are idling, working on crops and transporting, appears to me to better reflect the real world activities of a tractor engaged in work over a 12 hour period, rather than assuming, as Mr Lewis does, that the tractor will be constantly working throughout that 12 hour period.

159. Mr Lewis uses 8 to 12 weeks a year to calculate the total number of weeks on the basis that planting, cultivating and harvesting potatoes is a seasonal activity, only taking place during 8 - 12 weeks in any year. Mr Lewis points to paragraph 4 (11) of my order of 10 June 2022 in which I give permission to Andrew and Paul to rely on expert evidence concerning fuel used in the planting, cultivation and harvesting of potatoes (see paragraph 150 above).

160. Mr Bell points to paragraphs 539 (e) of the Liability Judgment (see paragraph 148 above) in which I refer to the evidence of Mr Brain that the Partnership was using PLC's fuel on almost a daily basis and paragraph 656 (see paragraph 149 above) in which I say that I will ask the experts to calculate fuel use for one Partnership tractor for 5 days a week from February 2016, without saying this will be limited to the weeks in which the planting, cultivation and harvesting of potatoes will have taken place.

161. Notwithstanding that paragraph 4 (11) of the Order dated 10 June 2022 refers to PLC fuel being used by Partnership VME in the planting, cultivation and harvesting of potatoes from 2016, I did not intend that the calculation of one Partnership tractor using PLC fuel for 5 days a week from February 2016 should be restricted to those weeks in which planting, cultivation and harvesting of potatoes took place. It was meant to be a "rough and ready" calculation of fuel use, based on one tractor for 52 weeks a year, 5 days a week. The reasons why I did not intend that the calculation should be restricted to one tractor used for the weeks in which planting, cultivation and harvesting of potatoes would take place are in summary that: (a) as Mr Lewis noted in relation to issue (a) (vii) potato farming uses a lot of vehicles, machinery and equipment and so, when potatoes were being planted, cultivated and harvested, by the Partnership, more than one tractor together with machinery and equipment that also used fuel, would be in use at the same time; (b) Mr Miller worked 7 days a week, 13 hours a day planting and harvesting potatoes (see issue (a) (vi) above) (not 12 hours a day 5 days a week); and (c) as noted above, Mr Brain gave evidence that Partnership vehicles were filled up with PLC fuel and bowsers were also filled with PLC fuel at the same time to take to Home Farm for use in Partnership machinery and equipment on an almost daily basis and Mr Bell noted the very high level of fuel use recorded against Samuel Bridgen's fuel key fob (see paragraph 537 (d) of the Liability Judgment) suggesting that PLC's fuel was being used for the Partnership's own business activities extensively, not just for potato farming. It is unfortunate therefore that the Order of 10 June 2022 refers to the use of PLC fuel in connection with the planting, cultivating and harvesting of the Partnership's own

potatoes as the Liability Judgment did not restrict my findings about the use of PLC fuel, for the Partnership's own business, to only the activities of potato farming.

162. Mr Bell is right therefore that the correct calculation is one tractor for 5 days a week, for 52 weeks a year from 1 February 2016. As to when the period should end, Mr Bell calculated fuel use up to a few days before the date of his report and Mr Lewis calculated fuel use up to 31 October 2021, the day before the start of the Liability Hearing.

163. Mr Zaman says that, in the Liability Judgment, I recorded that Paul had accepted, in cross examination, that the use of PLC's fuel by the Partnership was continuing at the date of the Liability Hearing. Mr Zaman refers to paragraph 538 (d) of the Liability Judgment in which I say "Paul says that the Partnership has its own fuel tanks for diesel and gas oil at Home Farm, but he accepted that the Partnership used PLC fuel if it was doing planting cultivation or harvesting work for ABF or working for the benefit of PLC. He accepted that paragraph 185 of his second witness statement is wrong, in saying that, to avoid any suggestion that the Partnership was using fuel paid for by PLC, gas oil used by the Partnership was no longer ordered and paid for by PLC and delivered to Home Farm, Paul accepted that this was still happening."

164. Contrary to Mr Zaman's suggestion, Paul did not accept that, at the time of the Liability Hearing, PLC fuel was still being used by the Partnership for its own business activities, only that gas oil was being ordered by PLC and delivered to the Partnership at Home Farm, for use in the planting, cultivation or harvesting of potatoes for ABF or where the Partnership was working for the benefit of PLC.

165. I did not specify, as I accept I should have, in the Liability Judgment, or in the Order dated 10 June 2022, an end date for the calculation of the use of PLC fuel by the Partnership for its own business activities. I consider that the end date should be 31 October 2021, the day before the Liability Hearing commenced on the basis that all of my findings of PLC fuel used by the Partnership for its own business activities predated the commencement of the Liability Hearing and that once Mr Ellis and Mr Tomkinson, two of the three directors of PLC alongside Paul were alerted, during the Liability Hearing to the abuse which had been taking place of the Partnership using PLC's fuel for its own business activities, it is reasonable to infer, given my findings in the Liability Judgment about their honesty and integrity, that they will have sought reassurance from Paul, that the Partnership was not continuing to use PLC fuel for its own business activities after the Liability Hearing.

166. The total number of weeks is therefore 52 weeks x 5.75 years = 299.

167. I find that PLC fuel used by the Partnership for its own business activities, based on one tractor in use for 52 weeks a year for 5.75 years is: 299 (total number of weeks) x 12 (hours per day) x 5 (number of days per week) x 48p (average fuel price per litre) x 17.53 (number of litres used per hour) = £150,954.34.

SUMMARY OF FINDINGS IN RELATION TO ISSUES (a) (I) – (XI)

168. In summary, my findings in relation to the 11 Issues (a) (i) – (xi) are:

(i) profits made by the Partnership from the Cemex Subcontract are in the range £119,124 - £156,735 but no adjustment is to be made, for that profit, in calculating the value of Paul's shares in ABPT;

(ii) profits made by the Partnership from the Biffa Solids Subcontract are £15,071 and profits made by the Partnership from the Biffa Liquids Subcontract, approximately £15,000, but no adjustment is to be made for either, in calculating the value of Paul's ABPT shares;

(iii) loss suffered by PLC from using the Partnership, rather than a third party to transport solid waste from Cemex: – no loss, so no adjustment to be made in calculating the value of Paul's ABPT shares;

(iv) the difference between what Gilbert Transport charged the Partnership to remove solid waste from the Biffa Site and what the Partnership charged PLC is £15,071, adjust the value of Paul's ABPT shares accordingly;

(v) the difference between what the Partnership charged PLC and what Preston's would have charged PLC for spreading the same Biffa liquid waste (including an allowance for using PLC's tanker and boom) is £9,351 but no adjustment is to be made for this, in calculating the value of Paul's ABPT shares;

(vi) the cost to PLC of its employees used by the Partnership is £174,973, adjust the value of Paul's ABPT shares accordingly;

(vii) the cost to PLC of maintaining the Partnership's VME is £59,309, adjust the value of Paul's ABPT shares accordingly;

(viii) the costs incurred by PLC in taxing and insuring Partnership vehicles on PLC's Operating Licence in 2010/11: no loss, therefore no adjustment to be made in calculating the value of Paul's ABPT shares;

(ix) the value of PLC fuel used by the Partnership on the Cemex Subcontract: - £33,257.95, adjust the value of Paul's ABPT shares accordingly;

(x) the value of PLC's fuel used by Partnership tractors spreading Biffa liquid waste - £18,255.01, adjust the value of Paul's ABPT shares accordingly;

(xi) the value of PLC's fuel used by the Partnership's VME, for its own business purposes - £150,954.34, adjust the value of Paul's ABPT shares accordingly.

169. I calculate that the aggregate of PLC's losses resulting from Paul's unfairly prejudicial conduct is £451,820.30 and the value of Paul's ABPT shares should be reduced by 44.4% of that loss (see paragraph 371).

WHAT RELIEF SHOULD I GRANT?

170. There is a large degree of agreement between Mr Zaman and Mr Auld as to the legal principles that guide the question of what, if any remedy, the court should grant under Section 996. The only dispute of substance between Mr Zaman and Mr Auld, as to the applicable principles, is as to when the conduct of the petitioner can be taken into account in deciding on remedy. I will determine first whether Andrew's conduct should be taken into account in deciding what, if any, remedy to grant before going on to consider the remaining guidance provided in the authorities on remedy and applying that guidance (with or without taking into account Andrew's conduct, according to what I decide) to the circumstances of this case.

SHOULD ANDREW'S CONDUCT BE TAKEN INTO ACCOUNT?

Counsels' Submissions on the Law

171. The relevance of Andrew's own conduct to determining the remedy which I should provide was hotly contested. Mr Zaman says that only conduct by Andrew that has a connection or nexus to my unfair prejudice findings against Paul is relevant to the exercise of my discretion. Mr Auld says that Andrew's conduct is relevant to the remedy (if any) that I grant, whether or not it is connected to the unfair prejudice that I have found proved, against Paul.

172. In support of his proposition that the conduct of Andrew is only relevant to remedy if it has a connection or nexus to the unfair prejudice that I have found proved, Mr Zaman refers to three authorities: (a) *Richardson v Blackmore* [2005] EWCA Civ 1356; (b) *VB Football Assets v Blackpool Football Club (Properties) Limited [2017] EWHC 2767 (Ch);* and *(c) Grace v Biagioli* [2005] EWCA Civ 1222 . Mr Auld relies upon *Re Interactive Technology Corp [2016] EWHC 2896 (Ch)* for his contrary position.

173. In *Richardson v Blackmore* [2005] EWCA Civ 1356, the petitioner had forged a letter, in order to try to persuade the respondents to sell to him their shares for £250,000 each. The court found that the respondents had acted in a way which was unfairly prejudicial to the petitioner. Lloyd LJ said:

> *"[55] Mr Hollington showed* us *Moody v Cox [1917] 2 Ch. 71*... *Scrutton L.J. said, at pp.87–88, that "equity will not apply the principle about clean hands unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for."*
>
> *[56] That is entirely consistent with* Willis *and* Gonthier *, where the misconduct lay in fabricating evidence in support of the claim itself. I deplore the petitioner's conduct as much as the judge did. However, considering the point first on the same material as the judge took into account, it seems to me that, on his finding (see para.116) that it* had no bearing on the matters directly in issue, a *finding which he was plainly entitled to make, he was right to disregard the forgery, and the petitioner's use of the forged letter, when deciding whether the conditions* under s.459 *were made out. He was also right to disregard it in relation to the*

question whether to exercise his discretion to make any, and if so what, order under s.461 *. The forgery itself had no immediate or necessary relation to the circumstances upon which the petitioner's entitlement, or otherwise, to relief depended. At best it was an episode in the background history. Given the lack of impact it had on Mr Richardson and Mr Wheeler, the judge was entitled to treat it in the way in which he did."*

174. In *Grace v Biagioli*, Patten J said:

"[77] ...If Mr Grace's conduct ought to be excluded (which we accept) from any consideration of whether he has suffered unfair prejudice, we do not understand how it can then be admissible so as to deprive him of what would otherwise be the appropriate remedy for that prejudice. It is also difficult to see what (if any) allowance the judge actually made for Mr Grace's conduct, so as to justify a lesser remedy than the one sought. We are not, therefore, persuaded that Mr Grace's conduct can be used to support the rejection of a buy-out order.

175. *In VB Football Assets v Blackpool Football Club (Properties) Limited*, Marcus Smith J summarised the approach to the relevance of conduct by the petitioner as follows:

[417] In the case of a winding-up petition on the just and equitable ground, the petitioner must come to the court with "clean hands", and inequitable conduct on his part may bar his remedy. There is no similar rule in the case of a section 994 petition.

"[418] However, as was described in Re London School of Electronics, such conduct can be relevant in two ways:
i) It may render the conduct on the other side, even if it is prejudicial, not unfair.
ii) Even if the conduct on the other side is both prejudicial and unfair, the petitioner's conduct may nevertheless affect the relief which the court thinks fit to grant.

[419] .....In terms of the petitioner's conduct rendering otherwise unfairly prejudicial conduct merely prejudicial, and not unfair, it seems clear that the mere fact that the petitioner is a wrongdoer, even in relation to the company of which he is a member, is not enough to deny him or her a remedy under section 994. What is required is some connection or nexus between the petitioner's conduct and the alleged unfair prejudice. Thus, in Re RA Noble & Sons (Clothing) Ltd, the petitioner's controlling shareholder had shown a lack of interest in obtaining the financial information to which the petitioner was entitled. In light of this factor, the conduct of the majority shareholder in the company could not be regarded as unfair. Similarly, a covert strategic decision to leave a director with the burden of running a company and free to continue drawing excessive remuneration with a view to recover it from him at a later date might justify a court in debarring a petitioner from pursuing a complaint of excessive remuneration."

176. Mr Auld refers to paragraph 318 of the judgment of Morgan J in *Re Interactive Technology Corp* where he said:

> "*It is established that wrongdoing on the part of a petitioner seeking relief under Section 994 can be relevant in two ways. The first way is that the Petitioner's wrongdoing may make the prejudicial conduct of the Respondent not unfair. The second way is that the Petitioner's wrongdoing may justify the Court in refusing to grant relief to the Petitioner or may influence the choice of any relief which is granted*."

Discussion and Decision - When Should Conduct of the Petitioner be Taken into Account?

177. In the final sentence of paragraph 318 of his judgment in *Interactive Technology Corp*, Morgan J says that the principles he sets out in that paragraph are established by *Re London School of Electronics Ltd [1986] Ch 211* at 222 B-C, *Richardson v Blackmore* and *Grace v Biagioli*. The latter two are the Court of Appeal authorities, which Mr Zaman relies on in support of his submission that Andrew's conduct cannot or should not be taken into account, unless it has a nexus or connection with Paul's unfairly prejudicial conduct.

178. In order to decide whether Mr Auld or Mr Zaman are right, I propose:

(a) to consider, in chronological order, what principles are established by the three authorities which Morgan J refers to in paragraph 318 of his judgment in *Interactive Technology Corp*, as to when the conduct of the petitioner should be taken into account in deciding on remedy;
(b) consider whether Morgan J in his judgment in *Interactive technology Corp*, when read as a whole, supports Mr Auld's submission that the conduct of Andrew should be taken into account, whether or not the conduct is connected or has a nexus with the conduct of Paul, that I have found to be unfairly prejudicial to Andrew;
(c) conclude, based upon my review of those authorities, what legal principles apply to the question of when the conduct of a petitioner should be taken into account in deciding on remedy; and
(d) finally I will determine whether any of Andrew's conduct to which Mr Auld refers should be taken into account in deciding on remedy having regard to those legal principles.

179. In *London School of Electronics Ltd* a petition was presented under section 75 of the Companies Act 1980 ("Section 75") on the ground that the affairs of the company were being conducted in a manner that was unfairly prejudicial to the petitioner. Counsel for the respondents argued that section 210 of the Companies Act 1948 (the predecessor to Section 75) required the court to find that it was just and equitable to make an order and that therefore a petitioner under Section 75 must come to the court with "clean hands" in order to be granted a remedy under section 75. It was, in rejecting that submission, that Nourse J said, at page 222 paragraph A – C that "*The combined effects of subsections (1) and (3) is to empower the court to make such order as it thinks fit for giving relief, if it is first satisfied that the affairs the company are being or have been*

conducted in a manner which is unfairly prejudicial to the interests of some part of the members. The conduct of the petitioner may be material in a number of ways, of which the two most obvious are these. First, it may render the conduct of the other side, even if it is prejudicial, not unfair: cf.: In R A Noble & Sons (Clothing) Ltd [1983] B.C.L.C 273. Secondly, even if the conduct on the other side is both prejudicial and unfair, the petitioner's conduct may nevertheless affect the relief which the court thinks fit to grant under subsection (3). In my view there is no independent or overriding requirement that it should be just and equitable to grant relief or that the petitioner should come to the court with clean hands."

180. Nourse J then went on to find that the conduct of the petitioner, in leaving the employment of the company, but remaining a director of it and procuring that 12 students, previously enrolled with the company went with him to a new college, did not render the prejudicial conduct of the respondents not unfair. Nourse J did not suggest that the petitioner's conduct in that case had any influence on the remedy that he granted (which was that the respondents buyout the petitioner's shares). Nourse J's conclusion that the petitioner did not need to come to the court with "clean hands" and that conduct of the petitioner may render the conduct of the respondents, even if prejudicial, not unfair is part of the ratio of his decision, but his comment that "secondly even if the conduct on the other side is both prejudicial and unfair, the petitioner's conduct may nevertheless affect the relief which the court thinks fit to grant under subsection (3) is obiter, as it was not essential to his decision, that the remedy should be that the respondents buy out the Petitioner's shares.

181. In *Richardson v Blackmore*, the judgment of the Court of Appeal was delivered by Lloyd LJ. In that case a company named Capital Cabs was owned in equal shares by three shareholders, P, R1 and R2. R1 and R2 wanted to retire from the business but P wished to continue and offered to purchase R1 and R2's shares. In the course of pursuing a purchase of R1 and R2 shares, P gave R1 and R2 a letter which purported to be from a competitor of Capital Cabs, offering to buy the shares of each shareholder in Capital Cabs for £200,000 each. The purpose of that letter, the judge at first instance found, was to reduce the expectation of R1 and R2 as to what P would pay them for their shares. The letter was in fact a forgery created by P, a fact that came out at trial.

182. The judge at first instance found that there were three elements to the unfairly prejudicial conduct of R1 and R2 directed at P, namely: (a) Capital Cabs was a quasi-partnership and it was unfair and prejudicial to P for R1 and R2 to sell their shares to a third party, without P's consent; (b) P had been excluded from the management of Capital Cabs, by R1 and R2; and (c) after the petition had been issued, Capital Cabs had purchased businesses from the third party that had agreed to acquire R1 and R2's shares.

183. One of the grounds of appeal considered by the Court of Appeal was whether P's forging of the letter was, by itself, a sufficient ground to deny P a remedy. In deciding that the forging of the letter was not a sufficient ground to deny P a remedy Lloyd LJ said:

(a) at paragraph 53 - *"There is more to be said for the contention that the petitioner's conduct was relevant to the court's discretion whether or not to grant relief under section 461 [the predecessor of Section 996 CA 2006] if the conditions under section 459 were satisfied [predecessor to Section 994 CA 2006] . The judge dealt with this rather briefly ….. He cited the decision of Nourse J in re London School of Electronics Ltd … as authority for the proposition that there is no requirement that the petitioner under s. 459 should come to the court with clean hands. It is authority for that proposition, but it also shows that conduct which in another context might be used to invoke the clean hands doctrine can be relevant on a s.459 petition, in that it "may nevertheless affect the relief which the court thinks fit to grant" …. Nourse J did not say so in terms, but it seems to me clear that, depending on the seriousness of the matter and the degree of its relevance, such conduct would be capable of leading a court to deny the petitioner any relief at all, even though the conditions under s.459 are made out*.";

(b) at paragraph 58 - *"The starting point for this is that the petitioner has established that the respondent's conduct of the affairs of the company was prejudicial to him as a shareholder, and unfairly so, in the three respects on which he relies ….. it would therefore be open to the court to exercise its discretion so as to grant him a remedy under s.461. Nevertheless it is also open to the court to deny him a remedy in the exercise of its discretion.*" and

(c) at paragraph 61 - "….*In my judgment …. his conduct is neither sufficiently serious nor sufficiently closely related to the respondent's unfairly prejudicial conduct to make it appropriate for the court to exercise its discretion so as to refuse to grant him a remedy under section 461 which it would otherwise grant…*"

184. That the conduct of the petitioner must be sufficiently serious and sufficiently closely connected to the proved allegations of unfair prejudice against the respondents is part of the ratio of the judgment of Lloyd LJ, because it was on that basis that he determined that the petitioner's conduct in forging the letter, was not a sufficient reason for the court to refuse to grant a remedy to him under section 461.

185. I have already referred to that part of paragraph 77 of the judgment of Patten J in *Grace v Biagioli* (decided by the Court of Appeal after *Richardson v Blackmore*) on which Mr Zaman relies, in saying that the conduct of the petitioner must be closely connected to or have a nexus with the unfairly prejudicial conduct of the respondents in order to affect remedy. For completeness what Patten J said in paragraph 77 of his judgment in full was: "*The first point relied on by the judge is that there was fault on both sides and that the conduct of Mr Grace could affect the remedy to be granted. Although as already mentioned, the general principle is not in doubt, we do not accept that it is a relevant factor going to remedy in this particular case…… The judge's ruling that the existence of fault on the part of the petitioner should exclude the making of a buyout order, even if that order would otherwise be an appropriate remedy for conduct on the part of the respondents amounting to unfair prejudice, also needs to be examined. Although we do not rule out such a case, it is difficult to reconcile this with the judges earlier [finding that Mr Grace's conduct was irrelevant to and not a justification for the non-payment by the respondents of the 2002 dividend. If Mr Grace's conduct ought to be excluded (which we accept) from consideration of whether he has suffered unfair prejudice, we do not*

understand how it can then be admissible so as to deprive him of what would otherwise be the appropriate remedy for that prejudice. It is also difficult to see what (if any) allowance the judge actually made for Mr Grace's conduct, so as to justify a lesser remedy than the one sought. We are not, therefore, persuaded that Mr Grace's conduct can be used to support the rejection of a buyout order."

186. Before referring to the judgment of Morgan J in I*nteractive Technology Corp*, on which Mr Auld relies, I will summarise what relevant guidance/principles I consider are set out in the three authorities which Morgan J relied upon in I*nteractive Technology Corp*, for the propositions he sets out in paragraph 318 of his judgment:

(a) *London School of Electronics Ltd* - a petitioner bringing an unfair prejudice petition need not come to the court with "clean hands" in order to be granted a remedy. Conduct of the petitioner may be relevant to remedy (although this was obiter and Nourse J gave no guidance as to when the conduct of the petitioner could or should be taken into account in deciding on remedy);
(b) *Richardson v Blackmore* - conduct of the petitioner could be taken into account in deciding on remedy and "depending on the seriousness of the matter and the degree of its relevance the conduct could lead the court to deny the petitioner any relief, even if he had made out his case that there was unfairly prejudicial conduct by the respondents." If the petitioner's conduct is ".... neither sufficiently serious nor sufficiently closely related to the respondent's unfairly prejudicial conduct.... [it will not be] appropriate for the court to exercise its discretion so as to refuse to grant a remedy under section 461 which it would otherwise grant…"; and
(c) *Grace v Biagioli* - if the conduct of the petitioner does not render the conduct of the respondents either not prejudicial or not unfair, then it should, at least usually not be taken into account in deciding what remedy the court should provide for the unfairly prejudicial conduct of the respondents.

187. *Interactive Technology Corp* ("ITC") concerned an online business carried on through ITC, which was owned in equal shares by three brothers, Warren, Stuart and Jonathan. Morgan J found that the petitioner, Jonathan had:
(a) unilaterally decided that the online gaming business ought to be wholly owned by him, on the basis that he had done the vast majority of the work to make it profitable;
(b) caused ITC to make substantial payments to Jonathan in remuneration which were not agreed by Warren or Stuart;
(c) transferred the business and assets of ITC to a company which Jonathan owned;
(d) resisted attempts by Warren and Stuart to become involved in the affairs of ITC, as they were entitled to be; and
(e) lied, on oath, that it had been agreed by the three brothers that the online gaming business should belong solely to Jonathan.

188. Jonathan made numerous complaints about unfairly prejudicial conduct by Warren and Stuart in relation to the affairs of ITC, but Morgan J only found that two of those complaints were made out, namely: (a) Stuart and Warren caused ITC to refuse an offer by Jonathan of an audit which, if it had been carried out, would have saved time and

costs and the motive for that refusal by Stuart and Warren was to keep alive an allegation of wrongdoing by Jonathan, which would have been disproved by that audit; and (b) Warren and Stuart caused an email to be sent to Jonathan's solicitors which contained improper threats of contempt and criminal proceedings against Jonathan for failing to disclose, in his evidence (filed in response to a freezing injunction) offshore bank accounts. Morgan J found that Warren and Stuart may have had suspicions that Jonathan had offshore accounts, that he had not disclosed, but they had no evidence of this and had decided to make the threats of committal and criminal proceedings in the hope that their suspicions may prove to be correct and would persuade Jonathan to pay a greater sum for their shares in ITC.

189. At paragraph 318 Morgan J said "*In considering whether the matters of complaint were unfairly prejudicial to Jonathan, I have not sought to weigh in the scales the wrongdoing of Jonathan in relation ITC against the prejudicial conduct of ITC, Warren and Stuart. It is established that wrongdoing on the part of the petitioner seeking relief under section 994 can be relevant in two ways. The first way is that the petitioner's wrongdoing may make the prejudicial conduct of the respondent not unfair. The second way is that the petitioner's wrongdoing may justify the court in refusing to grant relief to the petitioner and may influence the choice of any relief which is granted. These propositions are established by Re-London School of Electronics Ltd… Richardson v Blackmore… and Grace v Biagioli.*"

190. Morgan J said at paragraph 319 that it could not be said that Jonathan's misconduct had the effect of meaning that Warren and Stuart's conduct was not unfair or not prejudicial. He went on to say however at paragraph 324 that "*There has been a breakdown of trust and confidence between the three brothers. That breakdown was caused by Jonathan's conduct. The unfairly prejudicial conduct which I have found on the part of ITC, Warren and Stuart did not cause the breakdown and did not contribute to it. Further, I do not think that I could hold that such conduct has prolonged or will prolong the period of breakdown in trust and confidence. That conduct was not and is not causative in relation to the present relationship between the company and the three brothers.*" At paragraph 325 he said - "*My reaction to these circumstances is that the proper response is to withhold from Jonathan the relief which he seeks under section 996. I do not consider that it would be fair or just to make an order conferring on Jonathan an entitlement to buy out the shares of Warren and Stuart (on terms with which they do not agree) when he is the one who is at fault for the situation which has developed and his fault is many times graver than the relevant conduct of ITC, Warren and Stuart and where their conduct was not causative of the present state of affairs.*"

191. Morgan J does not mention in *Interactive Technology Corp* any guidance given in the authorities as to when the conduct of the petitioner should be taken into account in deciding on remedy, notwithstanding that the Court of Appeal decisions in *Richardson v Blackmore* and *Grace v Biagioli* are mentioned by him as authorities for the much wider proposition that the conduct of the petitioner can be taken into account in deciding on remedy. Whether or not Morgan J had in mind the guidance of the Court of Appeal in *Richardson v Blackmore* and *Grace v Biagioli*, when giving his judgment in *Interactive*

Technology Corp, the guidance given in those Court of Appeal cases is binding on me and I take that guidance to be what I have summarised in paragraph 186 above.

Should Andrew's conduct affect the remedy granted under Section 996?

Andrew's Conduct

192. The conduct of Andrew which Mr Auld says is relevant to the question of remedy, is in summary:

(a) Andrew substantially failed in the three petitions that he issued, claiming that the affairs of: (i) ABPT; (ii) BIL; and (c) ABF had been conducted in a manner unfairly prejudicial to Andrew. The BIL and ABF petitions were dismissed in their entirety. The allegations of unfair prejudice in the ABPT petition against Mr Ellis and Mr Tomkinson were dismissed in their entirety and although the ABPT petition succeeded against Paul, on some issues, Andrew failed on most of his allegations, including his most serious allegations which including allegations of fraud, which I found Andrew should never have pursued;

(b) Andrew made serious allegations of fraud against his father and was refused permission to amend the ABPT Petition to include those allegations;

(c) I found Andrew to have given dishonest evidence, particularly as to his claim that he was dismissed as managing director of PLC without his consent (I found Andrew had asked that his position as managing director of PLC be terminated and that the termination should be made to look as if he was being dismissed, without his consent, in an attempt to improve his position in his divorce financial remedy proceedings);

(d) Mr Sharratt (PLC's Financial Director) although not a defendant to any of Andrew's petitions (because he is not a shareholder of any of the companies) was wrongly accused by Andrew of fraud and dishonesty;

(e) Andrew made a number of claims that Mr Tomkinson and Mr Ellis were engaged in serious misconduct, none of which were proved;

(f) Andrew received very considerable personal benefits from PLC/BIL to the detriment of those companies:

    (i) a salary of £110,000 was paid to Andrew after he became an MP in May 2010, when he was providing no services to PLC, in return for that salary;

    (ii) "the Willows" was purchased from Andrew by BIL at an inflated price;

    (iii) Andrew persuaded BIL to purchase the Old Vicarage from him in 2011 for £1.5m, being more than it was worth and in order to avoid Andrew losing a deposit which he had put down for the purchase of the Old Rectory; and

    (iv) following Andrew's divorce, the Old Vicarage was rented by BIL to Andrew on favourable terms, but he still failed to pay the rent;

(g) Andrew made many ill-founded complaints, about fraudulent activity at PLC/BIL/ABF to: (i) the police; (ii) the auditors of those companies; and (iii) their bank causing significant damage to the reputation of those companies and their directors; and

(h) even after the end of the Liability Hearing, Andrew has continued to make false complaints, damaging the companies.

193. The Court of Appeal in *Grace v Bagioli* in my judgment specifically left the door open to the conduct of the petitioner being taken into account in deciding on remedy, even if the conduct of the petitioner did not result in the respondent's conduct being not unfair or not prejudicial to the petitioner (see paragraph 185 above "…we do not rule out such a case.…"). It is not surprising that the Court of Appeal should do so, given that the exercise of the court's discretion under Section 996 is a fact specific one. The Court of Appeal would therefore be anxious, in those circumstances, not to say that the conduct of the petitioner, even if it did not make the conduct of the respondent not unfair and not prejudicial, could never be taken into account in deciding what remedy to grant under section 996. In contrast, the Court of Appeal in *Richardson v Blackmore* did not say that conduct of the petitioner that was not sufficiently serious, nor sufficiently connected to the unfairly prejudicial conduct of the respondent might still be taken into account in deciding on remedy. It seems to me that this is because if the conduct is not sufficiently connected to the unfairly prejudicial conduct, then taking it into account in deciding on remedy would amount to requiring the petitioner to come to the court with "clean hands", which the judgment of Nourse J in *London School of Electronics Corp* (endorsed by the Court of Appeal in in *Richardson v Blackmore* and *Grace v Biagioli*) made it clear was not something that a petitioner was required to do.

194. In my judgment Andrew's conduct is not either directly or sufficiently indirectly connected with the unfairly prejudicial conduct of Paul to influence the remedy that I grant under Section 996.

195. As for a direct connection, in the Liability Judgment, I found that Andrew's misconduct did not make Paul's own misconduct, in diverting the resources of PLC to the use of the Partnership, without recording that use and without compensating PLC for that use, either not unfair or not prejudicial. In addition Mr Auld does not suggest and I did not find, in the Liability Judgement, that Paul's unfairly prejudicial conduct is directly connected to Andrew's misconduct in any other way. As I will mention next, when considering whether there is an indirect connection between Paul's unfairly prejudicial conduct and Andrew's misconduct, almost all of Andrew's misconduct, on which Mr Auld relies took place long after Paul started diverting PLC's resources to the use of the Partnership.

196. As for whether there is some indirect connection between Andrew's misconduct and Paul's unfairly prejudicial, the facts of *Interactive Technology* Corp illustrate a way in which there might be a sufficient indirect connection between the unfairly prejudicial conduct of a petitioner and the misconduct of the respondent(s). Although, having read the judgment of Morgan J in *interactive Technology Corp*, I cannot see that Morgan J considered the question of whether Jonathan's conduct was sufficiently connected with the unfairly prejudicial conduct of Warren and Stuart (see paragraph 191 above) Morgan J did make findings that Jonathan's misconduct was far more serious than that of Warren and Stuart and that it was the conduct of Jonathan that caused the breakdown of the relationship between the three brothers (see paragraph 190 above). The

misconduct of Warren and Stuart (failing to accept Jonathan's offer of an audit and making inappropriate threats that contempt and criminal proceedings may be taken against Jonathan) took place in the context of the breakdown of the relationship between the three brothers that Morgan J found occurred as a result of Jonathan's misconduct. It could be said therefore that in *Interactive Technology Corp*, there was an indirect (and arguably sufficient) connection between Jonathan's misconduct and the unfairly prejudicial conduct of Warren and Stuart, in that the unfairly prejudicial conduct of Warren and Stuart would not have taken place, but for the more serious conduct of Jonathan, that caused the breakdown in their relationship.

197. In this case, the misconduct of Andrew, to which Mr Auld refers, could not be said to have created the relevant context in which Paul's diversion of PLC's resources to the Partnership for his personal benefit took place, or that Paul's unfairly prejudicial conduct would not have happened, if the misconduct of Andrew had not taken place. Paul's unfairly prejudicial conduct commenced in 2009, well before the relationship between Andrew and the other shareholders/directors of ABPT/PLC broke down in 2017. It was only after the breakdown in the relationship in 2017 that the vast majority of Andrew's conduct, on which Mr Auld relies, took place. The exception is the substantial personal benefits that Andrew received from BIL/PLC. The benefits were: (a) BIL purchasing the Willows from Andrew in June 2009, approximately contemporaneously with Paul starting to divert PLC's resources to the use of the Partnership; (b) Andrew was elected as an MP in May 2010 and committed very little of his time to the affairs of PLC thereafter, but still received a salary of £110,000; (c) BIL purchased the Old Vicarage from Andrew in December 2011; and (d) Andrew was allowed, by BIL, to occupy the Old Vicarage, following the completion of the financial remedy proceedings in Andrew's divorce, at the end of 2014. All of those benefits having been authorised by the boards of PLC and BIL.

198. Mr Auld's case is that Andrew's misconduct, concerning the benefits he received, consisted of persuading the other directors of PLC/BIL to approve what Mr Auld says were undeserved personal benefits for Andrew, at the expense of those companies. However, it was never suggested by Paul that the personal benefits that Andrew received had anything to do with his diversion of PLC's resources to the Partnership, Mr Auld does not suggest it and I made no finding, in the Liability Judgment to that effect. None of Andrew's conduct, on which Mr Auld relies (whilst it may be sufficiently serious) has any direct or indirect connection with the unfairly prejudicial conduct of Paul.

199. I have found that the conduct of Andrew did not make Paul's conduct either not prejudicial or not unfair and that there is no sufficiently direct or indirect connection between the conduct of Andrew, to which Mr Auld refers, and the unfairly prejudicial conduct of Paul. Andrew's misconduct, serious as it is, but having no sufficient connection to the unfairly prejudicial conduct of Paul, whilst it may amount to Andrew coming to the court with unclean hands does not justify my denying Andrew a remedy under Section 996, or granting a lesser remedy than I otherwise would.

LEGAL PRINCIPLES RELEVANT TO REMEDY (OTHER THAN CONDUCT)

200. The starting point is Section 996 of the CA 2006 which provides (where relevant):

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

(2) Without prejudice to the generality of subsection (1), the court's order may—

(a) regulate the conduct of the company's affairs in the future;

(b) require the company—

(i) to refrain from doing or continuing an act complained of, or

(ii) to do an act that the petitioner has complained it has omitted to do;

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

201. The granting of relief is discretionary, the burden is on the Petitioner to establish any entitlement to relief. In *Antoniades v. Wong [1995] 2 BCC 682* Mummery LJ stated: "This means that even if the facts are those which the Petitioner alleges constitute an unfair prejudice, the Petitioner must still convince the Court that it is fit to make an order granting the relief which he seeks."

202. The assessment must take place at the date of the Remedies Hearing. *Minority Shareholders: Law. Practice and Procedure by Victor Joffe KC* at paragraph 7.12 says "*The prospective nature of the jurisdiction is reflected in the fact that, if it decides to make an order, the Court must assess the appropriateness of any particular remedy as at the date of the hearing and not as at the date of presentation of the petition and may take account of conduct between those dates; indeed, the Court is entitled to look at "reality and practicalities" of the overall situation, "past, present and future"*."

203. Any remedy granted must be proportionate to the unfair prejudice found and should fit the particular circumstances of the case.

204. The interests of creditors should be taken into account and (Mr Auld says) the interests of the other minority shareholders in ABPT. Mr Auld refers to *Re. Neath Rugby*

(No.2) [2009] EWCA Civ 261 where Stanley Burton LJ said about creditors' interests: *"Their interests are clearly relevant and may be decisive in deciding what order should be made under the section. I do not see why the Court should close its eyes to the interest of others and the effect of any order made under Section 996 on them, although of course the weight to be given to their interests will depend on the circumstances …"*

205. Mr Zaman and Mr Auld accept that the most common order is an order that the Respondent buys out the Petitioner's shares.

206. Mr Zaman and Mr Auld agree that relevant guidance which I should take into account, in deciding on remedy was given by the Court of Appeal in *Grace v Biagioli*. In that case the sole act of unfair prejudice proven was that in 2002 a dividend of £80,000 had been declared, at the instance of the majority shareholders of which £20,000 should have been paid to the petitioner. Following a falling out between the shareholders, the dividend was reversed by the majority shareholders and the dividend that would have been paid to the respondents was paid to the respondents as "management charges" but nothing was paid to the petitioner. The judge at first instance ordered the respondents to pay the petitioner the £20,000 dividend which had initially been due, but granted no other remedy. On appeal, the Court of Appeal held that a share buyout order, requiring the respondents to buy out the petitioner's shares was the appropriate remedy. I have set out below those parts of the judgment of Patten J sitting in the Court of Appeal which set out the principles to be applied in deciding on remedy and have highlighted in bold in the text the relevant guidance:

> *"73. Once unfair prejudice is established, the court is given* ***a wide discretion as to the relief which should be granted****. Although s.461(1) speaks in terms of relief being granted "in respect of the matters complained of", the court has to* ***look at all the relevant circumstances in deciding what kind of order it is fair to make****. It is* ***not limited merely to reversing or putting right the immediate conduct which has justified the making of the order****. In Re Bird Precision Bellows [1986]Ch.658 , Oliver LJ described* ***the appropriate remedy as one which would "put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company****." The prospective nature of the jurisdiction is reflected in the fact that the court must assess the appropriateness of any particular remedy as at the date of the hearing and not at the date of presentation of the petition; and may even take into account conduct which has occurred between those two dates. The court is entitled to look at the reality and practicalities of the overall situation, past, present and future.*
>
> *74. It was, therefore, incumbent on the judge* ***to consider the whole range of possible remedies and to choose the one which on his assessment of the existing state of relations between the parties was most likely both to remedy the unfair prejudice already suffered and to deal fairly with the situation which had occurred****. The principal criticism of his judgment on this issue, is that it concentrated on the precise nature of the prejudice already suffered (i.e. the non-payment of the dividend), but failed to look at matters in the round. In particular, no adequate regard was paid to the fact that the Respondents had in effect helped themselves to*

the dividend to which Mr Grace was undoubtedly entitled, nor to what is said to be the overwhelming likelihood that similar acts of prejudice will be suffered in the future.

75. ***In most cases, the usual order to make will be the one requiring the Respondents to buy out the petitioning shareholder at a price to be fixed by the court****. This is normally the most appropriate order to deal with intra company disputes involving small private companies. This is the relief which Mr Grace says that the judge should have granted and which he seeks on this appeal. The reasons for making such an order are in most cases obvious. It will free the petitioner from the company and enable him to extract his share of the value of its business and assets in return for foregoing any future right to dividends. The company and its business will be preserved for the benefit of the Respondent shareholders, free from his claims and the possibility of future difficulties between shareholders will be removed. In cases of serious prejudice and conflict between shareholders, it is unlikely that any regime or safeguards which the court can impose, will be as effective to preserve the peace and to safeguard the rights of the minority. Although, as Lord Hoffmann emphasised in O'Neill v Phillips , there is no room within this jurisdiction for the equivalent of no-fault divorce, nothing less than a clean break is likely in most cases of proven fault to satisfy the objectives of the court's power to intervene."*

207. Mr Zaman also refers to the summary of the relevant principles provided in *VB Football Assets v Blackpool Football Club (Properties) Limited [2017] EWHC 2767* by Marcus J, as follows (again with the principles highlighted many of them repeating what the Court of Appeal said in *Grace V Biagioli*):

"[424] As Oliver L.J. noted in Re Bird Precision Bellows Ltd, the effect of [Section 996]
"...is to confer on the court ***a very wide discretion to do what is considered fair and equitable in all the circumstances of the case, in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company****."*

[425] In terms of the approach to be taken, the following points hold good:
i) Obviously, the discretion must be exercised judicially and on rational principles. As is noted in paragraph 6.282 of *<u>Minority Shareholders</u>:*
"Once unfair prejudice has been established, the judge is obliged to ***consider the whole range of possible remedies and choose the one which on his assessment of the current state of relations between the parties is most likely to remedy the unfair prejudice and deal fairly with the situation which has occurred.*** *'The Court must do what is fair'. In carrying out this task****, the court can have regard to the effect of its order on third parties (particularly creditors) and their interests, although the weight to be given to their interests will depend on the circumstances.****"*
ii) The range of orders that can be made span the broad spectrum from: doing nothing (see, e.g. Antoniades v. Wong [1995] 2 BCC 682); to ordering a share

purchase or "buyout" (generally, but not necessarily, of the shares of the petitioner), thus enabling a "clean break"; to more or less detailed regulation of the conduct of the company's affairs. This third course involves a "bespoke" solution and runs the risk of perpetuating an impossible relationship of joint management. It has been adopted comparatively rarely - no doubt because "solutions" seeking to impose co-operation tend not to work precisely because co-operation is required - but examples are Sikorski v. Sikorski [2012] EWHC 1613 and Re Neath Rugby Ltd (No. 2) [2008] BCC 390 , on appeal [2009] 2 BCLC 427.

*iii) **When considering the appropriate remedy, the Court is not bound by the relief sought by the petitioner**. In Re Neath Rugby Ltd (No. 2) [2009] 2 BCLC 427 at [85], the Court of Appeal stated:*

"It was suggested that on a petition under section 994 the court cannot award relief that the petitioner does not seek. In the present case, the correctness or otherwise of that proposition is academic, since ultimately, when it was apparent from the judge's judgment that Mr. Hawkes would not be able to buy out Mr. Cuddy, he agreed to the order proposed by the judge being made on his petition. On any basis, therefore, the judge had power to make the order he did. But I would not want it to be assumed that that proposition represents the law. The terms of section 996 are clear: once the court is satisfied that a petition is well-founded, 'it may make such order as it thinks fit', not 'such order as is sought by the petitioner'."

I am very conscious that this course may be more theoretical than realistic, particularly if the course that the court is minded to take predicates co-operation between warring factions. But, equally, the fact that a petitioner advocates one course, does not make it fair or appropriate.

*iv) One aspect of fairness that must be borne in mind is that **the remedy must be proportionate to the unfair prejudice found. In the case of relatively modest unfair prejudice, a buyout order may be disproportionate**. Equally, it is necessary to bear in mind the conduct of the petitioner. In this case, I do not consider that the facts and matters relied upon by the Respondents as set out in Section 1 should in any way alter the relief that I would otherwise be minded to grant.*

208. In summary the guidance as to remedy which I take from the Court of Appeal judgment in *Grace v Biagioli* and the judgment of Marcus Smith J in *VB Football Assets v Blackpool Football Club (Properties) Limited* is as follows:

(a) the burden is on the petitioner to establish his entitlement to a remedy;
(b) the appropriate remedy should be assessed at the date of the remedy hearing;
(c) the court has a wide discretion as to what remedy should be granted;
(d) the court should look at all the relevant circumstances in deciding what order to make to put right the conduct which the petitioner has suffered at the hands of the respondent and prevent it happening in the future;
(e) the court should consider the whole range of possible orders to remedy the unfair prejudice suffered and deal fairly with the situation which has occurred;
(f) the usual order (for a small private company) is one requiring the respondent to buy out the petitioner’s shares at a price fixed by the court. Such an order enables the petitioner to recover their share of the value of the business and the company to be preserved for the benefit of the respondent, thereby ensuring a clean break;

(g) the court can have regard to the effect of its order on third parties and their interests, although the weight to be given to those interest depends on the circumstances;
(h) the court is not bound to provide the relief sought by the petitioner; and
(i) the remedy must be proportionate to the unfair prejudice found. In the case of relatively minor unfair prejudice, a buyout order may be disproportionate.

The Parties Respective Positions on Remedy (Excluding Conduct)

Paul

209. Mr Auld says that I should grant no remedy, alternative order Paul to pay compensation to PLC for the losses that I determine it has incurred as a result of Paul's unfairly prejudicial conduct. Finally, Mr Auld says that, if I consider that a buyout of either Paul or Andrew's shares is appropriate, then I should order that Paul buys out Andrew's shares or that ABPT buys back Andrew's shares.

210. Mr Auld says that no remedy is appropriate because:

(a) Paul's conduct, in causing the Partnership to use PLC's resources, without keeping proper records of that use or properly recompensing PLC for that use is historic and relatively minor;
(b) there is no risk of the behaviour being repeated, because proper corporate governance measures have been put in place to avoid any re-occurrence; and
(c) PLC can pursue recompense from Paul/the Partnership for the losses it has suffered, without the need for any court order requiring Paul to recompense PLC for its losses.

211. The same reasons apply to the alternative remedy of ordering Paul to recompense PLC for the loss I find that it has suffered as a result of Paul's unfairly prejudicial conduct (save that I would not be leaving it to the board of PLC to pursue recompense from Paul).

212. As to why, if I decide that a buyout of either Paul or Andrew's shares is appropriate, I should order that Paul buys out Andrew's shares, or that ABPT buys back Andrew's shares:

(a) directing the Respondent to purchase the Petitioner's shares is the usual order; and
(b) directing that Andrew acquires Paul's shares would give him 88.8% of ABPT's shares, enabling him, as holder of over 75% of ABPT's shares to exercise complete control over its affairs. Given Andrew's conduct to date:
    (i) that control is likely to be exercised to the detriment of the remaining minority shareholders in ABPT, namely Mr Ellis, Mr Tomkinson and the SSAS; and

(ii) the affairs of BIL and PLC are inextricably linked in that BIL is PLC's landlord of the premises at Enterprise House, from which PLC operates and the owner of the AB Plant which powers PLC's production process at Enterprise House. In turn PLC supplies BIL with fuel for the AB Plant. Mr Auld also says PLC has a substantial dilapidations liability and there is likely to be a substantial rent review claim by BIL in relation to the rent payable by PLC for Enterprise House. Given that Paul, Mr Tomkinson, Mr Ellis and the SSAS between them will continue to hold the majority of BIL's shares, putting Andrew in a position to control the affairs of PLC is likely to cause significant conflict between the two companies, not the clean break which is the normal justification for ordering a buyout of shares. If on the other hand Andrew's shares in ABPT are acquired either by Paul or ABPT itself, Andrew will not control BIL or PLC and conflict between PLC and BIL will be avoided.

Andrew

213. Mr Zaman, for Andrew, says that I should order that Andrew should buy Paul's shares in ABPT at the valuation fixed by me, after deducting 44.4% of the value of the losses incurred by PLC as a result of the 11 Issues (I have determined that value to be £451,820.30, see paragraph 169 above).

214. Mr Zaman says that I have found that Paul breached the duties that he owed to PLC, as its director from 2009 up to the date of the Liability Hearing, by diverting PLC's resources to the Partnership, for his own benefit. My findings include a finding that Paul acted dishonestly by including Partnership vehicles on PLC's Operator's Licence. Paul's conduct, says Mr Zaman, is much more serious than that of the majority shareholders in *Grace v Biagioli* who deprived Mr Grace of a dividend of £20,000 to which he was entitled, whilst ensuring that they received, in additional "management fees" payments from the company equivalent to their share of the cancelled dividend. The Court of Appeal in *Grace v Biagioli* considered that an order requiring the respondents to buy out the petitioner's shares was the appropriate remedy in that case.

215. Mr Zaman says that it is clear that, in circumstances such as the present, the remedy should ensure a clean break, having regard to the following principles established by the authorities:

(a) the court should seek to cure for the future the unfair prejudice which the petitioner has suffered at the hands of the respondents (not just provide a remedy for the conduct of the respondents) the focus is on the respondents' wrongful actions;
(b) here Paul has helped himself to PLC's assets;
(c) nothing less than a clean break will satisfy the objects of the court's intervention and a buyout of shares is the normal remedy in a small private company, in order to achieve that clean break;

(d) it is unlikely that any regime or safeguards which could be imposed would be effective to preserve the peace and safeguard the rights of Andrew, if he remained a minority shareholder;
(e) the petitioner's views on remedy are an important factor; and
(f) a crucial issue is the ability of the parties to fund a purchase.

216. Paul's primary position, that there should be no remedy at all, because his unfairly prejudicial conduct is not very serious and is historic, is unrealistic. The loss caused to PLC by Paul's unfairly prejudicial conduct has been calculated by the experts at between £548,583 (Mr Lewis) and £836,846 (Mr Bell). That level of loss can hardly be described as trivial or not very serious and both experts agreed, when asked, that the sums involved were substantial.

217. Mr Zaman says that Paul's secondary position, that I should simply order that he pays compensation to PLC for the losses that it has suffered, as a result of his unfairly prejudicial conduct, is inconsistent with the Court of Appeal approach in *Grace v Biagioli*, where the Court of Appeal disagreed with the decision of the first instance Judge that the remedy should be that a dividend of £20,000 should be paid to Mr Grace to make good the loss he had suffered. In any event if Paul was going to pay back the losses he caused to PLC, by breaching his duties as its director, he should have done so some time ago.

218. As for Paul's final position that, if there is to be a buyout order, then Paul or ABPT should be ordered to purchase Andrew's shares on the basis that it is the "usual order", Mr Zaman says that Andrew is the wronged party and he does not wish to sell his shares to Paul, instead he offers to buy Paul's shares at fair value, without a minority discount.

219. Whilst Paul's conduct goes back over 13 years and is in that respect historic, nonetheless the conduct of Paul in causing the Partnership to use PLC's resources, continued at least right up to and during the Liability Hearing in 2021, when Paul accepted, when cross-examined at that hearing, that the Partnership was still using fuel purchased by PLC.

DECISION ON APPROPRIATE REMEDY

Is no remedy appropriate ?

220. The burden is on Andrew to establish that it is appropriate to grant a remedy in respect of the unfairly prejudicial conduct of Paul. For the reasons that follow, I am satisfied that it is appropriate to grant a remedy.

221. I do not accept that "minor and historic" is a fair description of the conduct of Paul, in diverted PLC's resources to the use of the Partnership, at the expense of PLC and for the personal benefit of Paul. I have found that the value of the loss caused to PLC and the consequent value of the benefit obtained by the Partnership and therefore Paul

personally is £451,820.30. Mr Auld divided the PLC loss calculated by Mr Lewis, over 13 years and submitted that the average loss to PLC over that 14 years was minor. However I do not regard an overall loss of £451,820.30 as minor and the fact that it accrued over 14 years simply serves to illustrate that this was not an isolated incident or incidents but a sustained pattern of Paul diverting PLC's assets to the use of and for the benefit of the Partnership, in breach of the duties that he owed to PLC as its director.

222. Mr Auld submits that there is no risk of Paul's conduct, of diverting PLC's assets to the use of the Partnership, being repeated in the future. In saying this Mr Auld pointed to the board of PLC taking separate advice from an independent solicitor, since the Liability Hearing, on proper corporate governance and implementing that advice, as evidenced by board minutes.

223. On the first day of the Remedies Hearing I excluded those elements of the witness statements of Paul and Mr Sharratt that dealt with anything other than the ability of Paul/ABPT to buy out Andrew's shares in ABPT. The evidence that I excluded, included evidence of the boards of ABPT/PLC taking separate advice on corporate governance from an independent solicitor and board minutes dated after the Liability Hearing. I proceed nonetheless, for present purposes, in Paul's favour, on the basis that the boards of ABPT/PLC have taken the advice of an independent solicitor on proper corporate governance and meetings of the boards of ABPT/PLC have taken place since the Liability Hearing, in accordance with that advice. The problem with all that is that the advice was taken and the board minutes created in anticipation that they would be produced in these proceedings, at the Remedies Hearing, in support of the contention that Paul's conduct, in diverting PLC's assets to the use of the Partnership would not be repeated in the future. Once however the spotlight of these proceedings, in particular, in advance of the Remedies Hearing, is taken off the activities of the boards of PLC and ABPT, I am not persuaded there does not remain a substantial risk that PLC's resources will be diverted to the use of the Partnership and more generally that the business affairs of PLC and the Partnership will not be properly separated, to the disadvantage of PLC. I come to this conclusion because:

(a) there are only four directors of PLC/ABPT, namely Paul, Mr Sharratt, Mr Tomkinson and Mr Ellis;
(b) Mr Tomkinson is a non-executive director who attends board meetings, but other than that spends little of his time at the business premises of PLC or otherwise involved in its business. Mr Tomkinson's ability to monitor what is going on depends upon the information that is provided to him by Mr Sharratt/Paul and they did not make him aware that Paul was diverting PLC's resources to the use of the Partnership in the past;
(c) Mr Ellis is an employee of PLC, but he conceded at the Liability Hearing, that he is kept very busy working as purchasing director of PLC and up to that point he had little time to spend on monitoring the financial regulation of PLC, which he left to Mr Sharratt and Paul. Like Mr Tomkinson therefore, he was dependent upon information provided to him by Mr Sharratt/Paul concerning the financial affairs of PLC;

(d) I am not satisfied that there has been a fundamental change in the ability of Mr Tomkinson or Mr Ellis to independently monitor the financial regulation of PLC, they remain dependent upon Mr Sharratt and Paul to provide them with information about PLC's financial affairs. In any event both Mr Tomkinson and Mr Ellis have expressed a wish to retire from their roles, so it is uncertain how long they will remain in place, as directors to perform any corporate governance role;

(e) it is Paul who caused the Partnership to use PLC's resources, without that use being properly recorded and PLC being properly reimbursed for that use. Mr Sharratt, as financial director of PLC, the director most directly responsible for controlling the financial affairs of PLC, allowed it to happen. As it remains the position that these two directors are the only directors who are in a position to ensure that the Partnership does not use PLC's resources, without properly accounting for that use and reimbursing PLC, I do not consider that I can be confident that this will not re-occur; and

(f) Paul knew, well in advance of the Liability Hearing, that it formed part of the allegations of unfair prejudice against him, that he had caused the Partnership to use PLC's resources without properly accounting for that use. In the witness statements that Paul signed for the purposes of the Liability Hearing, he said that, in order to make it clear that the Partnership was not using PLC's fuel without properly reimbursing PLC for that use, PLC was no longer paying for any of the fuel that the Partnership used. During his cross examination at the liabilities hearing however, Paul admitted that PLC was continuing to pay for fuel used by Partnership vehicles, where the Partnership was carrying out work for the benefit of PLC. Having therefore recognised, in advance of the Liability Hearing, that it was important that he could demonstrate clearly that the Partnership was not using fuel paid for by PLC, without reimbursing PLC for that use, and that the best way of doing that was for the Partnership to pay for all its own fuel, Paul failed to stop PLC paying for fuel used by Partnership vehicles in spite of claiming in his witness statement that he had done so. That lack of control/failure to actually do what he said he had done, leads me to doubt Mr Auld's assertion that the diversion of PLC's resources to the use of the Partnership will not re-occur in the future, if the newly corporate governance aware board of PLC is left to ensure that it does not.

224. Finally, as to Mr Auld's assertion that I can be confident that, if I grant no remedy, the independently advised board of PLC will ensure that PLC is properly compensated for the Partnership's use of its resources, I am afraid I have no such confidence, for the following reasons:

(a) during the hearing on 10 June 2022, when I handed down the Liability Judgment, Mr Auld suggested that, the first direction I should make should be for the accountancy experts to determine what loss PLC had suffered as a result of Paul's unfairly prejudicial conduct, with a view to the amount of the loss being reimbursed to PLC, before the Remedies Hearing. I did not give that direction, but Mr Auld made it clear at the hearing on 10 June 2022 that, had I done so, then he intended to say at the Remedies Hearing (on the basis that, by then PLC had been reimbursed for the amount of its losses) that PLC's loss had been made good and any prejudice to Andrew cured;

(b) on 22 August 2023, Paul's solicitors wrote to the independent solicitors advising the board of PLC. In that very detailed letter, Paul's solicitors said that they wanted to engage with those solicitors concerning my findings in the Liability Judgment about Paul having breached the duties that he owed to PLC as its director and losses caused to PLC in consequence of those breaches. In their letter Paul's solicitors, having gone in detail through my findings in the Liability Judgment concerning Paul's breaches of duty and the potential value of PLC's losses arising from those breaches, said that PLC had benefitted greatly from services which the solicitors asserted that the Partnership had provided to PLC either without charge or at a charge which was less than the market rate. Paul's solicitors suggested that the value of the benefits thereby conferred on PLC should be taken into account in reducing what Paul should pay to PLC to reimburse it for the losses that I would determine at the Remedies Hearing, that PLC had suffered; and

(c) the letter of 22 August 2023 does not persuade me that I can be confident that the Board of PLC will recover appropriate compensation from Paul for the losses that PLC has suffered as a result of Paul's unfairly prejudicial conduct, because:

(i) the Liability Judgment was handed down on 10 June 2022 and a draft circulated some months before that, yet in spite of what Mr Auld said at the hearing on 10 June 2022, the issue of Paul paying compensation to PLC was not even raised until 14 months later, only about 2 weeks before the start of the Remedies Hearing. Even at that very late stage the question of Paul paying compensation to PLC was not raised by the solicitors acting for the board of PLC but rather by Paul's solicitors. This does not suggest that the board of PLC has been taking seriously the issue of recovering compensation from Paul for PLC's losses, but rather that the letter of 22 August 2023 was a last ditch attempt by Paul, just before the Remedies Hearing, to create some correspondence that suggests that the issue is being addressed;

(ii) far from making any offer to pay compensation to PLC for the losses that I determine PLC has incurred as a result of Paul's unfairly prejudicial conduct/breaches of duty (which would be consistent with what Mr Auld was suggesting should happen at the hearing on 10 June 2022) a significant number of claims are put forward that the Partnership has undercharged PLC for work that it has done for PLC's benefit in the past with the suggestion that these should be set off against the losses that I determine PLC has suffered as a result of Paul's breaches of duty;

(iii) the response of the independent solicitors acting for the board of PLC, written on 1 September 2023, 4 days prior to the start of the Remedies Hearing, appears to accept, in substance all of the points made in the long and detailed letter of 22 August 2023 from Paul's solicitors. No point is made that the Partnership may not be able now to claim more money for work that it carried out in the past for the benefit of PLC, or that, even if it could, Paul may not be able to set off such a claim against PLC's claim against him for breach of duty; and

(iv) I am very far from confident that Mr Sharratt/Mr Ellis/Mr Tomkinson, who have spent so long on "Paul's side of the fence" in the dispute with Andrew would cause PLC to appropriately and aggressively pursue Paul for

reimbursement of PLC's losses, particularly in circumstances where the first response of the solicitors acting for the board of PLC, sent 4 days before the Remedies Hearing appears to accept substantially all the points made by Paul's solicitors about the Partnership having claims against PLC, without challenge.

What remedy should I grant?

Preliminary points

225. In deciding on remedy I will apply the principles set out in paragraph 208 (a) – (i) above.

226. Mr Auld suggests (if there is to be a remedy at all) that the remedy should be that Paul is ordered to reimburse PLC for the losses it has suffered as a result of Paul's unfairly prejudicial conduct (assessed by me at £451,820.30). In the alternative, if I decide that the appropriate remedy is that Paul's or Andrew's shares in ABPT should be bought out, I should order that Andrew's shares are purchased by Paul or bought back by ABPT. The only remedy that Mr Zaman suggests is that Andrew buys out Paul's shares in ABPT.

227. In deciding on remedy I have a wide discretion. I am not bound to provide the relief proposed either by Mr Auld or by Mr Zaman.

228. In this case, I do not consider that there is any remedy other than the remedies suggested by Mr Auld or Mr Zaman which is appropriate, although, what they suggest represents only the general form of remedy, there are a number of additional orders which I will consider making, the aim of which would be to ensure that those general forms of remedy are more appropriate and effective.

Paul to reimburse PLC for its losses

229. I will consider first the remedy which Mr Auld says is the appropriate remedy, if I grant a remedy at all, of ordering Paul to reimburse PLC for the losses it has suffered as a result of Paul causing the Partnership to use PLC's resources without reimbursing it for that use. I have determined that the loss suffered by PLC is £451,820.30. Is it appropriate therefore to order Paul to pay to PLC the sum of £451,820.30 with or without any other appropriate order or orders?

230. Mr Auld says that ordering that the shares of either Andrew or Paul are bought out is disproportionate to the relatively minor and historic unfairly prejudicial conduct of Paul. In contrast, ordering Paul to make good PLC's losses arising from his conduct would put right the consequences of that conduct both for PLC and Andrew. Mr Auld also says that there is unlikely to be any re-occurrence of the Partnership using PLC's resources without properly accounting for/reimbursing PLC for that use.

231. In addition to ordering Paul to pay to PLC the sum of £451,820.30, to reimburse PLC for its losses, I could make orders concerning the future conduct of the affairs of PLC, aimed at ensuring that there is no re-occurrence of Paul's misconduct.

232. Often there is no perfect solution to a conflict between shareholders and the court is left seeking the best available solution in all the circumstances. At least one of the reasons why a buyout order is the most common order in relation to small private companies is that it is often seen as offering the best opportunity to achieve a clean break for the future. In this case there are a number of problems with achieving a clean break for the future, between Andrew on the one hand and the other shareholders of ABPT on the other and complications caused by the closely connected affairs of PLC and BIL, particularly if I order the purchase of Paul's shares by Andrew. I will discuss these issues below, but for the moment I say that, if it is possible to fashion an order for the purchase of either Paul or Andrew's shares in ABPT that holds out a reasonable prospect of achieving a clean break, then this would, in my judgment, be a more appropriate remedy than ordering Paul to pay £451,820.30 to PLC, with or without orders for the future regulation of PLC's affairs. I have come to this conclusion for the following reasons:

(a) as already explained, in paragraph 221 above, I do not consider that Paul's unfairly prejudicial conduct can be regarded as minor or historic. Paul caused PLC's resources to be used by the Partnership over a 13 year period causing a loss to PLC which I have calculated at £451,820.30. Such serious misconduct, by Paul in breach of his duties as a director of PLC would not, in my judgment, make a buyout order disproportionate. As Mr Zaman points out, *Grace v Biagioli* concerned a failure to pay a dividend of £20,000 to Mr Grace and the Court of Appeal considered that the appropriate remedy in that case was a buy out order;
(b) for the reasons set out in paragraphs 223 above, I consider that there is a significant risk that Paul's conduct would re-occur;
(c) I have considered whether I could fashion orders to regulate the future conduct of the affairs of PLC which would have a reasonable prospect of preventing a re-occurrence of Paul's behaviour. I do not consider that any attempt to impose such regulations upon PLC, would in practice be effective, for the following reasons:
    (i) Mr Auld's position is that the board of PLC has already adopted good corporate governance practices, in accordance with the advice of an independent firm of solicitors instructed by it. Mr Auld did not suggest any orders that I might make concerning the future regulation of the management of PLC which might bolster his assertion (which I have rejected) that the board of PLC has taken sufficient steps to ensure that its affairs will be subject to proper corporate governance practices in the future; and
    (ii) I could direct that a new independent director or directors should be appointed, having the specific task of scrutinising the corporate governance of PLC, including in particular its financial affairs. Such director/directors would however, in practice, have to be non-executive directors (there is no obvious person who could act as an independent executive director) with all the difficulties that Mr Tomkinson has faced (see paragraph 223 (b) above) in being reliant upon information supplied to him by Paul/Mr Sharratt; and

(d) there is a serious question about Paul's ability to pay the sum of £451,820.30 Paul to PLC, if I ordered him to do so. In his fourth witness statement, Paul deals with his personal financial circumstances (in order to provide evidence as to his ability to purchase Andrew's shares in ABPT). Paul says that he is unable to raise money by way of remortgage on his matrimonial home due to the high value of the existing mortgage (£1.5m). He refers to selling the Partnership's potato farming equipment which he suggests might raise £250,000, although over an extended period of time. Paul did not deal with his ability to reimburse PLC for its losses and based on the evidence Paul gave about his personal assets, I am not satisfied that he could afford to pay £451,820.30. Paul's solicitor's letter of 22 August 2023 to PLC's independent solicitors did not offer to make any payment to PLC, but rather suggested that the Partnership had undercharged PLC for work it had carried out for PLC's benefit in the past and that this undercharging should be set off against Paul's liability to PLC for breaching the duties he owed to it as its director. The amounts put forward by Paul's solicitor for the Partnership undercharging PLC suggest that Paul wishes to argue that the Partnership undercharging PLC by amounts that exceeds what PLC lost as a consequence of the 11 Issues (which I have determined to be £451,820.30) and that the undercharging by the Partnership should be set off against PLC's losses, resulting from Paul's breaches of duty.

A share buyout order

Preliminary points

233. The share buyout options are:

(a) Paul buys Andrew's shares in ABPT;
(b) ABPT buys back Andrew's shares in ABPT; or
(c) Andrew buys Paul's shares in ABPT (it is Andrew's case that he is able to afford to buy Paul's shares in ABPT at the value attributed to them, ABPT buying out Paul's shares in ABPT is not therefore put forward as an option).

234. Paul accepts that he does not have sufficient personal assets to purchase Andrew's shares himself. If Andrew's shares are to be purchased therefore, ABPT will have to buy them back.

235. In *Grace v Biagioli* the Court of Appeal (at paragraph 75 of its judgment, see paragraph 206 above) describes the usual order as one requiring the respondent to buy out the petitioner's shares. I do not consider that the fact that the Court of Appeal in *Grace v Biagioli* describes the respondent buying out the petitioner's shares, rather than the other way round, as the usual order, is any reason to favour an order requiring Andrew's shares to be purchased rather than Paul's, because:

(a) as just noted, Paul accepts that he does not have sufficient personal assets to purchase Andrew's shares himself. If Andrew's shares are to be purchased therefore, ABPT will have to buy them back, so Paul is not asking for "the usual order" in any event;

(b) the reasons given by the Court of Appeal for saying that ordering the respondent to purchase the petitioner's shares is the usual order, are all connected to the court order achieving a clean break. If a clean break can be achieved either by the court ordering the petitioner to purchase the respondent's shares or the respondent to purchase the petitioner's shares, then I see no reason to favour the former over the latter;

(c) in most cases the petitioner is a minority shareholder holding substantially less shares than the other shareholders and the petitioner seeks an order that, if the respondent(s) is/are found to have acted in a manner that is unfairly prejudicial to the petitioner, that the respondents purchase their shares. In this case Andrew holds 37,000 or 44.4% of PLCs' issued share capital, the same number of shares as Paul holds. Ordering Andrew to buy Paul's shares or Paul to buy Andrew's shares, will result in the purchaser holding 88.8% of ABPT's share capital. This case is not therefore like most cases; and

(d) I have found that Paul has acted in a manner which is unfairly prejudicial to Andrew, Andrew wishes to acquire Paul's shares in ABPT but does not wish to sell his shares in ABPT to Paul (or ABPT). Andrew's wishes, as the successful petitioner are, in my judgment, relevant to the consideration of the appropriate remedy.

236. I am satisfied that, in considering whether a buyout order is appropriate, and if so which buyout order, I should consider:

(a) the position of the minority shareholders of ABPT other than Andrew and Paul, namely Mr Tomkinson who holds 666 shares, Mr Ellis who holds 500 shares and the SSAS which holds 8,185 shares; and

(b) the consequences of a buyout of Andrew or Paul's ABPT shares on the business and assets of BIL, whose business is inextricably linked with that of PLC (see below) and for BIL's shareholders and creditors.

237. In order to determine which of the buyout options represents the best option, I will describe the advantages and disadvantages of each option, determine how (if at all) the disadvantages might be cured or ameliorated by my making supplemental orders and finally decide which buyout option is the most appropriate remedy to grant in this case.

ABPT to buy back Andrew's shares

238. The advantages of ABPT buying back Andrew's shares, compared to Andrew buying out Paul's are:

(a) if ABPT buys back Andrew's shares, then Paul will control over 75% of ABPT's shares. Mr Tomkinson and Mr Ellis, who each have small minority shareholdings in ABPT and who were successful respondents to the ABPT Petition issued by Andrew would, on the face of it be content if ABPT were to buy back Andrew's shares. They would not be content for Andrew to buy Paul's shares in ABPT, thereby becoming the 88.8% shareholder of ABPT, for the reasons I set out below in dealing with the disadvantages of Andrew acquiring Paul's shares. It is unclear what the attitude of the trustees of the SSAS would be to such an arrangement;

(b) the directors of ABPT/PLC namely, Paul, Mr Tomkinson, Mr Ellis and Mr Sharratt have worked together since Andrew ceased to be a director of ABPT/PLC. On the face of it there is no difficulty in them continuing to act as directors of ABPT, if ABPT acquires Andrew's shares. If however Andrew were to acquire Paul's shares then, given the animosity between Andrew and the directors of ABPT/PLC it is very unlikely that Andrew could work together with those directors or they with him;

(c) given (a) and (b) a simple purchase by Andrew of Paul's shares is unlikely to lead to a clean break, in the sense that ABPT and its subsidiary, PLC are able to continue their businesses free of the acrimonious dispute that has dogged their businesses since 2017 and only Paul will have received payment for his share of PLC's business (Mr Tomkinson, Mr Ellis and the SASS will remain locked into a business over which they have no influence and in respect of which, at least so far as Mr Ellis and Mr Tomkinson are concerned, they are in conflict with the controlling shareholder);

(d) the businesses of BIL and PLC are inextricably linked in that: (i) BIL is the landlord of Enterprise House which is occupied by PLC for the purposes of its business; (ii) BIL provides PLC with the power it needs to operate its business from the AD Plant that BIL owns; and (iii) PLC provides the waste product of its production process to BIL to provide at least part of the fuel for the AD Plant; and

(e) the directors of BIL are Paul, Mr Ellis, Mr Tomkinson and Mr Sharratt and its share capital is held in exactly the same proportions as the share capital of ABPT by Andrew, Paul, Mr Tomkinson, Mr Ellis and the SSAS. If Andrew were to acquire Paul's shares in ABPT, BIL would be likely to continue to be controlled by its existing directors. Given the nature of the acrimonious dispute between Andrew of the one part and Paul, Mr Ellis, Mr Tomkinson and Mr Sharratt of the other part, this is likely to result in substantial friction between PLC and BIL, in respect of their relationships of landlord and tenant and supplier and consumer of the electricity produced by the AD Plant; and

(f) the likely friction in the relationship between PLC and BIL is another reason why a clean break is unlikely to be achieved, if Andrew were to acquire Paul's shares in ABPT.

239. The principal disadvantage of my making an order that ABPT buys back Andrew's shares is that its ability to do so is in doubt. In addition, as already noted, Andrew, the successful petitioner, does not want Paul or ABPT to buy his shares, Andrew wishes to buy Paul's ABPT shares. This latter point does not preclude me from making an order that ABPT buys back Andrew's shares, but it is a factor which I need to take account.

Andrew to buy Paul's shares

240. If Andrew buys Paul's shares in ABPT, then Andrew will hold 88.8% of ABPT's share capital, enabling him to pass ordinary and special resolutions, appoint and remove directors and generally control the business and affairs of ABPT and its subsidiary PLC. I have already touched upon the disadvantages of this because they are the mirror image of the advantages of ABPT buying back Andrew's shares in ABPT, namely and in summary the disadvantages are:

(a) conflict between Andrew and the existing directors of ABPT/PLC (Paul, Mr Tomkinson, Mr Ellis and Mr Sharratt) is highly likely, given the acrimonious dispute between them that has been ongoing, since 2017. This may lead to the existing directors of ABPT/PLC resigning or being removed by Andrew, in the short term, until either of those things happens, PLC's business is likely to be disrupted by that conflict;
(b) the minority shareholders of ABPT other than Paul, namely Mr Ellis, Mr Tomkinson and the SSAS will be locked in as shareholders of ABPT, with no means of realising the value of their interests in the business of PLC; and
(c) PLC will be controlled by Andrew, but BIL by its directors, Paul, Mr Ellis, Mr Tomkinson and Mr Sharratt. Given the complexity of the interrelationship between the businesses of PLC and BIL this is likely to be a recipe for significant conflict and disruption to the businesses of both companies in relation to such matters as: (i) a substantial dilapidations claim that I understand BIL has against PLC in relation to Enterprise House; (ii) I understand that the new professional trustees of the SSAS are now pressing for a rent review of the rent payable by BIL to the SSAS as freehold owner of Enterprise House, BIL is likely to have to press for a rent review of the rent paid by PLC to it as intermediate landlord of Enterprise House; and (iii) the terms on which BIL supplies electricity to PLC and PLC provides its waste product as fuel for the AD Plant.

241. The principal advantage of ordering that Andrew buys Paul's shares in ABPT is that, on the evidence, Andrew has the funds immediately available to him to purchase Paul's shares, by borrowing the necessary funds from Mr Hosking, who made it clear, at the Remedies Hearing that he is prepared to provide to Andrew such funds, on loan as are necessary to enable Andrew to purchase Paul's shares in ABPT. The fact that this is the remedy that Andrew, the successful petitioner, wants is also a factor in favour of me granting that remedy.

Which buyout/buy back should I order?

242. On 30 August 2023, Andrew made an open offer to Paul. A copy of Andrew's solicitor's letter of 30 August 2023 appears in the schedule to this judgment. In summary, Andrew offered:

(a) to acquire Paul's shareholding in ABPT (37,000 shares amounting to 44.4% of its issued share capital) for £4 million less 44.4% of the sum determined by me to be the loss suffered by PLC as a result of the 11 Issues; or
(b) to acquire Paul's shareholding in ABPT for £3,630,000 with no adjustment for the 11 Issues; and
(c) in the case of either (a) or (b) completion would take place within 14 days of the court order approving the proposed settlement and the costs of the petition and reserved costs would be determined by the court.

243. The Remedies Hearing was listed for hearing between 4 September 2023 and 8 September 2023 although the first day was allocated for judicial reading. At the start of the hearing on 5 September 2023, I observed that, in his skeleton argument, Mr Auld

had made a number of points as to why Andrew's offer of 30 August 2023 would not result in a clean break (in substance the reasons were those referred to in paragraph 240 above).

244. On 6 September 2023 Andrew made a revised offer to Paul. A copy of the revised offer made by Andrew's solicitors on 6 September 2023 also appears in the schedule to this judgment. In summary, the revised offer said that:

(a) Andrew was prepared to take all steps possible to provide comfort to the court and Paul that his offer would achieve a clean break;
(b) the offers made in the letter of 30 August 2023, concerning the purchase by Andrew of Paul's shares in ABPT were repeated;
(c) whilst the court could not order Mr Tomkinson, Mr Ellis and the SSAS to sell their shares in ABPT to Andrew, Andrew offered to submit to a court order that required him to offer to purchase their shares in ABPT, for fair value;
(d) Andrew offered to be bound by a court order requiring him to offer to purchase all of the shares in BIL which he did not own, to be valued by an independent valuer; and
(e) as to a concern expressed by the directors of PLC, that Andrew would, if he acquired Paul's shares in ABPT, cause PLC to pursue spurious claims against them, Andrew was prepared to submit to a court order providing, so far as possible, comfort to Paul, Paul's family, Mr Tomkinson, Mr Ellis and Mr Sharratt that he would not cause PLC to bring any claim against them, in respect of the issues raised by him in his ABPT Petition.

245. Mr Bell assessed the equity value of ABPT (that is the value of all its shares) at £9,058,000 without taking account of the 11 Issues and £10,011,000, taking the 11 Issues into account (making the value of Andrew and Paul's 44.4% shareholdings in ABPT worth £4,021,752 without taking the 11 Issues into account and £4,444,884 taking the 11 Issues into account). Mr Lewis assessed ABPT's Equity Value at £5,637,000, without taking the 11 issues into account and £5,915,000 taking the 11 Issues into account (making the value of Andrew/Paul's 44.4% shareholdings in ABPT worth £2,502,828 without taking the 11 Issues into account and £2,626,260 if the 11 issues are taken into account.

246. Whilst I have not finally determined what the equity value of ABPT is or what the value of Andrew and Paul's shares in ABPT is, I have concluded that the value of Andrew's shares in ABPT is approximately £3,686,000 (see paragraph 369 below) and the value of Paul's shares in ABPT after adjustment for 44.4% of the losses suffered by PLC, as a result of the 11 Issues is approximately £3,485,000 (see paragraph 370 below).

247. Paul accepts that he does not have sufficient personal assets to enable him to raise the funds to purchase Andrews' shares in ABPT and that the only option to acquire Andrew's shares in ABPT would be for ABPT to buy back Andrew's shares, offering its shares in PLC and PLC's assets as security for the lending needed to buy back Andrew's shares.

248. In his fourth witness statement, dated 6 July 2023, Paul sets out details of the potential funders for a buyback of Andrew's ABPT shares, who have been approached by Paul and Mr Sharratt up to the date of his witness statement and the result of those approaches. In summary, Paul says:

(a) HSBC did not have "the appetite" to lend unless they knew that Andrew was out of the picture completely;
(b) Clearwater were not interested in providing finance;
(c) Lloyds Bank were not interested in discussing funding to buy Andrew's shares, they were more concerned about their existing exposure as a lender to ABPT/PLC/BIL;
(d) RBS were not willing to get involved;
(e) a partner at a major regional accountancy practice was not prepared to act in seeking to raise the finance required;
(f) Dains accountants had been instructed to assist the directors of ABPT in attempting to raise finance to buy back Andrew's ABPT shares. Roy Farmer, a Corporate Finance Partner at Dains was sceptical that anyone would be willing to fund a buy back of Andrew's shares in ABPT alone. Mr Farmer suggested that if they were unable to obtain finance to purchase Andrew's shares in ABPT alone, then they should look at the option of acquiring Andrew's shares in both ABPT and BIL; and
(g) Mr Farmer introduced Paul to SME Capital who indicated that they were unlikely to be interested in funding a purchase of Andrew's shares in ABPT because of the existence of the litigation. It was unlikely that anyone would fund the purchase of Andrew's shares in ABPT alone, there would be a better chance of getting funding to purchase Andrew's shares in ABPT and BIL. A cash flow lender might provide the funding needed by ABPT to buy back Andrew's shares in ABPT, acting in conjunction with an asset based lender which was willing to fund a buy back of Andrew's shares in BIL.

249. The evidence given by Paul in cross examination and in response to questions that I asked of him at the Remedies Hearing added little to what he says in his fourth witness statement. Paul said that he was confident that, given time, money could be raised to fund the purchase of Andrew's shares in ABPT. When I asked him why he was confident, Paul said that "once we know what we need to do, it's easier to go out and actually get that funded. I'm extremely confident". Paul went on to say that he would prefer to arrange a buy back of Andrew's shares in ABPT and BIL and that the prospects of raising funds to do so were very good. I note that Mr Bell's figure of £4,444,884 for the value of Andrew's ABPT shares is slightly closer to my estimate of £3,668, 000, than Mr. Lewis's figure of £2,626,260.

250. The Liability Hearing concluded at the end of 2021 and Paul has known since March 2023 the values that Mr Bell and Lewis attributed to Andrew's shares in ABPT. Given that during that time Paul has been unable to find any prospective lender who is prepared to say that, even in principle, they might be prepared to fund a purchase of Andrew's shares in ABPT or ABPT and BIL, I do not consider that Paul has any good grounds for the optimism he expressed at the Remedies Hearing as to the likelihood of a funder or funders being found who are prepared to provide the necessary funding to enable

Andrew's shares in ABPT or ABPT and BIL to be bought back once he knew what had to be raised.

251. I am satisfied that Andrew can fund the purchase by him of the shares of all the other shareholders of ABPT and BIL. I am satisfied of this because: (a) it is not disputed that Mr Hosking is a very wealthy man who can, should he choose to do so, afford to advance the funds Andrew to enable Andrew to purchase all of those shares. It was not suggested to Mr Hosking, in cross examination, that he could not afford to do so; and (b) I asked Mr Hosking whether £4 million was the limit of what he was prepared to lend to Andrew or whether he would lend Andrew whatever was needed to acquire the shares in ABPT and BIL. Mr Hosking said that there was no limit to what he was prepared to lend to Andrew for this purpose.

252. I am satisfied that there is very little prospect of the necessary funds being raised to enable ABPT to buy back Andrew's shares without Andrew's shares in BIL being bought back at the same time. That conclusion is based on: (a) the comments of Mr Farmer (see paragraph 248 (f) above; (b) the advice that Paul says he received from SME Capital to that effect (see paragraph 248 (g) above); and (c) my own assessment that the affairs of PLC and BIL are so inextricably linked and the dispute between Andrew on the one hand and the other shareholders of ABPT/BIL on the other is so entrenched, bitter and acrimonious that no funder is likely to consider funding the buy back of Andrew's shares in ABPT, to which Andrew has not agreed, leaving Andrew as a substantial minority shareholder in BIL (holding 44.4% of its shares) and with the SSAS (holding a little under 10% of its shares) having effectively a casting vote, should its professional trustees choose to use it. That position is likely, in my judgment, to be seen by a potential funder as a recipe for disaster.

253. Andrew has made it clear that he does not agree to his shares in ABPT being bought by Paul. I am satisfied that, if I made an order that Andrew's shares in ABPT should be bought back by ABPT, Andrew would not agree to his shares in BIL being bought back at the same time. This means that only a buy back of Andrew's shares in ABPT would be possible and I have already concluded that it is extremely unlikely that a funder or funders will be found who are prepared to fund only that.

254. In conclusion, on ability to fund a purchase of shares:

(a) I am satisfied that Andrew can fund the purchase of all the other shareholders shares in ABPT alone or ABPT and BIL;
(b) Paul cannot fund the purchase of Andrew's shares in ABPT or ABPT and BIL himself;
(c) the only option to purchase Andrew's shares in ABPT alone is for ABPT to fund the buy back of those shares by borrowing the funds on the security of the assets of ABPT and PLC. It is highly unlikely that any funder or funders would provide the funding for ABPT to buy back Andrew's shares alone; and
(d) the prospects of a funder or funders (probably funders) being found who would be prepared to fund the buy back of Andrew's shares in ABPT and BIL is better, but this is not, in practice, an option because, if I ordered that Andrew's shares in ABPT

were bought back by ABPT, I am satisfied that Andrew would not agree to his shares in BIL being bought back and I cannot order Andrew to do so.

255. It is open to me, notwithstanding that I consider that there is very little prospect of ABPT raising the funds to buy back Andrew's shares (and buying back Andrew shares in ABPT and BIL is not an option) to give ABPT an opportunity to attempt to do so. However if I give Paul that opportunity, I can only do so on one of two bases, namely either: (a) that if Paul is successful in raising the funds, I will make an order that ABPT buys back the shares that Andrew holds in it: or (b) that if Paul is successful in raising the funds I will decide then whether to order that ABPT buys back the shares that Andrew holds in it or to make an order that Andrew purchases Paul's shares in ABPT. I can see no reason why I would be in a better position to decide, if Paul is successful in raising finance, at that point, whether to order ABPT to buy back its shares from Andrew or that Andrew purchases Paul's shares in ABPT, therefore, in my judgment, deciding to give Paul the opportunity to raise the funds for ABPT to buy back Andrews shares involves a decision now that that is the appropriate remedy (if Paul can raise the funds).

256. In order to determine whether ordering a buy out of shares is the appropriate remedy at all and if it is, whether (notwithstanding my conclusion that there is very little prospect of finance being raised to enable ABPT to buy back Andrew shares) I should give Paul an opportunity to raise the funds, I need to consider: (a) whether the primary advantage of ordering that Andrew buy Paul's shares, of a "clean break" can be achieved in this case; and (b) whether, having regard to the likely effects on the other shareholders of ABPT/BIL and the directors of ABPT/PLC/BIL of Andrew purchasing Paul's shares in ABPT, I should conclude that it is not appropriate to order that Andrew buys Paul's shares in ABPT (taking into account any orders that I might make to assist in achieving a clean break and protect the interests of the relevant shareholders/directors).

257. The starting position, in considering whether ordering that Andrew buys Paul's shares in ABPT would achieve a clean break and whether the prejudice it may cause to the interests of others is sufficient reason not to order that Andrew buys Paul's shares in ABPT, is that I cannot order that the shares of any shareholder in ABPT, other than Paul, or the shares of any other shareholder in BIL (including Paul's) are sold to Andrew.

258. I am satisfied that, if Andrew were to purchase Paul's shares in ABPT, then: (a) Mr Tomkinson and Mr Ellis and the SSAS will be locked into a company over which they could exercise no effective influence and which is likely to be run substantially for the benefit of Andrew and any of his supporters (perhaps including Mr Hosking, as Mr Auld suggested); (b) it is very likely that the directors of ABPT/PLC (Paul, Mr Tomkinson, Mr Ellis and Mr Sharratt) would not be able to work with Andrew in those changed circumstances (this was, after all the reason why they refused to reinstate Andrew as a director of ABPT/PLC in 2017). They would all be likely to resign or be removed as statutory directors and Paul's employment as Managing Director, Mr Sharratt's employment as Financial Director and Mr Ellis's employment as Purchasing Director of PLC would likely cease, either immediately on Andrew buying Paul's shares, or shortly thereafter; and (c) BIL's business is inextricably linked with that of PLC. There are many

points of likely conflict between the two companies, if controlled separately, in particular relating to the occupation of Enterprise House by PLC, as BIL's tenant and the provision of electricity by BIL's AD Plant to power PLC's production process at Enterprise House. BIL, its shareholders and directors (as well as ABPT/BIL) are likely to suffer prejudice, as a consequence of PLC being controlled by Andrew and BIL being controlled by Paul/Mr Ellis/Mr Tomkinson/Mr Sharratt (this is on the assumption that the professional trustees of the SSAS do not choose to always support Andrew, thereby giving Andrew effective control of BIL, which I accept is unlikely given that the trustees are unlikely to wish to be drawn into the dispute or vote the SSAS shares on disputed decisions).

259. Andrew's revised offer of 6 September 2023 seeks to address these concerns by: (a) allowing the other shareholders of ABPT to extract the value of their interest in PLC's business; and (b) offering to buy the shares held by Paul/Mr Tomkinson/Mr Ellis and the SSAS in BIL at a price fixed by an independent valuer.

260. It is, of course, a matter Mr Tomkinson, Mr Ellis and the SSAS as to whether, if I ordered that Paul's shares in ABPT are purchased by Andrew, they choose to accept the offer of Andrew to purchase their shares in PLC at fair value. The professional trustees of the SSAS are, in my judgment, consistent with their duties to the SSAS, likely to accept that offer, given that the alternative is for the SSAS to be locked into an investment which has an uncertain future. Mr Tomkinson and Mr Ellis have expressed a wish in the recent past to dispose of their shares and end their involvement with ABPT/PLC/BIL. If I ordered that Andrew buys Paul's ABPT shares, I think it is likely that Mr Tomkinson and Mr Ellis would accept Andrew's offer, for the same reason as I consider that the professional trustees of the SSAS would accept it (and, in Mr Tomkinson and Mr Ellis's cases, also because of their previously expressed wish to dispose of their shares and retire from the businesses). On the balance of probabilities I find that, if I order that Andrew purchases Paul's shares in ABPT and that Andrew offers to buy Mr Ellis, Mr Tomkinson and the SSAS's shares in ABPT, Mr Ellis, Mr Tomkinson and the SSAS will accept Andrew's offer, in order to avoid being minority shareholders in ABPT with Andrew holding 88.8% of its shares and therefore controlling the business and affairs of ABPT/PLC.

261. If I am wrong and Mr Tomkinson and/or Mr Ellis and/or the SSAS do not accept Andrew's offer to purchase their ABPT shares at fair value, which is a matter for them, then Andrew's offer, nonetheless, represents a reasonable basis upon which they can realise the value of their shares of the business of PLC and avoid what I accept are the likely adverse effect upon them, as minority shareholders of ABPT, of Andrew acquiring Paul's shares in ABPT. Objectively, in those circumstances, Mr Tomkinson/Mr Ellis/the SSAS will not be unfairly prejudiced by the consequences of Andrew purchasing Paul shares in ABPT, because they all have a route to realise the value of their shares in ABPT and avoid being tied in as minority shareholders to companies controlled by Andrew. For those reasons I do not consider that any adverse effects on Mr Ellis, Mr Tomkinson and the SSAS as shareholders of ABPT, of my ordering that Andrew purchases Paul's shares in ABPT, are a good reason not to make such an order.

262. I have accepted that the current statutory directors of ABPT/PLC are likely to resign or be removed by Andrew, if Andrew buys Paul's shares in ABPT and that the employment by PLC of Paul, Mr Ellis and Mr Sharratt is also likely to be terminated in one way or another.

263. That a shareholder whose shares are ordered to be purchased as the remedy under Section 996 resigns or is removed as a statutory director and employee of the relevant company, is a natural consequence of the purchase of their shares, for that reason, I do not consider that the prejudice to Paul from the likely termination of his position as a statutory director of ABPT/PLC and his employment as Managing Director of PLC would be unfair to him, if I order that Andrew purchases his shares in ABPT. This is not therefore a factor against ordering Andrew to purchases Paul's shares in ABPT.

264. Mr Sharratt is a statutory director of and is employed as the Financial Director of ABPT/PLC/BIL and I have no doubt that, all other things being equal, he would wish to remain as both a statutory director and employed as Financial Director of those companies. In contrast to that, as I have already said, Mr Tomkinson who is a statutory non-executive director of ABPT/PLC and Mr Ellis who is a statutory director of ABPT and PLC and acts as purchasing director of PLC have both, in the recent past, expressed the wish to retire from those positions.

265. I do not consider that the likely termination of the statutory directorships of Mr Sharratt, Mr Tomkinson and Mr Ellis in ABPT/PLC and of the employment of Mr Ellis and Mr Sharratt by PLC are material factors against my ordering that Andrew purchases Paul's shares in ABPT because: (a) I have not been referred to any authority in which the wishes of the existing statutory directors or employees to continue in those roles has been taken into account as a material factor in deciding on the appropriate remedy under Section 996 (let alone a reason not to order a buyout of shares as the appropriate remedy); (b) the resignation or removal of directors and senior employees associated with a shareholder whose shares are to be purchased, in accordance with an order made by the court, pursuant to its powers under Section 996, is likely, in my judgment to be a common consequence of the purchase of those shares; and (c) in the case of Mr Tomkinson and Mr Ellis they are unlikely to suffer material prejudice as a result of the termination of their roles in PLC/ABPT, because they have expressed a desire to retire from those roles, in any event.

266. I accept that the likely conflict between PLC and BIL, if I order Andrew to purchase Paul's shares in ABPT and the adverse effects on BIL and its shareholders, other than Andrew (that is Paul, Mr Tomkinson, Mr Ellis and the SSAS) are relevant factors. Andrew offers however to submit to a court order requiring him to purchase their shares in BIL at a price fixed by an independent valuer. They are not bound to accept Andrew's offer, but it provides Paul/Mr Tomkinson/Mr Ellis and the SSAS with an opportunity to realise the fair value of their interests in BIL and thereby avoid the consequences of the likely conflict between PLC and BIL, if they do not accept that offer. I accept that, if Andrew does acquire the shares of the other shareholders of BIL, or sufficient of them to give him control of BIL, then the statutory directorships of Paul, Mr Tomkinson, Mr Ellis and Mr Sharratt will be brought to an end, but for the reasons set out in paragraph 265

above in respect of ABPT, I do not consider that this is sufficient reason not to order that Andrew buys Paul's shares in ABPT, subject to him submitting to an order that he offers to purchase the shares of the other shareholders in BIL at a price fixed by an independent valuer.

267. I consider that the appropriate remedy is to order that Andrew purchases Paul's shares in ABPT, on the basis that Andrew will submit to a court order which requires him to offer to purchase: (a) the shares of Mr Ellis, Mr Tomkinson and the SSAS in ABPT at fair value; and (b) the shares of Paul, Mr Ellis, Mr Tomkinson and the SSAS in BIL at a value to be determined by an independent valuer. Whilst I will hear submissions on the point, it seems to me that Andrew should purchase simultaneously Paul's shares in ABPT and the shares of the other shareholders in both ABPT and BIL who accept Andrew's offers. In short, the reasons why I consider that an order in that form is the appropriate remedy are:

(a) I see very little prospect of ABPT raising the funds to buy back Andrew's shares alone (given my finding that Andrew will not agree to sell his shares in BIL) this is a strong factor against allowing time for it to attempt to do so;
(b) even if, contrary to my expectations, ABPT could raise the funds to buy back Andrew's shares, there is likely to be significant conflict going forwards, given Andrew's 44.4% interest in the shares of BIL and his unwillingness to sell them;
(c) Andrew's offer to acquire the shares of all the other shareholders in ABPT and BIL is likely to achieve a clean break if it is accepted and it represents an opportunity for the shareholders of BIL to realise the fair value of their interests in the business of PLC and BIL and to avoid the likely consequences for them of conflict within PLC and between PLC and BIL if they are under separate control;
(d) if Andrew's offers to purchase the shares of all of the other shareholders in ABPT (other than Paul's shares) and BIL is not accepted, then I nonetheless consider that offering those shareholders the opportunity to dispose of their shares to Andrew at fair value means that they will not be unfairly prejudiced by Andrew acquiring Paul's shares in ABPT;
(e) for the reasons already explained, I do not consider that the likely loss of the statutory director and employee roles by Paul, Mr Tomkinson, Mr Ellis and Mr Sharratt in ABPT/PLC and their statutory director roles in BIL, if Andrew acquires a majority of its shares is sufficient reason not to order that Andrew buys Paul's shares in ABPT, on the basis that the order that he does so, requires him to make the offers that he has agreed to make to purchase the shares of the other shareholders in ABPT/BIL; and
(d) Andrew is the successful petitioner and his views regarding remedy are a relevant factor.

THE VALUE OF ANDREW/PAUL'S ABPT SHARES

268. Andrew and Paul hold the same number of shares in ABPT, namely 37,000 each amounting to 44.4% each of the issued share capital of ABPT.

269. Initially it was Mr Auld's position, in his skeleton argument, that a minority discount should be applied if Andrew's shares were to be purchased, although he was silent on whether a minority discount should be applied, if Paul's shares were to be purchased. Mr Zaman's position was that a minority discount should not apply whether Paul or Andrew's shares were to be purchased. In closing however, Mr Auld accepted that no minority discount should be applied, whether Andrew or Paul's shares were purchased.

270. In light of the agreement of both counsel that no minority discount should be applied, I need to determine:

(a) the value Andrew/Paul's shares in ABPT, with no adjustment for the loss incurred by PLC as a result of the 11 Issues (assessed by me at £451,820.30). Given that they each hold the same number of shares in ABPT, those values will be the same; and
(b) the value of Paul's shares in ABPT taking into account any appropriate adjustment to that value, for losses incurred by PLC as a result of the 11 Issues.

VALUE OF ANDREW/PAUL'S SHARES WITH NO ADJUSTMENT FOR THE 11 ISSUES

The Experts' Approach

271. Each expert takes the same approach to valuing ABPT's shares, namely:

(a) because ABPT has no business or assets, other than its shares in PLC and ABPT owns the entire issued share capital of PLC, both experts have calculated PLC's Equity Value and treated that as the Equity Value of ABPT (and therefore the value of all ABPT's shares);
(b) both experts have used the "market approach" to valuing PLC namely:
    (i) calculate PLC's Maintainable EBITDA (Earnings Before Interest, Tax, Depreciation and Amortisation);
    (ii) multiply Maintainable EBITDA by a multiple calculated by the experts, thereby arriving at an Enterprise Value for PLC; and
    (iii) add to the Enterprise Value excess working capital cash and assets and (in the case of Mr Lewis but not Mr Bell) make a deduction for a capital expenditure requirement which Mr Lewis considers that PLC has, to arrive at an Equity Value for PLC's shares and therefore ABPT's shares.

272. Notwithstanding that the experts adopt the same approach to valuing ABPT's shares, they have arrived at very different valuations. Mr Bell values ABPT's shares at £9,058,000 without adjustment for the 11 Issues and £10,011,000 taking those issues into account and Mr Lewis values them at £5,637,000 without taking the 11 Issues into account and £5,915,000 taking them into account.

Maintainable EBITDA

273. Mr Bell calculates PLC's Maintainable EBITDA at £815,000 and Mr Lewis at £762,000, disregarding the 11 Issues and at £858,000 and £774,000 respectively, taking the 11 Issues into account. In calculating PLC's Equity Value, the 11 Issues only impact on the calculation of Maintainable EBITDA.

274. Mr Bell's calculations are based upon PLC's draft financial statements for the three financial years ending 31 May 2023 which included, at the date of Mr Bell's Report (3 March 2023) 6 months of forecasted results to 31 May 2023. Mr Bell deducts from his calculation of EBITDA for each of those financial years what he considers to be non-recurring items of income and expenditure for each year, arriving at a net EBITDA for each year of: 31/5/21 - £1,660,000; 31/5/22 - (£300,000); and 31/5/23 - £1,117,000 giving an average Maintainable EBITDA calculated over the 3 financial years of £826,000.

275. In the experts' Joint Report on Valuation, Mr Bell adjusts his Maintainable EBITDA figure from £826,000 to £815,000 (excluding the 11 Issues and to £858,000 including the 11 Issues) to take account of adjustments made in the final signed version of PLC's accounts for the financial year ending 31/5/21 compared to the draft accounts for that financial year, which he used in preparing his report.

276. Mr Lewis calculates Maintainable EBITDA by calculating the average adjusted (that is adjusted for non-recurring items) EBITDA margin for the financial years ending 31/5/20, 31/5/21, 31/5/22 and the 6 months to 30/11/22, all reported, rather than projected results, which he calculates at 3.3% and Mr Lewis then applies this percentage to the PLC turnover of £21.9m in the 12 months to 30/11/22, arriving at a figure of £762,000 for Maintainable EBITDA, excluding the 11 Issues and £774,000 including the 11 Issues. Mr Lewis has not adjusted his figure to take account of adjustments made in the final signed version of PLC's accounts for the financial year ending 31/5/21.

The EBITDA Multiple

277. Prior to applying any discounts or premiums, Mr Bell calculates the multiple at 8.11 from information he obtains from three sources: (a) published data on comparable quoted companies; (b) market data from comparable private company transactions; and (c) the BDO Private Company Price Index ("BDO PCPI") for the last quarter of 2022. Mr Bell explains that he has used the BDO PCPI, because the two comparable private company transactions identified by him are dated 18 months or more prior to the date of his report (3 March 2023) and economic conditions have changed during that period. Mr Bell says that the BDO PCPI provides market information on what multiples were applied to EBITDA in transactions to acquire private companies in the last quarter of 2022 and therefore acts to update that data for changes in economic conditions in the last 18 months prior to the date of his report.

278. Mr Bell calculates the net EBITDA multiple, after applying the premiums and discounts that he considers should be applied at 6.71 in the following way:

(a) the average EBITDA multiple from information provided for the EBITDA for comparable quoted companies is 7.33. Mr Bell applies to that EBITDA multiple (i) a discount of 30% for risk and marketability; and (ii) a premium of 15% for control, giving a net EBITDA multiple of 5.9;
(b) the average EBITDA multiple from information provided for two private company comparable transactions is 10.64, to which Mr Bell applies three discounts: (i) a discount of 10% for the smaller size of PLC compared to the comparable private company transactions; (ii) a discount of 10% to take account of the fact that only publicly available information is being taken into account; and (iii) a discount of 10% to take account of the fact that the private company comparable transactions are historic (one in February 2019 and one in February 2021). The overall discount of 30% reduces the net EBITDA multiple to 6.38 for comparable private company transactions;
(c) Mr Bell then considers the BDO PCPI for the last quarter of 2022, which shows a historic EBITDA multiple of 9.8, Mr Bell applies two discounts to this figure: (i) a discount of 10% for the size of PLC compared to the typical deal size recorded in the BDO PCPI; and (ii) a discount of 10% to take account of the fact that only publicly available information is being taken into account. The two discounts totalling 20% reduce the EBITDA multiple for the BDO PCPI to 7.84; and
(d) Mr Bell then calculates the average of (i) the EBITDA multiple for comparable quoted companies net of discounts of 5.9; (ii) the EBITDA multiple for comparable private company transactions net of discounts of 6.38; and (iii) the BDO PCPI EBITDA multiple net of discounts of 7.84, to arrive at his overall net average EBITDA multiple of 6.71.

279. Mr Bell then multiplies his Maintainable EBITDA of £815,000 by his EBITDA Multiple of 6.71 giving an Enterprise Value for PLC of £5,465,000, excluding the 11 Issues and an Enterprise Value of £5,754,000 including the 11 Issues (Maintainable EBITDA of £858,000 x 6.71 = £5,754,000).

280. Mr Lewis uses only two sources of public information to calculate his multiple: (a) published data from comparable quoted companies; and (b) market data from comparable private company transactions.

281. Mr Lewis calculates the appropriate EBITDA multiple as in the range 4.7 - 5.2, in the following way:

(a) the average published EBITDA multiple of nine comparable quoted companies is 8.8 (the four comparable quoted companies used by Mr Bell are included in Mr Lewis's nine comparable quoted companies);
(b) the average published EBITDA multiple from three comparable private company transactions (none of which are the same as the two comparable private company transactions used by Mr Bell) is 5.9;

(c) for the nine comparable quoted companies' average EBITDA multiple of 8.8, Mr Lewis applies the following discounts/premiums: (i) a control premium of 23.4%; (ii) a discount for lack of marketability of 19.7%; and (iii) a company specific discount of 40%, arriving at an average comparable quoted companies EBITDA net multiple of 5.2;

(d) for the average published EBITDAs from three comparable private company transactions of 5.9, Mr Lewis applies a company specific discount of 20%, reducing the average comparable private company transactions multiple to 4.7;

(e) Mr Lewis says that he considers the correct overall EBITDA multiple to be in the range 4.7 - 5.2 (the net EBITDA multiples calculated by Mr Lewis from the comparable private company transactions and comparable quoted companies after applying discounts and premiums respectively, identified by Mr Lewis); and

(f) multiplying Mr Lewis's Maintainable EBITDA of £762,000 by the midpoint between 4.7 and 5.2, of 4.95 gives an Enterprise Value for PLC of £3,774,000 excluding the 11 Issues and an Enterprise Value of £3,832,000 including the 11 Issues (Maintainable EBITDA of £774,000 x 4.95 = £3,832,000).

Calculation of Equity Value

282. In order to calculate the Equity Value of PLC and hence the Equity Value of ABPT, the experts agree that their Enterprise Value figures should be adjusted for excess working capital and surplus cash which should be added to their respective Enterprise Values. Mr Lewis, but not Mr Bell, then deducts from his Enterprise Value, a Capital Expenditure Requirement that he considers a purchaser of ABPT's shares would take into account, but Mr Bell does not.

283. Both experts make adjustments for excess working capital and surplus cash, by adding those values to their respective Enterprise Values. Mr Bell calculates excess working capital and surplus cash at a total of £3,593,000. Mr Lewis calculates excess working capital at £1,883,000 and surplus cash at £1,780,000 (a total of £3,663,000) a difference of £70,000. That difference was not explained in the Joint Report, but, in response to a request from me the experts have explained what the difference is and their respective opinions upon it.

284. Mr Lewis deducts from his Enterprise Value, £1.8m which he considers to be an appropriate adjustment for what he identifies as a short-term investment required to replace PLC's worn out plant and machinery. Mr Lewis considers that the replacement of worn out plant and machinery would not result in any increase in PLC's profitability to offset against that required capital expenditure. Mr Bell considers that if such plant and machinery were replaced (which he does not accept it needs to be) then this would result in an improvement in PLC's profitability which would increase maintainable EBITDA.

The Issues

285. In summary the issues on which the experts are not agreed, which I need to resolve are:

(a) in calculating Maintainable EBITDA:
   (i) should Maintainable EBITDA be calculated: - in accordance with Mr Bell's approach of calculating a simple average of EBITDA for the financial years ending 31/5/21, 31/5/22 and 31/5/23 (including six months of projected figures in the latter accounts); or - in accordance with Mr Lewis's approach, by calculating the average EBITDA margin over the period 1/6/19 - 30/11/22 and applying that EBITDA margin to PLC's revenue of £21.9m in the 12 months to 30/11/22?
   (ii) should Maintainable EBITDA be adjusted in accordance with the adjustments made in the signed version of PLC's 31/5/21 accounts, when compared to the draft accounts and if so what adjustment should be made? and
   (iii) should Maintainable EBITDA be adjusted for the 11 Issues?
(b) in calculating the Multiple:
   (i) should I prefer: - Mr Bell's approach of using comparable quoted companies' data, comparable private company transaction data <u>and</u> the BDO PCPI; or Mr Lewis's approach of only using comparable quoted companies' data and comparable private company transaction data and whose data should I prefer for comparable quoted company and private company transactions?
   (ii) should I prefer Mr Bell or Mr Lewis's approach to the calculation of the appropriate discounts to be deducted from the EBITDA multiple? and
   (iii) should I prefer Mr Bell or Mr Lewis's approach to the calculation of appropriate premiums to be added to the EBITDA multiple?
(c) additions and deductions from Enterprise Value to arrive at Equity Value:
   (i) what is the correct figure for excess working capital and surplus cash and assets to be added to the Enterprise Value? and
   (ii) should there be a deduction from Enterprise Value for a capital expenditure requirement, as Mr Lewis says and if so what deduction?

286. A few days before the start of the Remedies Hearing, Paul's solicitor sent to both experts revised accounts for the financial year to 31/5/23 purporting to show that rather than making a profit of £541,000, as shown in the draft accounts sent to the experts PLC had made a loss of £826,000. Mr Auld said that I should take the new figures into account in deciding on PLC's Equity Value.

287. During their cross examinations, both Mr Bell and Mr Lewis were asked whether, in deciding on the Equity Value of PLC, the new draft accounts for the period ending 31/5/23 should be taken into account. Both experts said that they should not be taken into account, because it was unclear what the adjustments made to the draft accounts previously provided were in order to arrive at the new loss figure of £826,000 and unclear what the justification for those adjustments was. It was, they both said, in any event, not possible from the figures contained in the new balance sheet to determine what non-recurring items were included in those figures. Without that information, both

experts agreed that they could not recalculate Maintainable EBITDA and even if they could calculate it, they could not be satisfied that such recalculation was justified or appropriate. I accept the opinion of both experts and will not adjust the Equity Value of PLC (and therefore of ABPT) to take account of the revised draft accounts for the period ending 31/5/23, supplied a few days before the start of the Remedies Hearing.

Maintainable EBITDA Some General Points

288. Maintainable EBITDA is a prediction of future EBITDA, it may be based upon past results, future projections, or a combination of the two. Mr Bell has based his calculations on unsigned accounts and projections for the period 1/6/20 – 31/5/23, being 30 months of reported results 1/6/20 - 30/11/22 and 6 months of projections 1/11/20 - 31/5/23. Mr Lewis has based his calculations on reported results for the 42 month period 1/6/19 – 30/11/22. Adjustments are made by both experts for items which they consider to be non-recurring, because such non-recurring items would not, by their very nature, affect future EBITDA.

289. Although Mr Lewis bases his calculations of maintainable EBITDA, solely on past results, those past results were (other than the accounts to 31/5/20) contained in draft unaudited accounts, which carry with them the risk that they may be adjusted in the future as part of the audit process or otherwise before they are signed (as happened for the signed 31/5/21 accounts).

290. PLC's turnover (although not EBITDA) was relatively consistent for its financial years ending 31 May 2018 – 31 May 2020, but then fluctuated significantly in the following years. Such fluctuations would appear largely to be accounted for by the effects on PLC, in common with many businesses, of the Covid outbreak and lockdowns associated with it that lasted from around March 2020 until the summer of 2021 and the invasion of Ukraine by Russia which occurred in February 2022 and is ongoing. Care therefore needs to be taken in considering the financial statements of PLC, as a basis for projecting future EBITDA.

Issue (a) (i) The Appropriate Financial Statements to use and Approach to Calculating EBITDA

291. In the Joint Report the experts agree the adjustments which are appropriate for non-recurring items in order to calculate maintainable EBITDA. I accept those adjustments.

292. Mr Bell uses financial statements for PLC for the financial years ending 31/5/21 - 31/5/23, a period of 36 months, including five months of projected results to 31/5/23 and calculates Maintainable EBITDA for each period.

293. Mr Lewis uses the financial statements of PLC for the financial years ending 31/5/20 - 31/5/22 and the 6 months of results for the period ending 30/11/22, a period of 42 months and calculates Maintainable EBITDA for each period.

294. Mr Bell takes an average of his calculated maintainable EBITDA figures for the financial years ending 31/5/21 - £1,660,000; 31/5/22 - (£300,000) and 31/5/23 - £1,117,000, to arrive at his Maintainable EBITDA figure of £826,000.

295. Mr Lewis calculates the average maintainable EBITDA margin for the period 1/6/19 – 30/11/22 to be 3.3% and then he applies this margin to PLC's turnover for the 12 months ending 30/11/22 of £21,983,000 to arrive at his Maintainable EBITDA figure of £762,000.

296. Mr Bell says that he has used the figures for the three financial years to 31/5/23, because he considers the figures for the financial year to 31/5/23 (including five months of projections) to be more relevant than those for the financial year to 31/5/20, in terms of assessing maintainable EBITDA. Mr Bell considers that Mr Lewis's failure to include the figures for the 6 months to 31/5/23 means that management's most recent assessment of PLC's financial performance has not been taken into account by him.

297. Mr Lewis considers the financial information for the year 31/5/20 is relevant as it enables him to include in his calculations, three years of actual results. Mr Lewis says that he has not considered the 6 months figures to 31/5/23 because, where forecast figures are included in a maintainable EBITDA calculation they are normally included for a 12 month period and if that is done, then an additional discount to the multiple is applied (which Mr Bell has not applied) to take account of the risk associated with using figures which have been forecast, as opposed to actual results.

298. I prefer the approach of Mr Lewis, both as to the financial statements used and his approach to calculating maintainable EBITDA for the following reasons:

(a) Mr Bell makes the point that Mr Lewis's approach does not take account of the managements most recent assessment of PLC's likely future performance. In contrast, Mr Lewis draws attention to projected figures being less reliable than actual results and to the practice, if projections are used to calculate Maintainable EBITDA, of applying a specific discount to the multiple, to reflect that greater risk, which he says Mr Bell has not done. Mr Bell does not deny the practice to which Mr Lewis refers, or that he has applied no discount to his multiple to reflect his use of projected figures; and

(b) whether: Mr Bell's point that Mr Lewis has failed to take into account the management's most recent view of PLC's likely future performance; or Mr Lewis's point that Mr Bell's approach of taking into account projected figures is inherently less reliable than figures based upon actual past trading, has more force depends to an extent at least on the reliability of the management projections. The less reliable the projections are, the more force there is to Mr Lewis's position of not relying on those projections. I am not satisfied that managements' projections, provided to the experts for the period ending 31/5/23 are reliable for the following reasons: (i) PLC is significantly behind in producing audited accounts; (ii) amendments of a material nature appear to have been made to the draft accounts provided to the experts for 31/5/21 before they were audited and signed; and (iii) whilst I have accepted the opinion of both experts that the substantial

amendments made to the draft accounts for the period ending 31/5/23, supplied to the experts a few days before the Remedies Hearing should not be taken into account, the fact that Paul's solicitors sent revised accounts prepared by PLC's management for the period ending 31/5/23, to the experts, a matter of days before the Remedies Hearing purporting to show that a projected profit in the draft accounts previously given to the experts of £1,117,000 had turned into a loss of (£826,000) suggests that the projections contained in the accounts to 31/5/23 provided to the experts are unreliable.

299. Prior to any adjustments to reflect amendments to the 31/5/21 accounts and the 11 Issues adjustments, Mr Lewis's figure for Maintainable EBITDA is £762,000 and I accept that figure.

Issue (a) (ii) Should Maintainable EBITDA be Adjusted to Reflect Amendments to the 31/5/21 Accounts?

300. Mr Bell has made adjustments to his Maintainable EBITDA figure, following late adjustments made to PLC's accounts for the period ending 31/5/21, before they were signed. Those adjustments overall result in Mr Bell reducing his Maintainable EBITDA figure from £826,000 to £815,000. Mr Lewis has not updated his calculations for the adjustments made to the signed financial statements for the period ending 31/5/21.

301. I consider that adjustments should be made to reflect the amendments to the audited and signed accounts for the period ending 31/5/21, because those accounts have gone through an audit process and have been approved and signed off by the directors of PLC and for those reasons, in my judgment, should be treated as more reliable than the unsigned unaudited accounts.

302. Mr Bell has not however adjusted his Maintainable EBITDA figure for all of the adjustments which have been made to the signed accounts for PLC's financial year to 31/5/21. He has made no adjustment for the following three items:

(a) a new water accrual of £120,000 for the 30 month period 1/12/18 - 31/5/21. The water accrual is referred to in an email from Paul's solicitors to the experts dated 14/4/23. The email confirms that Mr Sharratt expects the charges to be credited once a water sub - meter is installed which he considers will demonstrate that PLC's actual water emissions make the accrual unnecessary. Mr Sharratt estimated the apportioned cost to PLC of the accrual in its financial year ending 31/5/21 at £40,000;
(b) a carry-over of a holiday accrual of £89,000 due to the impact of Covid is added back, by Mr Bell as a non-recurring item; and
(c) additional audit fees of £48,000 are added back by Mr Bell, as a non-recurring item.

303. Mr Lewis has considered whether, on the basis that, contrary to his opinion, adjustments should be made to Maintainable EBITDA to reflect amendments to the

31/5/21 accounts, Mr Bell is right to make no adjustment for the three items set out in paragraph 302 above. Mr Lewis does not dispute that the holiday accrual and additional audit fees are non-recurring items which should be excluded from the calculation of Maintainable EBITDA, but he says that, because PLC may become liable to higher water charges in the future, a purchaser of PLC's shares would seek a discount off the purchase price to reflect this risk.

304. I am satisfied that Mr Bell is right to make no adjustment to his Maintainable EBITDA figure for the water accrual, holiday accrual and additional audit fees. Mr Lewis accepts that the holiday accrual and additional audit fees should be treated as non-recurring items and by their very nature, they appear to me to fall into that category. So far as the water accrual is concerned, on the basis that Mr Sharratt considers that potential water charges included in the accrual are not properly chargeable, I consider that, on the balance of probabilities, a potential purchaser would be persuaded that the accrual was unnecessary and should not therefore result in the purchase price for ABPT's shares being discounted.

305. As I have decided that Mr Lewis's calculation of Maintainable EBITDA is to be preferred, save for these adjustments, Mr Lewis's Maintainable EBITDA figure of £762,000 should be adjusted to reflect the adjustments made to the draft accounts for PLC's financial year ending 31/5/21, in the signed version of those accounts, but not taking into account the water accrual, holiday accrual and additional audit fees.

Issue (a) (iii) should Maintainable EBITDA be adjusted for the losses made by PLC as a result of the 11 Issues?

306. In my judgment Mr Lewis's figure for Maintainable EBITDA of £762,000, after being adjusted for the matters set out in paragraph 305 above, should be further adjusted to take account of those losses that I have determined PLC suffered as a result of the 11 Issues, insofar as PLC's EBITDA would have been higher in the accounts that Mr Lewis relies on in calculating Maintainable EBITDA, if PLC had not incurred those losses. There are two reasons for this: (a) the losses represent non-recurring items; and (b) in calculating the value of Paul's shares in ABPT (for the purpose of the order I have decided to make that Andrew purchase those shares) I have determined (see paragraph 370 below) that the price at which Andrew purchases Paul's shares should be reduced by 44.4% of the value of PLC's losses caused by Paul. It is right in those circumstances that the Equity Value of ABPT's shares should be increased to reflect those non-recurring losses.

Issue (b) (i) The Appropriate Data to use to Calculate the Multiple

307. Mr. Lewis says that the International Valuation Standards Council recommends the use of the market approach where there are frequent and/or recent observable transactions in substantially similar assets. Both he and Mr Bell have identified comparable quoted companies and comparable private company transactions. The BDO PCPI is derived from EBITDA multiples paid by trade and private equity buyers for UK private companies generally, not just companies with comparable businesses to PLC.

Using the BDO PCPI would only be appropriate, if comparable transactions could not be identified. Excluding the BDO PCPI from Mr Bell's assessment of the multiple would reduce Mr Bell's multiple from 6.71 to 6.14.

308. Mr Bell does not agree that using the BDO PCPI multiple is not appropriate, in cases where comparable quoted companies and private company transactions have been identified. The comparably private company transactions identified by Mr Bell and Mr Lewis are dated 18 months or more prior to the date of the experts reports and market conditions have changed during this time, Mr Bell says. The BDO PCPI gives market information on multiples of EBITDA being paid for private companies, in the last complete quarter prior to the date of the experts' valuations (3/3/23).

309. During his cross examination, I asked Mr Bell whether, if the purpose of using the BDO PCPI was to update the comparable private company transaction data identified by Mr Bell for changes in market conditions, a more satisfactory way of doing so might be to apply the increase in the BDO PCPI over the 18 month period prior to the date of his report. Mr Bell described this suggestion as "interesting".

310. At the end of the Remedies Hearing I asked the experts to adjust their calculations to take into account the increase in the BDO PCPI for the 18 months prior to the date of their reports.

311. I accept Mr Bell's point that there have been substantial changes in the UK and world economies over the period of 18 months prior to March 2023. That period starts just after the ending of COVID lockdown restrictions in the summer of 2021 and includes the invasion of Ukraine by Russia in February 2022 and events in that conflict thereafter. Some mechanism for dealing with any variation in EBITDA multiples over this period is, in my judgment, appropriate but I do not consider that including the BDO PCPI data for the last quarter of 2022, as one of the sources for calculating the multiple is appropriate. As Mr Lewis points out, the BDO PCPI is not based upon private companies operating comparable businesses to PLC and therefore the data for comparable private company transactions obtained by Mr Bell/Mr Lewis would be affected by including the BDO PCPI data for the last quarter of 2022, not only to reflect changes in economic conditions in the UK but also the myriad of different businesses included in the BDO PCPI which are not comparable to the business carried on by PLC.

312. In my judgment, the most accurate multiple is likely to be obtained by:

(a) combining the comparable private company transaction data identified by both Mr Bell and Mr Lewis (five private company transactions in total) which provides the largest comparable data sample for the calculation; and
(b) increasing the multiple derived from the combined private company transaction data, by the increase in the BDO PCPI over the 18 month period prior to March 2023 and I direct that this aspect of the EBITDA Multiple should be calculated in that way.

Issue (b) (ii) Is Mr Bell's or Mr Lewis's Approach to the Calculation of Discounts to the EBITDA Multiple to be preferred?

313. Mr Bell calculates an average EBITDA multiple of 7.33 from data he has obtained for four comparable quoted companies. He applies a discount of 30% to that figure for "risk and marketability".

314. Mr Bell calculates an average EBITDA multiple of 10.64 from data he has obtained for two comparable private company transactions. Mr Bell applies three discounts to that multiple: (a) a discount of 10% for the smaller size of PLC, compared to the comparable private company transactions; (b) a discount of 10% to take account of the fact that only publicly available information has been used; and (c) a discount of 10% to reflect the fact that the two transactions Mr Bell has identified are historic (one taking place in February 2019 and one in February 2021).

315. I have decided that the BDO PCPI should not be used to calculate the EBITDA multiple and therefore the discounts that Mr Bell applies to the BDO PCPI EBITDA multiple are not relevant and I will not consider them.

316. Mr Lewis calculates an average EBITDA multiple of 8.8 from the data he has obtained for nine comparable quoted companies. He applies two discounts to that average EBITDA multiple: (a) a discount for lack of marketability of 19.7%; and (b) a company specific discount of 40%.

317. Mr Lewis calculates an average EBITDA Multiple of 5.9 for the two comparable private company transactions that he has obtained data on and applies a company specific discount of 20% to that average EBITDA multiple.

Comparable quoted company discounts

318. Mr Lewis's company specific discount of 40% comprises four elements: (a) a discount because PLC is smaller than the nine quoted companies upon which Mr Lewis obtained data; (b) a discount for uncertainty over the continuation of PLC's contracts with key customers; (c) a discount for PLC being dependent on a relatively small number of key customers, for the majority of its turnover; and (d) a discount for the negative impact on PLC of media attention surrounding Andrew. During his cross-examination, I asked Mr Lewis how much of the company specific discount of 40% he attributed to each of those four elements. Mr Lewis said that the discount was split equally between each of the four elements (that is 10% each).

319. Mr Bell's discount of 30%, includes both lack of marketability and risk. Mr Bell describes the risk element as the risk represented by PLC having a smaller asset base and limited income stream and spread of business, when compared to the four comparable quoted companies upon which Mr Bell obtained data. As I will explain shortly, the "risk" element of Mr Bell's discount of 30% includes issues covered by the

first three elements of Mr Lewis's company specific discount (items (a) -(c)) although Mr Bell attributes a significantly smaller discount to those risk elements than Mr Lewis does.

320. A marketability discount is a discount to reflect the fact that a minority shareholding in a private company (such as those of Paul and Andrew) is not easily saleable, whereas shares in a quoted company can easily be bought and sold on the stock exchange or other public exchange.

321. I will deal with Mr Lewis's company specific discount of 40% first.

322. Mr Lewis accepted that a company specific discount, if applied, is typically in the range 20 – 40% and that his company specific discount is therefore right at the top of that typical range.

323. The experts agree that applying a discount because the subject company (in this case PLC) is smaller than the identified comparable quoted companies, used to calculate the EBITDA multiple, is normal practice. Mr Lewis applies such a discount as part of his overall company specific discount of 40% (attributing 10% to this element of the overall discount) and Mr Bell applies it as part of the risk element of his marketability and risk discount of 30%.

324. The experts agree that uncertainty over future contracts could attract a discount. Mr Lewis says that PLC's contract with Lidl is its most significant contract amounting to 35% of its turnover in the financial year to 31/5/22. The current (at the time of Mr Lewis's report) contract with Lidl was due to end on 31 August 2023. Fresh Direct, PLC's second largest customer, accounting for 10% of its turnover in the financial year to 31/5/22 have three contracts with PLC ending in April and July 2023. PLC's third largest customer, Bidford has price agreements with PLC running for three and six months. Mr Lewis had not seen a written contract with PLC's fourth largest customer, Brake Bros. In the year to 31/5/22 those four customers accounted for around 75% of PLC's turnover. Mr Lewis considered that the short-term nature of the contracts represents a risk, but he accepted that he had not been informed of any specific risk that any of the contracts would not be renewed, or only renewed on less favourable terms for PLC.

325. Mr Bell pointed out that (apart from Covid affected trade) PLC's turnover had consistently grown over the years and absent a specific identified risk of a major customer not renewing their contract with PLC, he did not consider that a specific discount for the risk of contracts not being renewed or only being renewed on terms material less advantageous to PLC, should be applied.

326. Mr Lewis said that in the last three financial years, over 90% of PLC's turnover has been generated by 15 or fewer customers and, as already noted that in the financial year to 31/5/22, 75% of PLC's turnover was accounted for by its top four customers. Relying on such a small number of customers, in Mr Lewis's view, exposed PLC to a risk, if one or more of those customers ceased trading with PLC, for which he considered a discount of 10% should be applied.

327. Mr Bell considered that 15 customers was not a particularly small number of customers and that, as far as Mr Lewis's point about uncertainty concerning key customers renewing their contracts was concerned, absent a specific threat of a key customer not renewing their contract, no discount should be applied for that risk.

328. Mr Lewis considered that media attention surrounding Andrew, connected with him being a controversial MP, has and could in the future, adversely affect PLC, which someone considering purchasing ABPT's shares will be likely to take into account in deciding what price they were willing to pay for them. Mr Lewis accepted that he had never applied such a discount before, but he thought the position of PLC and Andrew was exceptional and justified a discount of 10%.

329. Mr Bell considered that there was no evidence that media attention surrounding Andrew had adversely affected PLC's turnover or profitability and therefore a discount was not appropriate.

330. PLC's contracts with its customers are short-term contracts, but I have no evidence before me that the targets of the comparable quoted companies identified by Mr Bell/Mr Lewis have anything other than short term contracts with their customers. PLC has not informed either expert of a risk of a contract with a major customer not being renewed and I accept Mr Bell's point that PLC's turnover has consistently increased over the years, notwithstanding that it is likely (I have no evidence to the contrary) that PLC has always had short-term contracts, at least with its most significant customers. I am not satisfied that a separate company specific discount should be applied for the risk of major customers not renewing their contracts or only agreeing to renew them on terms unfavourable to PLC, but I will consider the point as part of what Mr Bell categorises as his general marketability and risk discount.

331. There is considerable overlap between Mr Lewis's discount for there being a risk of PLC's most significant customers not renewing their contracts and his discount for PLC being dependent on a relatively small number of customers. Both relate to the risks associated with PLC being dependent on a small number of customers for a large proportion of its turnover combined with not having long term contracts with its largest customers, exposing PLC to the risk that those contracts will not be renewed or that these major customers may leverage their importance to PLC, to negotiate terms of supply, in the future, which are materially less favourable to PLC. I do not consider that a separate discount for PLC being dependent on a small number of customers is appropriate, but I will consider this point when considering the appropriate size of Mr Bell's general marketability and risk discount of 30%.

332. I do not consider that any discount should be applied for, what in Mr Lewis's view, is the adverse effect of Andrew's position as a controversial MP on PLC, for the following reasons:

(a) Mr Lewis relies on no specific evidence of Andrew's profile having had an adverse effect on PLC;

(b) Andrew's profile could, in certain circumstances, have a positive effect for PLC, for example he may have influence with important people which may be of assistance to PLC's business. The fact that Andrew has persuaded Mr Hosking, a very wealthy individual, to advance large sums of money to him to enable him to fund this litigation and to finance the purchase of Paul and other shareholders shares in ABPT and BIL helps, in my judgment, to support that conclusion; and
(c) if Andrew has had an adverse effect on PLC's business historically then this will be reflected in a reduced Maintainable EBITDA for PLC, and there will be an element of double counting for that effect, in discounting the multiple which is applied to the Maintainable EBITDA, in order to calculate PLC's Enterprise Value.

333. Mr Lewis applies a discount for lack of marketability of 19.7%. Mr Bell applies a discount of 30% for lack of marketability and the risk associated with PLC having a small asset base and limited income stream and spread of business. The first element of Mr Lewis's company specific discount of 40% is that PLC is smaller than the nine comparable quoted companies he obtained data on. The risk elements included in Mr Bell's marketability and risk discount of 30% (small asset base and limited income stream and spread of business) all refer, or substantially refer to PLC's size relative to the four comparable quoted companies that Mr Bell obtained data on. Mr Lewis's second and third elements of his company specific discount (PLC being dependent on a relatively small number of key customers and to a lesser extent uncertainty concerning renewal of their contracts) are also linked, although less so, to the size of PLC compared to the comparable quoted companies identified by Mr Bell and Mr Lewis.

334. It is unclear what element of Mr Bell's general discount of 30% applies to lack of marketability and what element to risk, but if Mr Lewis's lack of marketability discount of 19.7% is deducted from Mr Bell's overall discount of 30%, this would leave a risk element of 10.3%. Given the lack of specific threat of major customers not renewing contracts or only renewing them on terms unfavourable to PLC and that PLC has historically grown its turnover in spite of those risks, I consider that an overall discount of 10.3% would be adequate as a general discount for the risk represented by PLC being smaller than the comparable quoted companies identified by Mr Bell and Mr Lewis and having a limited asset base, income stream and spread of business. A discount of 30% should therefore be applied to the EBITDA multiple of 8.8 that Mr Lewis has obtained from his analysis of the data of nine comparable quoted companies (four of which are the same quoted companies as Mr Bell obtained data on).

Comparable Private Company Transactions Discount

335. Mr Bell applies three discounts to the comparable private company transaction data he has used, namely: (a) a discount of 10% for the smaller size of PLC, compared to the comparable private company transactions; (b) a discount of 10% to take account of the fact that only publicly available information has been used; and (c) a discount of 10% to reflect the fact that the two transactions Mr Bell has identified are historic (one taking place in February 2019 and one in February 2021).

336. Mr Lewis applies a specific discount of 20% to the comparable private company transactions data that he has used.

337. Mr Bell provides little explanation, beyond the description of the three discounts, as to why he has applied them, other than saying that owner managed businesses reported profits are often suppressed by discretionary expenditure which would not re-occur under a new owner, the effect of which is that the deal value may overstate the multiple and that is why he applies a 10% discount, on the basis that only publicly available information has been used.

338. Mr Lewis provides no explanation for his discount of 20% and neither expert was challenged in cross examination on the discount that they apply to comparable private company transactions.

339. I prefer Mr Bell's approach to the appropriate discount, in that he breaks down his discount of 30% into three parts and provides at least some explanation of why he has applied the discount for one of those parts. In contrast, Mr Lewis put his discount of 20% under the general heading of "company specific adjustment" he explains that he has applied a much smaller discount to his transaction multiple than he applied to his quoted company multiple, because the size difference between PLC and the private company transactions is not as large as the size difference between PLC and the quoted companies on which he has obtained data.

340. A discount of 30% should therefore be applied to the comparable private company transactions multiple which should, as previously directed (see paragraph 312 (a) above) be calculated from all five of the comparable private company transactions identified by Mr Bell and Mr Lewis.

The Premium to be Applied to the Multiple

341. Mr Bell applies a control premium of 15%, to the EBITDA multiple data he obtained for five comparable quoted companies and no premium for the data obtained by him from two comparable private company transactions.

342. Mr Lewis applies a control premium 23.4%, to the EBITDA multiple data he obtained for nine comparable quoted companies and no premium for the data obtained by him from two comparable private company transactions.

343. Mr Lewis explains why a control premium is applied. He says that, if a purchase of shares gives the purchaser a sufficient proportion of the company's shares to give them influence over such issues as the payment of dividends and the strategic decisions of the directors, then the purchaser will typically pay a premium to purchase those shares. In contrast shares purchased in a quoted company are often purchased in small blocks which rarely give the purchaser any say about what the company does.

344. Mr Lewis explains that he has applied a control premium based upon a control premium study published by Business Valuation Resources LLC for the third quarter of 2022, which shows the average control premium for entities in the “food and kindred products” sector is 23.4%.

345. Mr Bell does not explain how he calculates his control premium of 15% other than to say that such matters are based upon experience and judgment.

346. In this case Andrew will acquire Paul’s shares giving Andrew 88.8% of the share capital of ABPT, easily giving Andrew effective control over ABPT and its subsidiary, PLC. A control premium is clearly justified in those circumstances.

347. I prefer Mr Lewis’s calculation of a control premium of 23.4% which he explains is based upon a control premium survey carried out in the third quarter of 2022 and that the figure 23.4% applies to the “food and kindred products” sector which would include PLC’s food business. In contrast, Mr Bell’s figure for a control premium of 15% is based upon his knowledge and experience which appears to me to be unlikely to be as accurate as Mr Lewis’s figure, based as it is on an up to date survey of discounts applied in the right sector.

348. A control premium of 23.4% should therefore be applied to the data obtained by Mr Lewis for nine comparable quoted companies.

Issue (c) (i) The correct figure for excess working capital and surplus cash and assets, to be added to the Enterprise Value?

349. There is a small difference between the experts as to what excess working capital and surplus cash and assets should be added to their respective Enterprise Values of PLC. The difference is £70,000. In response to a request from me the experts provided a note explaining the difference of £70,000 and their respective positions in relation to that difference.

350. There is a difference of £6,000 between Mr Bell’s figure of £1,889,000 for intercompany trading balances and Mr Lewis’s figure for intercompany trading balances of £1,883,000. Mr Lewis now accepts that his figure should be increased by £6,000.

351. Mr Bell includes in his figure a bank overdraft of PLC of £76,000 outstanding as at 31 January 2023, his valuation date. As at 30 November 2022, Mr Lewis’s valuation date, PLC had a positive balance at its bank and Mr Lewis notes that the balance at PLC’s bank varies from month to month. I am not satisfied, given the transitory nature of PLC’s bank balance, that it is appropriate to include the overdraft of £76,000 as at 31 January 2023 as surplus cash. The balance in PLC’s bank account as at 31 January 2023 may merely reflect the timing of payments into and out of that account, rather than a permanent cash deficit.

352. The figure for excess working capital is £1,889,000 and the combined figure for excess working capital and surplus cash and assets is £3,669,000.

Issue (c) (ii) a deduction from Enterprise Value for a capital expenditure requirement

353. In his report dated 3 March 2023, Mr Lewis says that, in his opinion, a deduction should be made from the Enterprise Value of PLC for its short term capital expenditure requirement for plant and machinery. Mr Lewis suggests a deduction of £1.8m should be made for this. The basis of Mr Lewis's opinion is, in summary that:

(a) in its accounts for the year ending 31 May 2018, the value of PLC's fixed assets was recorded at £4.5m, whereas, as at 31 May 2023, the forecast value of PLC's fixed assets is only £200,000, after applying depreciation;
(b) since the beginning of PLC's financial year to 31 May 2017, PLC has spent less than £750,000 in total on plant and machinery;
(c) historically PLC appears to have made significant investments in fixed assets on a 10 year cycle, first in 2004 and then in 2014 – 2016. If PLC continued to invest in plant and machinery consistent with that 10 year cycle, it would make a further substantial investment in plant and machinery in 2024;
(d) Mr Lewis has not been provided with any forecast for PLC to incur capital expenditure on plant and machinery, but based upon (a) – (c) he would expect that significant expenditure will need to be incurred in replacing PLC's plant and machinery in the near future;
(e) Mr Lewis has been provided with a presentation for a proposed investment in new peeling line machinery dated 12 April 2019. The new peeling line machinery would have cost £2.1m, but the investment did not proceed. Mr Lewis accepts that the presentation suggests that investing in the new peeling line machinery would enable PLC to save money on materials and labour, but he says that he is unable to verify those suggested cost savings; and
(f) Mr Lewis has included an "illustrative" amount of £1.8m in his valuation. This figure is the average of expenditure incurred by PLC in its financial years 31/5/14 – 31/5/16, which he considers to be indicative of the level of investment in plant and machinery necessary for PLC to maintain its level of operational efficiency.

354. Mr Bell does not include, in his valuation report of 3 March 2023, any deduction from PLC's Enterprise Value for a capital expenditure requirement.

355. In the expert's Joint Report, upon the valuation of ABPT's shares:

(a) Mr Bell acknowledges that he has not included an adjustment for any short-term investment in PLC's plant and machinery, he says that:

(i) Mr Lewis has not added back operational savings and efficiencies that would be likely to be achieved if an investment of £1.8m was made in plant and machinery by PLC. Mr Lewis appears to have assumed that any such investment would simply replace worn out machinery, resulting in the existing level of profitability of PLC being maintained; and

(ii) the presentation for the new peeling line machinery suggests that cost savings of £1m per annum would be achieved from installing the new machinery. If this is correct then it would mean that PLC's maintainable EBITDA would increase if the investment were made, as a result of that investment; and

(b) Mr Lewis says that:

(i) the investment requirement of £1.8m, in plant and machinery which he has proposed would simply result in the replacement of worn out plant and machinery and not involve efficiency savings; and

(ii) he accepts that the actual level of expenditure required is not within his expertise, but he says that a potential purchaser, in his opinion, would be likely to make an adjustment, according to their own assessment of the level of short-term investment required in plant and machinery. Mr Lewis notes that Mr Barton, in his marketability report accepts that any purchaser would want to ensure that PLC's plant and machinery, is in good order.

356. In answer to questions asked of him in cross-examination, Mr Lewis said that, in carrying out a valuation of shares, he always looks at the capital asset profile of the index company over the years. He noted that the value of PLC's capital assets had been falling and was now virtually written down to nil, which he believed indicated that PLC's plant and machinery had reached the end of its useful economic life, given that PLC's depreciation policy should be set, by reference to the nature of the asset being depreciated. When he was asked about why he had not taken into account any cost savings that might be achieved by acquiring new plant and machinery, Mr Lewis pointed out that he had also not taken into account the cost of financing the purchase of the new plant and machinery.

357. During his cross-examination, Mr Bell said that, even if money was spent simply upon replacing worn out machinery, with similar, but new machinery, that new machinery was likely to operate more efficiently and require less repair and maintenance than the old machinery. Mr Bell said that he was not given any information to suggest that capital expenditure on plant and machinery was necessary and that he would only make an adjustment to his valuation for capital expenditure on plant and machinery, if he was told that it was necessary for PLC to incur such expenditure, for example in a financial forecast. The fact that PLC's plant and machinery was practically written down to nil, did not, in Mr Bell's view, mean that it needed to be replaced. He also pointed out that the peeling line presentation suggested that the investment of £2.1m would result in cost savings that would pay back that investment in 2.08 years.

358. Mr Auld made submissions which reiterated the points that Mr Lewis has made. Mr Auld said that Mr Bell was wrong to assume that simply because he had not been presented with any information that PLC was planning to replace plant and machinery that no provision should be made for it, in his valuation. A purchaser would, said Mr Auld, recognise the need for a substantial investment in plant and machinery from inspecting PLC's accounts, as Mr Lewis had done.

359. Mr Zaman said that, if Mr Lewis were right, that PLC made substantial capital investments in plant and machinery in 10 year cycles and a new 10 year cycle was due to commence in less than 12 months' time, then such expenditure would be included in PLC's future projections but it was not. Further, Mr Lewis's failure to accept that any cost savings and efficiencies would flow from expenditure on new plant and machinery was clearly wrong, as illustrated by PLC's own projections, in the peeling line presentation.

360. I accept that any purchaser of ABPT's shares will be concerned about whether significant amounts of capital expenditure would be required, particularly in the short-term, in PLC's plant and machinery. This is Mr Lewis's opinion, Mr Barton's opinion and Mr Bell does not say otherwise.

361. Any need to invest in new plant and machinery brings with it the opportunity for that investment to result in cost savings for PLC which would improve its profitability going forward, after the investment has been made. This opportunity is illustrated by the presentation for the new peeling line which appears to have been prepared by someone at PLC (it is unclear who) using information provided by the manufacturer of the peeling line. The presentation suggests that cost savings would result in the investment of £2.1m being recovered, by those cost savings within 2.08 years. I accept of course that this may be an optimistic projection, but nonetheless, it illustrates the point that investment in new, more modern plant and machinery can bring with it the opportunity for significant costs savings.

362. Mr Lewis says that he has assessed a short term capital expenditure requirement on the basis that PLC would simply replace existing worn out plant and machinery, resulting in no cost savings. Technology however moves on and it is unlikely, in my judgment, that any significant investment of the type that Mr Lewis suggests would be contemplated by a potential purchase of ABPT's shares, would simply replace like for like plant and machinery and would not result in more cost effective production, or at the very least, as Mr Bell suggests, reduced repair and maintenance costs. These cost savings could be significant and, as illustrated by the new peeling line presentation, might even result in the cost of the investment being recovered by those cost savings, within a relatively short period.

363. Mr Bell says that he has not made an adjustment to his Equity Valuation of PLC, to take account of the need for short-term investment in plant and machinery, because he has not been provided with any specific information, in projections, or otherwise that there is a need to replace any of PLCs Plant and machinery.

364. Mr Lewis bases his assessment of a short-term capital requirement on: (a) the lack of any significant investment by PLC in plant and machinery since June 2016; (b) his view that PLC has made substantial investments in plant and machinery in 10 year cycles, the last beginning in the financial year to 31 May 2014 and ending in the financial year to 31 May 2015; and (c) the value of PLC's plant and machinery is effectively written down to nil, in its accounts, in accordance with PLC's depreciation policy.

365. Mr Lewis's assessment of the likely cost of short-term investment in plant and machinery that a prospective purchaser is likely to identify, is arrived at by calculating the average annual expenditure incurred by PLC in its three financial years to 31 May 2015.

366. I am satisfied that a prospective purchaser of ABPT's shares would be alerted to the possible need for short-term investment in plant and machinery by the content of PLC's accounts (and also, in all likelihood by their inspection of PLC's production facilities). Such a prospective purchaser might initially carry out a calculation, by looking at PLC's accounts, as Mr Lewis has done, to scope the likely extent of the investment required, however, in my judgment, a prospective purchaser would move on from merely looking at PLC's accounts to investigate what plant and machinery needs to be replaced in the short term, the actual cost of replacing it and what advantages, in terms of cost savings could be achieved by PLC, from carrying out the identified investment.

367. I am satisfied, on the balance of probabilities, based upon Mr Lewis's analysis of PLC's historic accounts, that a prospective purchaser, following investigation into the actual need to replace PLC's plant and machinery in the short term, would conclude that such investment is needed, but absent any evidence as to: (a) objectively, what plant and machinery could reasonably be said to require replacement in the short term; (b) how much the replacement of that plant and machinery would be likely to cost; and (c) any indication at all as to what efficiencies and cost savings would be likely to be achieved by replacing that plant and machinery, I am unable to conclude, on the balance of probability, that a prospective purchaser would conclude that the need for short term investment in plant and machinery for PLC is a factor which would reduce the amount that such a prospective purchaser would be willing to pay for 44.4% of ABPT's shares, or if it did, by how much. For those reasons, I am not satisfied that a deduction should be made from PLC's Enterprise Value for a short term capital requirement for the purchase of plant and machinery.

Summary of Conclusions on the Equity Value of PLC

368. I will need further assistance from the experts in calculating the Equity Value of ABPT, based upon the findings that I have made, which in summary are:

(a) Mr Lewis's figure for Maintainable EBITDA of £762,000 should be used subject to adjustment for items (b) and (c) below;
(b) Mr Lewis's figure or Maintainable EBITDA should be adjusted to take into account the adjustments made in the signed version of the 31/5/21 accounts, other than the provisions made for water accrual, holiday accrual and additional audit fees;
(c) Mr Lewis's figure for Maintainable EBITDA should be further adjusted for the losses I have found were suffered by PLC, as a result Paul causing the Partnership to use PLC's resources, without compensating PLC for that use, insofar as those losses impact on Mr Lewis's calculation of Maintainable EBITDA, from the accounts he has used;
(d) in calculating the EBITDA multiple:
    (i) do not use the BDO PCPI in calculating the EBITDA multiple;

(ii) use Mr Lewis's average EBITDA multiple of 8.8 from data obtained from nine quoted companies; and
(iii) combine the data obtained by both Mr Bell and Mr Lewis for comparable private company transactions to calculate the average EBITDA multiple from those transactions and increase that multiple by the increase in the BDO PCPI in the 18 months prior to March 2023;

(e) apply a discount of 30% to the comparable quoted company EBITDA multiple;
(f) apply a discount of 30% to the comparable private company transaction multiple;
(g) apply a control premium of 23.4 % to the comparable private company transaction multiple;
(h) calculate the EBITDA multiple by taking calculating the average of the net quoted company EBITDA multiple and net comparable private transaction EBITDA multiple;
(h) the figure for excess working capital and surplus cash and assets is £3,669,000; and
(i) no deduction should be made from ABPT's Enterprise Value, for a short term capital expenditure requirement for the purchase of plant and machinery by PLC.

369. The value of Paul's shares, to which no minority discount is to be applied, without any adjustment for the 11 Issues is 44.4% of the Equity Value of ABPT to be recalculated by the experts, in accordance with the findings I summarise in paragraph 368 above.

370. Whilst I have not finally determined what the Equity Value of ABPT is or the value of Andrew and Paul's shares in ABPT I have estimated below, solely for the purpose of considering the appropriate remedy, what the approximate value of Andrew and Paul's shares in ABPT is (which estimate I refer to in paragraph 246 above when dealing with the appropriate remedy):

(a) Mr Lewis's Maintainable EBITDA figure is £762,000, which should be adjusted for: (i) amendments made to the 31/5/21 accounts; and (ii) the effect of the 11 Issues. Mr Bell reduced his Maintainable EBITDA figure from the £826,000, in his report of 3 March 2023 to £815,000 in the Joint Report, to take into account adjustments made to the 31/5/21 accounts. Mr Lewis has increased the value of his Maintainable EBITDA figure from £762,000 to £774,000, to reflect the effect of the 11 Issues on his Maintainable EBITDA figure. I have calculated the losses suffered by PLC from the 11 Issues in different amounts and overall a smaller amount than Mr Lewis calculated the losses at. It appears to me that the effects of the amendments to the 31/5/21 accounts and of the 11 Issues will broadly cancel each other out and so I will use Mr Lewis's Maintainable EBITDA figure of £762,000 as the basis for estimating PLC's Equity Value;
(b) as for the multiple, this is to be arrived at by taking an average of the net multiples for comparable quoted companies and comparable private company transactions.
(c) I have determined that Mr Lewis's multiple for comparable quoted companies of 8.8 should be used. This needs to be reduced by a discount of 30% which reduces it to 6.16.
(d) I have directed that the multiple for comparable private company transactions should be calculated from all five private company transactions identified by Mr Bell and Mr Lewis. Mr Lewis calculates a multiple of 4.95 and Mr Bell 6.71, giving a combined multiple of 5.83. This combined multiple should be increased by the value

of the increase in the BDO PCPI in the 18 months to March 2023 and then discounted by 6.6%. I do not have access to the data for the increase in the BDO PCPI for the 18 months to March 2023 but I will assume it to be 10% for present purposes giving a net multiple from private company transactions of about 6;
(e) the average net multiple is approximately 6.08 (being the average of 6.16 and 6;
(f) the Maintainable EBITDA of £762,000 should be multiplied by the average net multiple of 6.08 giving an Enterprise Value of £4,632,960;
(g) add to the Enterprise Value of £4,632,960 excess working capital and surplus cash and assets of £3,669,000 to give an Equity Value of £8,301,960 for PLC. Andrew and Paul hold shares in ABPT equivalent to 44.4% each of its total issued shares giving an approximate value for their shares of £3,686,070 each (before adjustment of the value of Paul's shares for the 11 Issues.

THE VALUE OF PAUL'S SHARES ADJUSTED FOR PLC'S LOSSES FROM THE 11 ISSUES

371. £200,608.21 should be deducted from the value attributed to Paul's shares in ABPT, to reflect 44.4% of the loss of £451,820.30 which I have calculated PLC suffered as a result of Paul causing the Partnership to use PLC's resources, without properly compensating PLC for that use. The reason for that deduction is that Andrew's shareholding in ABPT (also 44.4%) can be said to have been reduced by £200,608.21, as a result of PLC suffering those losses and the reduction in the price paid by Andrew for Paul's shares therefore forms part of the remedy for Paul's unfairly prejudicial conduct. After deducting £200,608.21 from the value of Paul's 44.4% of the share capital of ABPT, the value of Paul's shares after adjustment for the 11 Issues is approximately £3,485,462. The precise figure will need to be calculated by the experts.