Financial Technology Ventures II (Q), L.P. v ETFS Capital Ltd

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Judge:	Bailiff
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Text

[2021] JRC 25

ROYAL COURT

(Samedi)

Before:

R. J. MacRae, Esq., Deputy Bailiff, and Jurats Olsen and Christensen

Between
(1) Financial Technology Ventures II (Q), L.P.
(2) Financial Technology Ventures II, L.P.
(3) Millennium Technology Value Partners II Holdings, L.P.
(4) Millennium Technology Value Partners II (Master) — B, L.P.
(5) Millennium Technology Value Partners II, L.P.
(6) Millennium Technology Value Partners II-A, L.P.
(7) Sig Growth Equity Fund II, L.L.L.P.
Plaintiffs

and
(1) ETFS Capital Limited
(2) Graham Tuckwell
Defendants

Advocate N. A. K. Williams **for the Plaintiff**.

Advocate S. J. Alexander **for the First Defendant**.

Advocate R. A. B. Gardner **for the Second Defendant**.

Authorities

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Companies Act 1980.

Companies Act 1985.

Companies Act 2006.

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Re Sunrise Radio [2009] EWHC 2893 (Ch).

Re Saul D Harrison & Sons plc [1995] 1 BCLC 14.

Re Coroin [2013] EWCA Civ 781.

Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492.

Re Leveraged Income Fund Limited [2002] JRC 209.

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Peter Exton v Extons Pty Ltd [2017] VSC 14.

Draganfly Investments Limited [2020] JRC 103.

Baird v Lees (1924) SC 83.

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Hawkes v Cuddy [2010] BCC 597.

Virdi v Abbey Leisure Ltd [1990] BCLC 342.

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Companies — decision and reasons following trial

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Bailiff

THE DEPUTY

Introduction

1 These proceedings were tried over a period of four weeks commencing on Monday 19 th

October and concluding on Friday 13 th November 2020. During the trial we heard evidence from fourteen witnesses, thirteen of whom were cross-examined and, where appropriate, re-examined by video link. The statements of all witnesses stood as evidence in chief. Mr Tuckwell gave evidence in Court before us and was cross-examined for four days. We were assisted by extensive opening and closing submissions during the first two days and last two days of the trial. We reserved judgment and now provide our decisions and the reasons for them.

The Parties

2 The case concerns the affairs of the First Defendant, ETFS Capital Limited ("the Company") which was incorporated as a Jersey private company on 20 th August 2004. Until 8 th May 2018 the Company was named ETF Securities Limited.

3 The First and Second Plaintiffs ("FTV") hold 49,075 shares in the Company representing some 22% of the Company's issued share capital. FTV is a private equity firm that partners with management teams in fast-growing companies to accelerate the growth of those companies. FTV was founded in 1998, is based in the United States of America, and has created total investment value of $6.1 billion. It has particular expertise in enterprise technology and services, financial services and payment and transaction processing.

4 The Third to Sixth Plaintiffs ("Millennium") hold 23,613 shares in the Company, representing some 10% of the Company's issued share capital. Millennium is also a private equity investor based in the United States of America. The firm has close to $1 billion in assets under management and has completed more than three hundred investments.

5 The Seventh Plaintiff ("Susquehanna") holds 6,955 shares in the Company, representing some 3% of the Company's issued share capital. Susquehanna is a private equity firm founded in 2006. Its capital comes from Susquehanna International Group, one of the world's largest privately-held financial services firms. Susquehanna says that its capital is *"patient"* and *"not subject to the vagaries of the private equity fundraising cycle"*. It is also based in the United States of America.

6 Accordingly, collectively the Plaintiffs hold approximately 35% of the shares in the Company. The Plaintiffs are all sophisticated investors.

7 The Company, the First Defendant, was represented by counsel before us, but called no evidence, cross-examined no witnesses, and adopted a neutral stance, save that it expressed the wish through counsel that the Company not be wound up and expressed the view through counsel that the potential tax issues which Mr Tuckwell's move to Australia in 2019 may have caused had been resolved (this is detailed below).

8 Graham Tuckwell, the Second Defendant, (“Mr Tuckwell”) is the founder and chairman of the Company. The shares that he holds directly, or indirectly jointly with his wife through their investment company, Rodber Investments Limited, total 130,025, representing 58% of the Company's issued share capital of 225,760 shares. Mr Tuckwell is an entrepreneur from Australia with extensive business experience and the creator of the exchange traded product which for most of its existence has been the main business of the Company. Exchange Traded Funds (“ETFs”) are baskets of securities that can be bought or sold through a brokerage firm on a stock exchange. The popularity of ETFs has grown since their inception in 1993 with global assets under management (“AUM”) in ETFs increasing from approximately $200 billion in 2003 to $6 trillion in 2019. The popularity of ETFs is attributed to low fees, ease of access and liquidity. Different ETFs are designed to track a range of asset classes, for example, Market ETFs track a particular stock exchange index, Bond ETFs provide exposure to different Bond types, and Commodity ETFs track a Commodity price such as gold, oil or corn. The Company specialised in Commodity ETFs. By 2006 the Company had created and was managing two Exchange Traded Commodities (“ETCs”), namely Oil Securities Limited and Commodity Securities Limited. This expanded over the years, especially following the acquisition in June 2008 of Gold Bullion Securities Limited (“GBS”), to which we refer in paragraphs 111 to 114 below, so that throughout the period from 2006 until 2018 the Company's principal ETC products were gold, oil and other commodity ETCs.

Background to the dispute

9 In October 2006, FTV invested in the Company and was allotted 40,299 preference shares, with a further allotment of 94,032 preferred shares in 2007. Each subscription was made at a price of $74.443 for each preferred share making FTV's total investment value $10 million. In October 2009 FTV purchased a further 2,755 ordinary shares in the Company from three existing shareholders of the Company. Finally, in June 2010, FTV purchased a further 1,031 ordinary shares in the Company.

10 FTV was party to, and had certain substantial rights pursuant to the terms of, a shareholders' agreement, which it executed when purchasing the shares in 2006 (“the Shareholders Agreement”). As a preferred shareholder, it held a basket of rights which were explored at trial. In November 2009, FTV converted all of its preferred shares into ordinary shares, thus losing all the rights that had attached to its previously preferred shareholding. However, that early conversion of shares at that particular time was designed to maximise its shareholding in the Company in the light of its expectation of an Initial Public Offering (“IPO”) or sale of the Company. A consequence of conversion led FTV to hold 66,348 shares, approximately 28.6% of the ordinary shares in the Company. FTV went on to purchase further shares in the Company. FTV subsequently sold 15,557 of its ordinary shares in the Company to Millennium, and 5,502 ordinary shares in the Company to Susquehanna in March and April 2011 respectively, again at a time when an IPO / sale of the Company was reasonably anticipated. The proceeds of these sales netted FTV about $64 million, which was $54 million more than its original investment in the preference shares, whilst it still retained about two-thirds of the ordinary shares that it had acquired.

Susquehanna purchased a further 1,453 shares in the Company from other existing shareholders at about the same time. Millennium made further purchases from shareholders in 2016.

11 The Company began work towards an IPO by 2009, and preparations were at an advanced stage when Millennium and Susquehanna purchased their ordinary shares from FTV in 2011. When, for various reasons, an IPO did not occur, sales of the Company to institutional investors were explored, but not finalised.

12 The Company fell in value from the autumn of 2012 onwards owing to a reduction in AUM principally caused by a fall in the price of commodities. A recovery in such prices in late 2016, following the rise in the price of gold and other precious metals, led to the board of the Company (the "Board") deciding to sell the business in 2017 and the conclusion of those sales in early 2018. In 2018, the Company sold three of its businesses for a total consideration of over $600 million (together the "Sales"). The Plaintiffs claim that the Sales amounted to a Liquidity Event, as defined in the Shareholders' Agreement and the Articles of Association of the Company, following which the proceeds of sale should, in accordance with not only the expectations of the Plaintiffs but also various representations of Mr Tuckwell, have been distributed to shareholders on a pro-rata basis.

13 The Plaintiffs seek an order that their shares be purchased by the Company or by Mr Tuckwell at a fair value with no discount calculated by reference to their minority shareholding. They say that any purchase of shares should be at the value of the Company at a date shortly after the completion of the Sales in around May 2018. In the alternative, the Plaintiffs seek a winding up of the Company with the surplus distributed, again pro-rata, amongst the shareholders.

14 The Plaintiffs allege that the obligation upon Mr Tuckwell / the Company to purchase their shareholdings has been triggered by Mr Tuckwell's unfairly prejudicial conduct. They argue, as particularised below, that Mr Tuckwell has breached his fiduciary and other duties to the Company and attempted to coerce the Plaintiffs to sell their shares to him at an unjustified discount. They also say that they have been prejudiced by the fact that the business of the Company has changed beyond recognition since the Sales and that the Plaintiffs have no wish to remain shareholders in the new business of the Company.

15 Mr Tuckwell denies any prejudicial conduct. He denies any breach of duty. He says that the definition of *"Liquidity Event"* in the Shareholders' Agreement and the Articles of Association is relevant only to preferred shareholders, and that FTV forewent its exit rights as a preferred shareholder when it converted its shares to ordinary shares. Millennium and Susquehanna were only ever ordinary shareholders and they purchased their shares from FTV and from other minority shareholders, not the Company. Mr Tuckwell says that the Plaintiffs all knew of the risks of purchasing minority shareholdings in a private company, that Mr Tuckwell has offered to purchase the Plaintiffs' shareholdings at a fair value supported by independent expert evidence and that the Plaintiffs' claim for relief must fail.

Mr Tuckwell says that in fact had FTV remained as preference shareholders for the period of five years and then converted their shares to ordinary shares, they would have received 31,137 shares, not the far greater number which they secured.

16 There are a number of minor shareholders in the Company, largely current and former employees, who played no active role in the proceedings save that some signed a letter which was emailed to the Court in support of the Plaintiffs' claim and that two, William Rhind ("Mr Rhind") and Benoit Autier ("Mr Autier") gave evidence.

The Law

17 It is helpful to set out the relevant legal principles by reference to which the Plaintiffs' claims need to be considered before dealing with the evidence and the claims made by the Plaintiffs by reference to that evidence.

Unfair prejudice

18 Article 141(1) of the Companies (Jersey) Law 1991 ("the Law") provides:

> ***"141 Power for member to apply to court***
>
> ***(1) A member of a company may apply to the court for an order under Article 143 on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least the member) or that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."***

19 On a finding of unfair prejudice, the Court has a wide discretion as to the relief ordered. Article 143 of the Law provides that the Court may make " ***such order as it thinks fit for giving relief in respect of the matters complained of***". Such an order is expressed to include the purchase of a member's shares in the company by another member, or by the company (Article 143(2)(d)).

20 As these Articles derive from similar English statutory provisions it is proper for the Jersey Courts to have regard not only to previous Jersey authorities, but also to the body of relevant English case law, bearing in mind of course that such case law is not binding on our Courts. The unfair prejudice remedy was introduced in the United Kingdom via section 75 of the Companies Act 1980, re-enacted in section 459 of the Companies Act 1985 (the relevant provision in force when the Law was adopted) and is now to be found in sections 994 – 999 of the Companies Act 2006.

21 Breaking down the requirements of Article 141, the Plaintiffs must be able to show three things, per David Richards J in *Re Coroin (No 2)* [2012] EWHC 2343 (Ch) at [625]:

> ***"first, the matters of which he complains are either actual or proposed acts or omissions of the company or consists of the conduct of the company's affairs;***
>
> ***secondly, that those matters have caused prejudice to his interests as a member of a company;***
>
> ***and thirdly, that the prejudice is unfair."***

22 As to the *"conduct of the affairs of the company"*, it is necessary to draw a distinction between, and to keep firmly in mind, the conduct of a shareholder, which is not an act of the company, and the act of the company. For these purposes, as Harman J held in *Re Unisoft Group Limited (No 3)* [1994] 1 BCLC 609 at page 623:

> ***"The action of the board is conduct of the affairs of the company and so, if damage is alleged, may raise the ground of 'unfair' prejudice, and a petition under s459 may be presented to the court.*** Further, a shareholder by exercising his own private right to vote his shares may cause the company to act, by the passing of some resolution in general meeting, in a matter alleged to be unfairly prejudicial to some members. Again it is not the act of the shareholder in voting that will found a petition but the result of that act if it produces action, or inaction, by the company. In my judgment the vital distinction between acts or conduct of the company and the acts or conduct of the shareholder in his private capacity must be kept clear. The first type of act will found a petition under s459; the second type of act will not."

23 In *Re Coroin* David Richards J said at [626]:

> ***"[The section] is not directed to the activities of shareholders amongst themselves, unless those activities translate into acts or omissions of the company or the conduct of its affairs.*** Relations between shareholders inter se are adequately governed by the law of contract and tort, including where appropriate the ability to enforce personal rights conferred by a company's articles of association."

24 Hollington on Shareholders' Rights (9^{th} Edition) at 7–24 gives an example of a director who steals from the company safe. This amounts to conduct by a director in his personal capacity and accordingly is not within the scope of the equivalent English legislation. Hollington says:

> ***"It would, however, be otherwise if the director in question used his dominant position in the company to stifle any proceedings by the company against himself.*** In those circumstances, it would be that use of a

dominant position that constituted the conduct complained of."

25 Accordingly, when considering whether or not the conduct complained is *"conduct of the company's affairs"*, the Court needs to be satisfied that the conduct complained of is not merely conduct of the shareholder.

26 As to *"prejudice"*, a shareholder must suffer prejudice to have a claim under Article 141 or (we will come back to this) to be entitled to have the company wound up. Generally, and self-evidently, there needs to be proof of financial prejudice. In *Re Coroin*, David Richards J said:

> ***"630. Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member…***
>
> ***631. Where the acts complained of have no adverse financial consequence, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omissions are breaches of duty owed to the company rather than to shareholders individually. If it is said that the directors or some of them had been in breach of duty to the company but no loss to the company has resulted, the company would not have a claim against those directors. It may therefore be difficult for a shareholder to show that nonetheless as a member he has suffered prejudice."***

27 The Plaintiffs point to the remark of Lord Hoffmann in *O'Neill v Phillips* [1999] WLR 1092 where he said at page 1105G:

> ***"the requirement that prejudice must be suffered as a member should not be too narrowly or technically construed."***

28 Prejudice need not be financial in character. Departures from the requirements of the statute and the company's constitution may be sufficiently serious to undermine the trust and confidence in the board and thereby amount to unfair prejudice even if there were no enduring adverse financial consequences (*Re Sunrise Radio* [2009] EWHC 2893 (Ch)).

29 The Plaintiffs accepted that *"prejudice"* could be remedied by conduct. For most purposes we accepted Mr Tuckwell's contention that on the facts of this case it was necessary for the Court to find financial prejudice to the Plaintiffs in order for them to have suffered prejudice. In particular, we accepted the submission that breaches of duty, if they had occurred, which had neither caused loss to the Company nor a devaluation in the Plaintiffs' shares were generally insufficient to amount to prejudice.

30 Thirdly, and finally, *"unfairness"*. The Plaintiffs drew our attention to In *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 (" *Re Saul D Harrison*") in which Hoffmann LJ (as he then was) identified three categories of conduct which could constitute unfairness, namely:

> (i) Conduct in breach of a company's articles of association;
>
> (ii) Conduct by directors in breach of their duties, for example in misusing their fiduciary powers; and / or
>
> (iii) Conduct contrary to some legitimate expectation of a member, that is conduct which would give rise to the exercise of some equitable restraint.

31 Mr Tuckwell argued that the third category had no application on these facts and relied *inter alia* on the judgment of Arden LJ in the Court of Appeal in *Re Coroin* [2013] EWCA Civ 781 at 747–748, at [17] as follows:

> ***"In order to show unfairness, Mr McKillen had to demonstrate unfairness stemming from a breach of a legal right conferred by the articles or the shareholders' agreement: see generally*** *O'Neill v Philips* [1999] 2 BCLC 1. ***In one category of case, that is where the company is formed on the basis of a personal relationship between the shareholders, the court is able to subject legal rights to equitable considerations."***

32 It is contended by Mr Tuckwell, and the Court accepts, that the starting point is to consider the bargain made between the shareholders as contained in the company's Articles of Association and any shareholders' agreement. As Lord Hoffmann said in *Re Saul D Harrison* at pages 17–18:

> ***"In deciding what is fair or unfair for the purposes of s 459, it is important to have in mind that fairness is being used in the context of a commercial relationship.*** The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association."

33 Lord Hoffmann went on to refer at page 19 to the judgment of Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 at page 500, where he said in the context of personal relationships between a shareholder and those who control the company which may give rise to additional considerations:

> ***"It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise.*** Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more…"

34 In *Re Saul D Harrison*, Lord Hoffmann remarked (page 20b-c):

> ***"Thus in the absence of 'something more', there is no basis for a legitimate expectation that the board and the company in general meeting will not exercise whatever powers they are given by the articles of association*** .
>
> ***In this case, as the judge emphasised, there is nothing more.*** The petitioner was given her shares in 1960 pursuant to a reorganisation of the share capital which vested the entire control of the company in the A shareholders and the board whom they appointed. This scheme is binding upon her and there are no special circumstances to modify its effects. Although the petition speaks of the petitioner having various 'legitimate expectations', no grounds are alleged for saying that her rights are not 'adequately and exhaustively' laid down by the articles. And in substance the alleged 'legitimate expectations' amount to no more than an expectation that the board would manage the company in accordance with their fiduciary obligations and the terms of the articles and the Companies Act."

35 Lord Hoffmann returned to this decision subsequently in the later case of *O'Neill v Phillips*. He said at pages 1098–1099:

> ***"The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles.*** As Warner J said *In re J. E. Cade & Son Ltd.* [1992] B.C.L.C. 213, 277: ***"The court… has a very wide discretion, but it does not sit under a palm tree."*** Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family….In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by the rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of

the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.

The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those ***conducting the affairs of the company to rely upon their strict legal powers.*** Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."

36 Mr Tuckwell says that this is not a case where it is proper for *"such equitable considerations"* to be taken into account as the Plaintiffs are sophisticated investors. When Lord Hoffmann gave examples of *"such equitable principles in action"* (page 1100) he referred to cases involving partnerships where different principles apply. He also resiled from his use of the term *"legitimate expectation"* in his previous decision in *Re Saul D Harrison* (page 1102), identifying it as a term borrowed from public law. He said that it was *"probably a mistake"* to use the term. Allowing the appeal and setting aside the order made by the Court of Appeal, which had granted relief to the minority shareholder, Lord Hoffmann observed at page 1102:

"The concept of a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application. That is what seems to have happened in this case."

37 He said at page 1101:

"So I agree with Jonathan Parker J when he said in *Re Astec (BSR) Plc*. [1998] 2 B.C.L.C. 556, 558:-

"In order to give rise to an equitable constraint based on 'legitimate expectation' what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former."

This is putting the matter in very traditional language, reflecting in the word 'conscience' the ecclesiastical origins of the long-departed Court of Chancery. As I have said, I have no difficulty with this formulation. But I think one useful cross-check in a case like this is to ask whether the exercise of the power in question will be contrary to what the parties, by words or conduct, have actually agreed. Would it conflict with the promises which they appear to have exchanged?"

38 Under the title "No-fault Divorce?" at pages 1104–1105, Lord Hoffmann said:

> ***"Mr. Hollington, who appeared for Mr. O'Neill, said that it did not matter whether Mr. Phillips had done anything unfair.*** The fact was that trust and confidence between the parties had broken down. In those circumstances it was obvious that there ought to be a parting of the ways and the unfairness lay in Mr. Phillips, who accepted this to be the case, not being willing to allow Mr. O'Neill to recover his stake in the company. Even if Mr. Phillips was not at fault in causing the breakdown, it would be unfair to leave Mr. O'Neill locked into the company as a minority shareholder .
>
> ***Mr. Hollington's submission comes to saying that, in a 'quasi-partnership' company, one partner ought to be entitled at will to require the other partner or partners to buy his shares at a fair value.*** All he need do is to declare that trust and confidence has broken down. In the present case, trust and confidence broke down, first, because Mr. Phillips failed to do certain things which, on the judge's findings, he had never promised to do; secondly, because Mr. O'Neill wrongly thought that Mr. Phillips had committed various improprieties; and finally because, as the judge said [1997] 2 B.C.L.C. 739, 742, ***he was 'inclined to see base motives in everything that Mr. Phillips did.'*** Nevertheless it is submitted that fairness requires that Mr. Phillips or the company ought to raise the necessary liquid capital to pay Mr O'Neill a fair price for his shares.
>
> ***I do not think that there is any support in the authorities for such a stark right of unilateral withdrawal.*** There are cases, such as *In re A Company (No. 006834 of 1988), Ex parte Kremer* [1989] B.C.L.C. 365, ***in which it has been said that if a breakdown in relations has caused the majority to remove a shareholder from participation in the management, it is usually a waste of time to try to investigate who caused the breakdown.*** Such breakdowns often occur (as in this case) without either side having done anything seriously wrong or unfair.
>
> ***It is not fair to the excluded member, who will usually have lost his employment, to keep his assets locked in the company.*** But that does not mean that a member who has not been dismissed or excluded can demand that his shares be purchased simply because he feels that he has lost trust and confidence in the others. I rather doubt whether even in partnership law a dissolution would be granted on this ground in a case in which it was still possible under the articles for the business of the partnership to be continued. And as Lord Wilberforce observed *In re Westbourne Galleries Ltd* [1973] A.C. 360, 380, ***one should not press the quasi-partnership analogy too far: 'A company, however small, however domestic, is a company not a partnership or even a quasi-partnership ....'***

The Law Commission Report on Shareholder Remedies to which I have already referred considered whether to recommend the introduction of a statutory remedy 'in situations where there is no fault' (paragraph 3.65) so that members of a quasi-partnership could exit at will. They said, at p. 39, para 3.66:

> ***'In our view there are strong economic arguments against allowing shareholders to exit at will.*** Also, as a matter of principle, such a right would fundamentally contravene the sanctity of the contract binding the members and the company which we considered should guide our approach to shareholder remedies.'

The Law Commission plainly did not consider that section 459 already provided a right to exit at will and I do not think so either."

39 In the context of this case, Mr Tuckwell was right, in the Court's view, to criticise the Plaintiffs' case as laden, as it was, with *"expectations"* which were not founded in rights provided for in the Shareholders' Agreement, Articles of Association or the general law. Accordingly, the Plaintiffs in their skeleton argument were wrong to rely on their *"legitimate expectation"* in circumstances akin to those in *O'Neill v Phillips*, in which Lord Hoffmann had expressed the view that such considerations are unhelpful in the context of company law and in any event, in our view, has no application to the facts of this particular case. We were emboldened in our view by some of the authorities put before us on behalf of Mr Tuckwell.

40 Reliance was placed upon the case of *Re Coroin Limited (No 2)* [2012] EWHC 2343 (Ch), to which we have already referred. The case involved a dispute involving a number of hotels.

41 That case, as this, involved parties who had no personal relationship and were experienced individuals or entities in receipt of their own legal advice and were operating in the context of a negotiated shareholders' agreement.

42 David Richards J said, when giving his conclusions in relation to the petitioner's case on unfair prejudice (having quoted extensively from the decision of Lord Justice Hoffmann in *Saul D Harrison* and the judgment of Lord Hoffmann in *O'Neill v Phillips* which he described as *"central to a consideration of these issues"* in respect of the question on fairness):

"634. It follows that Mr McKillen must establish conduct of the affairs of the company, or acts or omissions of the company, which have caused prejudice to his interests as a member in a manner which the law recognises as unfair. To the extent that his case is founded on breaches of the articles of association, breaches of the shareholders' agreement or breaches of duty by the directors, the element of unfairness may be

established .

635. For part of his case, however, Mr McKillen relies also on legitimate expectations of participation in the management of the company. In my judgement, this is not sustainable. The importance of the passage from the speech of Lord Wilberforce in *In re Westbourne Galleries Ltd* ***cited by Lord Hoffmann in*** *O'Neill v Phillips* ***is that it indicates the circumstances in which reliance may be placed on equitable considerations (Lord Hoffmann deprecates the use of the expression 'legitimate expectations', regretting that he introduced it into this area of the law: see p.1102) as giving rise to a possible case of unfair prejudice. It is very important to note that in that passage, having identified that the structure of a company is defined by company law and the articles of association, Lord Wilberforce observed that; "In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small." Equitable considerations, affecting the manner in which legal rights can be exercised, will arise only in those cases where there exist considerations of a personal character between the shareholders which makes it unjust or inequitable to insist on legal rights or to exercise them in particular way. Typically that will be in the case of a company formed by a small number of individuals on the basis of participation by all or some of them in the management of the company*** .

636. In my judgment, there is no room for equitable considerations of this kind in the present case. The company was formed by a group of highly sophisticated and experienced business people and investors with a view to the purchase of a well-known group of hotels for a price running into many hundreds of millions of pounds and to retaining and managing some of those hotels. There was little prior relationship between many of the investors and some were unknown to each other until a few days before the company was formed. More importantly, articles of association and a shareholders' agreement were negotiated and drafted, containing lengthy and complex provisions governing their relations with each other and with the company. I find it hard to imagine a case where it would be more inappropriate to overlay on those arrangements equitable considerations of the sort discussed by Lord Wilberforce and Lord Hoffmann."

43 We agree with Mr Tuckwell that on the facts of this case there is no room for equitable considerations. This extends to considerations of *"trust and confidence"* between the parties, although this is a matter which, although relied upon by the Plaintiffs in oral submissions, is hardly touched upon in their pleadings. The Court's focus must be on the Shareholders' Agreement and the duties owed by directors to the Company. As Richards J said in *Re Coroin* at [641]:

"Mr McKillen relies on the alleged breaches of duty by the directors as causing or resulting in unfair prejudice to his interests as a member.

> Plainly the decisions of directors as such involve the conduct of the affairs of the company and if those decisions are reached by the directors or a majority of them in breach of duty and result in prejudice to the member or to the interests of a member then the fact of the decisions being in breach of duty will supply the necessary element of unfairness."

44 In fact, the judge went on to say that most of the alleged breaches were not made out and on the facts none of the proven breaches resulted in any prejudice to Mr McKillen's interest as a member.

Winding up

45 Pursuant to Article 155(1) of the Law, a shareholder may ask for the Court to wind up a Jersey company on the ground that it is just and equitable to do so.

46 On the making of such an order, the Royal Court possesses various ancillary powers including (Article 155(4)) the appointment of a liquidator to direct the manner in which the winding up is to be conducted.

47 It is not possible exhaustively to define all of the circumstances when it may be just and equitable to order the winding up of a company. The Court has a wide discretion and each case must be assessed on its own merits. Common examples of where just and equitable winding up has been ordered by the court include where the *substratum* of a company has gone, where a company is insolvent and its affairs need to be investigated, where there is a deadlock between the members and / or directors preventing decision making on matters central to the company's prospects and where, if the company is a quasi-partnership, there has been a breakdown of relations between the participants such that they are unable to cooperate in the conduct of the company's affairs. As noted by the Royal Court in *Re Leveraged Income Fund Limited* [2002] JRC 209, Article 155 is based upon several provisions of the UK Companies Act and accordingly English authorities are often of assistance.

48 The Plaintiffs in this case have indicated in the course of argument that their principal remedy is to have their shares purchased at fair value and without any minority discount on the grounds that they have been unfairly prejudiced by the conduct of Mr Tuckwell, and that they seek winding up of the Company in the alternative. Mr Tuckwell argues that it is quite wrong to wind up the Company on the facts of this case. He drew the Court's attention to the decision of Mummery J In *Re A Company (No 314 of 1989)* [1991] BCLC 154 at 161, when he described winding up as a *"death sentence"*. This remark was quoted with approval by Lord Hoffmann in *O'Neill*.

49 Notwithstanding Lord Wilberforce's deprecation of categorisation in *Re Westbourne Galleries*, Hollington says at 10–11 that it:

> ***'…remains conventional for the purposes of exposition at least to follow the traditional categorisation of cases where a winding-up order would be made on the just and equitable basis.*** There were four such categories, to which one can add a fifth:
>
> > ***(1) loss of substratum;***
> >
> > ***(2) deadlock;***
> >
> > ***(3) justifiable loss of confidence due to mismanagement;***
> >
> > ***(4) expulsion of 'working partner'; and***
> >
> > ***(5) breakdown of trust and confidence'*** .

50 Our attention was also drawn to the decision of Sifris J in the Supreme Court of Victoria in *Peter Exton v Extons Pty Ltd* [2017] VSC 14, where he noted that courts are ***"extremely reluctant to wind up a solvent company"***. He also noted from previous Australian authority that it was ***"well accepted that the winding up of a solvent and flourishing company should be a last resort"***.

Loss of substratum

51 Mr Tuckwell says this is not a *"substratum"* case as the substratum of the Company has not gone. The Company continues in business and one aspect of the business, the Australian subsidiary, which was not sold in 2018, continues to engage in the same business, namely creating and managing ETFs, with which the Company as a whole was formerly engaged.

52 Mr Tuckwell contends that loss of substratum arguments based on narrowly-drawn objects clauses have very limited application in the modern world where such requirements have been diluted or abolished by widely-drawn objects clauses in a company's memorandum and articles of association.

53 There appears to be little in this latter point as there have been recent decisions of the Royal Court in which the Court has found that the company's *"substratum"* has been lost and a winding up on the just and equitable basis has been ordered, notwithstanding the terms of the objects clause in the memorandum and articles of association – see *Draganfly Investments Limited* [2020] JRC 103.

54 Mr Tuckwell argues that none of the Jersey authorities remotely resemble the present case. Cases where the court has wound up Jersey companies on this basis either, it is said, involve insolvency of the company so that continuation of the business is impossible, or a contractually-binding expiry date for the company's operation which has been passed. This Company, it is said, is a solvent company that can carry on business for the foreseeable

future. It is argued that winding up the Company would destroy its value.

Deadlock and expulsion of "working partner"

55 It cannot be suggested, nor do the Plaintiffs' contend, that this is, on the authorities, a deadlock case. Deadlock generally involves circumstances where parties or a combination of parties each hold 50% of the shares in a business.

56 *'Expulsion of working partner'* categorisation also has no application on the facts of this case as it generally relates only to quasi-partnerships where the minority shareholder is a working partner in the business.

Justifiable loss of confidence due to mismanagement, and breakdown of trust and confidence

57 Distinction needs to be drawn between *'justifiable loss of confidence due to mismanagement'* and *'breakdown of trust and confidence'*. The latter concept generally applies to a breakdown in relations in a quasi-partnership company, i.e. between shareholders whose relationship is more than just commercial, affording each other equitable rights and considerations that are superimposed over the commercial rights; these will frequently be in the context of a family business and accordingly have no application to these facts. However, the Plaintiffs contend that their justifiable loss of confidence due to mismanagement does entitle them to an order winding up the Company. The Skeleton Argument of Mr Tuckwell appeared at times to elide the two concepts.

58 The Plaintiffs argue that the Company is now in a state that could not have been contemplated by the parties when the Company was formed or when FTV invested in 2006 and, the Court can, by analogy with partnership law, bring an end to the Company by ordering it to be wound up. Reliance is placed upon two old Scottish cases (*Baird v Lees* (1924) SC 83 and *Loch v John Blackwood* [1924] AC 783), where it was held to be just and equitable to wind up a company where the shareholders had lost confidence in the governance of a company by reason of the lack of probity in the conduct of the company's affairs. Both parties agree that the just and equitable jurisdiction of the Court under Article 155 and the unfair prejudice jurisdiction under Article 141 are to some extent complementary, although there is no agreement as to the principles upon which the Court should operate in this case when considering whether or not to wind the Company up on this basis. Certainly the jurisdictions are not the same, and in *Hawkes v Cuddy* [2010] BCC 597, Stanley Burnton LJ said at [104]:

> ***"It is to be noted that Lord Hoffmann [in*** *O'Neill*] ***did not say that the facts giving rise to the jurisdiction to wind up under the 'just and equitable' jurisdiction were the same as those giving rise to the exercise of the jurisdiction under section 944: he used the word 'parallel'.*** To the contrary,

he expressly approved the statement of Mummery J in *Re a Company No 00314 of 1989* [1990] B.C.C. 221 ***that the grant of one remedy will not necessarily require proof of conduct which would justify a different remedy.*** In many, if not most, cases the conduct of the respondent may give rise [to both jurisdictions]; but there may be cases which satisfy the requirements of one jurisdiction but not the other. In addition, it should be borne in mind that a winding up may be ordered on the 'just and equitable' ground where no unfair conduct is alleged, as in the cases in which the so-called substratum has gone…."

59 The Plaintiffs also rely on *Virdi v Abbey Leisure Ltd* [1990] BCLC 342, in support of the proposition that a company may be wound up where it is in a state that was not within the reasonable contemplation of the parties when they invested. In *Virdi*, at the time when the shareholders acquired their interest in the company, it was understood between them that the sole project to be undertaken by the company was the acquisition, refurbishment and management of a particular nightclub. After the nightclub was sold, the company was left with no assets other than the proceeds of sale. The directors of the company wished to reinvest in a similar business, but the petitioning shareholder did not wish to participate in such a business. An application to strike out the petition was dismissed on the ground that, if the allegations were true, the petitioner must prima facie be entitled to a winding up order. *Virdi* was a rather different case to this. There were three shareholders and a single asset – the nightclub. The reason why the petition seeking a winding up of the company should not have been struck out, according to the Court of Appeal, was owing to the allegation, which could not be resolved on an application to strike out, that it was understood between the petitioner and the other shareholders that the company should not undertake any other ventures other than the nightclub owned by the company prior to its sale.

60 Mr Tuckwell argued that loss of trust and confidence could not justify the winding up of the Company outside a quasi-partnership case and that this was not such a case. He is correct in the sense that a breakdown of trust and confidence between shareholders cannot, on the facts of this case, justify winding up of the Company. This is not a quasi-partnership. However, in principle at least, justifiable loss of confidence in the Board, including Mr Tuckwell, due to mismanagement could result in the Company being wound up on the just and equitable basis. Reference was made to *Apex Global Management Limited v F1 Call Limited* [2015] EWHC 3269 (Ch) where claims for unfair prejudice and just and equitable winding up were before the Court. Hildyard J doubted whether an unfair prejudice petition could be bought on the grounds of a breakdown of the trust and confidence between the parties even in a quasi-partnership case in the absence of a breach of a legal right or equitable constraint affecting the conduct of the affairs of the company. He expressed the view that such a claim (or a claim based on lack of confidence in the company's management) would need to be grounded on conduct of the directors in respect of the company's business – following *Loch v John Blackwood Limited.*

61 Mr Tuckwell argues that for a court to wind up the Company on the just and equitable basis on the footing that the Plaintiffs have lost confidence in Mr Tuckwell due to his management

of the Company, the misconduct alleged must amount to a breach of duty or a breach of the Shareholders' Agreement. On the facts of this case, we agree with this proposition.

62 The Plaintiffs say that the question of *'trust and confidence'* in the conduct of the Company's affairs is important to them both in relation to their claim in unfair prejudice and for winding up of the Company. They said as much in their closing arguments to us. However, *'trust and confidence'* barely register in the Plaintiffs' pleadings – first appearing in the Amended Order of Justice at paragraph 12.9 and only in the context of a chapter of the Amended Order of Justice entitled *'Just and Equitable Winding Up'*. The Answer that Mr Tuckwell pleaded to this is that the Plaintiffs' allegation is *'embarrassing'* as:

> *"There is no allegation that there was ever 'trust and confidence' between the parties….* More importantly there was never a relationship of trust and confidence, of the sort with which the law requires: the relationship was entirely commercial and based solely on the agreements between the parties, essentially drafted by FTV."

63 Although Mr Tuckwell is correct to plead that there was not a relationship of trust and confidence between the parties — and indeed many of the Plaintiffs' witnesses were cross-examined on the footing that there was no personal relationship between themselves and Mr Tuckwell, which they accepted — this is a matter which only addresses the issue of breakdown of trust and confidence between shareholders, which we agree cannot, on the facts of this case, give rise to winding up of the Company on the just and equitable basis. The Plaintiffs' claim (to the extent that it is pleaded) is that they have lost trust and confidence in Mr Tuckwell owing to his management and conduct of the affairs of the Company – not his conduct as a mere fellow shareholder.

64 The Plaintiffs do mention *'trust and confidence'* in the pleaded Reply, which of course is a pleading that does not generally call for an answer.

65 Furthermore, Mr Tuckwell argues that there is a flaw in the suggestion that this particular company can be easily wound up. In the written submissions made on his behalf it is said:

> *"A just and equitable winding up will not allow the Plaintiffs to take what they see as their share of the Company's assets and walk off into the sunset.* As is clear from the expert evidence … any such winding up would need to be a lengthy and complex affair, particularly given the Company's long-term liabilities relating to gold to the World Gold Council."

66 We shall return to this complex issue, which may be a real impediment to winding up the Company, when considering the expert evidence.

Duties of directors

67 The general duty of a director of a Jersey company is set out under Article 74(1) of the Law:

> ***"(1) A director, in exercising the director's powers and discharging the director's duties, shall –***
>
> > ***(a) act honestly and in good faith with a view to the best interests of the company; and***
> >
> > ***(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."***

68 It is accepted by both parties that the duty of the director to act in the best interests of the Company means for the benefit of its members as a whole. Mr Tuckwell also accepted this in evidence. Mr Tuckwell stated that, while acting as a director, he did so for the benefit of the shareholders as a whole.

69 The Plaintiffs do not specifically plead the Article 74 duties, but say that the statutory duties are a codification of the customary law duties of directors. Mr Tuckwell accepts that the duty to act in that which the director considers to be the best interests of the Company may also exist under Jersey customary law and, in this context, English common law principles are likely to be persuasive.

70 It was argued on behalf of Mr Tuckwell that there is no allegation that he has not acted honestly whilst discharging his duties as a director. This assertion was repeated during the trial. That is not our understanding of the way in which the Plaintiffs plead their case and indeed put their case at trial. The key duties pleaded as owed to the Company by Mr Tuckwell are contained at paragraph 6.2 of the Amended Order of Justice, in which it states that Mr Tuckwell's duties to the Company included:

> (i) to act *bona fide* in the best interests of the Company;
>
> (ii) to act for proper purposes (and not collateral or improper ones);
>
> (iii) to avoid conflicts of interest and not to favour the interests of himself or any person over the interests of the Company; and
>
> (iv) not to exploit his position for his own personal benefit.

71 At paragraph 6.3, it is pleaded that all these duties were breached by Mr Tuckwell with *"Mr Tuckwell [having] treated the Company as his own"* and so far as the members of the Court are concerned the assertion that Mr Tuckwell *"failed to act bona fide in the best interests of the Company"* is an allegation that he did not always act honestly. Various other breaches are pleaded by the Plaintiffs in the Amended Order of Justice including, for example an allegation of breach of the Shareholders' Agreement in respect of the transfer of shares to the Tuckwell Foundation; and other allegations of breach of duty, for example in relation to

the forced resignation of the Company's Independent Directors (paragraph 9.5); and breaches of duty in relation to the change of the Company's business, including causing the Company's funds to be invested at his discretion (paragraph 11.1(b)), and refusing to distribute the proceeds of sale pro rata / pressuring the Plaintiffs to sell the shares at a substantial and unjustified discount (paragraphs 12.2, 12.4, 12.6, 12.7 and 13.1).

72 The Answer accepts that Mr Tuckwell owed the *"usual duties of directors"* to the Company without pleading specifically to the duties alleged.

73 Mr Tuckwell makes various criticisms of the Plaintiffs' pleadings. Where necessary, we will consider whether or not the Plaintiffs' claims are properly pleaded when dealing with each allegation made, and the facts that are said to amount to unfairly prejudicial conduct by or on behalf of Mr Tuckwell.

74 It would have been better if the Plaintiffs had pleaded their case by reference to the provisions of the Law and not merely mentioned those duties in their skeleton argument.

75 Nonetheless, it is clear that the first duty pleaded at paragraph 6.2 of the Amended Order of Justice is contained within Article 74(1)(a) of the Law.

76 The second duty pleaded is also a duty owed to the company on the authority of *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, cited with approval by the Royal Court in *AI Airports International Ltd v Pirrwitz* [2013] JCA 177.

77 As to the third alleged duty, namely to avoid conflicts, Mr Tuckwell argues that given the Law provides an express remedy for a failure to disclose interests pursuant to Article 76, that is the remedy of an aggrieved shareholder and that there is no other remedy available. As a fiduciary, a director is required to ensure that his duty to the Company and his personal interests do not conflict. Mr Tuckwell argues that the Company's Articles of Association permit directors to have interests in the Company, accordingly the customary law position is therefore modified – see Article 106(1) of those Articles.

78 Perhaps the best way of looking at this allegation, which requires Mr Tuckwell to avoid conflicts of interest and not to favour the interests of himself over the interests of the Company (which for these purposes must mean the Company as a whole), is that it is an aspect of his duty to act *bona fide* in the interests of the Company (meaning the members as a whole).

79 The Plaintiffs assert, in relation to the general duty to act in the best interests of the Company, that where shareholders have different interests in the outcome of an exercise of fiduciary powers, they must be exercised fairly as between different shareholders (*Mills v Mills* 1938 60 CLR 150). In the Australian case of *Mills v Mills*, Latham CJ said at page 164:

> ***“The question which arises is sometimes not a question of the interests of the company at all, but a question of what is fair as between different classes of shareholders.*** Where such a case arises some other test than that of “the interests of the company” must be applied…”

80 Accordingly, the interests of the Company plainly encompass the interests of the shareholders as a whole. It is clear from the decisions in *BSB (No 2)* [1996] 1 BCLC 155 and *Mutual Life v Rank Organisation* [1985] BCLC 11 that this duty extends to shareholders of the same class. In *Mutual Life*, Goulding J observed that the articles of association should be considered by reference to the ordinary principles of the law of contract. He added:

> ***“That law in such circumstances, and so far as relevant to this action, requires in my judgment but two implied terms.*** First, the time honoured rule that the directors' powers are to be exercised in good faith in the interests of the company, and secondly, that they must be exercised fairly as between different shareholders.”

81 Mr Tuckwell agreed in evidence that the Board should not act in the interests of the majority shareholder only, but act in what is in the best interests of the Company as a whole. In closing submissions, the Plaintiffs' advocate said that the duty to act fairly between shareholders with different interests (which is the same as a duty to act fairly between all shareholders) encompasses the duties pleaded at paragraph 6.2(b) and 6.2(d) of the Amended Order of Justice.

82 Accordingly, the key assertions made by the Plaintiffs against Mr Tuckwell are as pleaded at 6.2 and, as understood by the Court, are that he:

(i) failed to act *bona fide* and in the best interests of the Company as a whole (in line with the statutory duty at Article 74(1)(a));

(ii) failed to exercise his powers as a director for proper purposes (as pleaded at paragraph 6.2(b)); and

(iii) put his own interests above those of the Company (i.e. the shareholders as a whole) when acting as a director (paragraphs 6.2(c) and (d)).

83 It is against those duties, which we agree Mr Tuckwell owed to the Company in his capacity as a director, that we judge his conduct in this case.

The Plaintiffs' pleadings

84 Mr Tuckwell argued that the Plaintiffs' pleading was deficient in many respects. The Court

accepts the need for a claim in unfair prejudice properly to set out and particularise the case against any Defendant to such a claim. We accept Dillon LJ's dictum in *Re Tecnion Investments Ltd* [1985] BCLC 434 at 441 where he said:

> ***"It is very important that the allegations which are being relied on in a petition of this nature should be properly set out in the petition itself and not merely collected from various places in voluminous affidavit evidence.*** For my part, I would emphatically endorse the comments and citations of Megarry J in *Re Fildes Bros Ltd* [1970] 1 All ER 923 ***at 927*** , [1970] 1 WLR 592 ***at 597–598.*** He there referred to statements by Plowman J in *Re Lundie Bros Ltd* [1965] 2 All ER 692 ***at 699***, [1965] 1 WLR 1051 ***at 1058: 'It was suggested in the course of argument that it was really the evidence and not the allegations in the petition which was of importance in this matter.*** I entirely dissent from that proposition. It seems to me that it would be wrong for the court to travel outside the allegations in the petition, particularly in a case of this sort where the petition is based on the proposition that the respondents to it have been guilty of some oppression or some lack of probity'."

85 Clearly, the pleadings need to identify the allegations upon which the Plaintiffs rely in support of their claims.

86 The Plaintiffs say that pleadings are not meant to set out in exhaustive detail every aspect of a party's case and it is not proper for them to do so. The purpose of pleadings is to identify the material facts on which the pleading party relies. In *Three Rivers District Council v Governor and Company of the Bank of England* [2001] UKHL 16, Lord Hope said in respect of pleadings under the Civil Proceedings Rules, the approach was as indicated by Lord Woolf MR in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 792J–793A:

> ***""The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged.*** In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.""

87 In this case, there were some deficiencies in the Plaintiffs' pleadings and where necessary we refer to them in this judgment. However, generally the Defendants' complaints about the adequacy of the Plaintiffs' pleadings, particularly in relation to what we regard to be the key

allegations, are overstated and in the final analysis the Plaintiffs have sufficiently pleaded their claims in relation to those matters which, in the Court's view, warranted our close attention.

The evidence, the Plaintiffs' pleaded allegations and the Court's findings

FTV's investment in the Company, its expectations and the Shareholders' Agreement

88 The fact and date of FTV's investment in the Company are referred to at paragraph 9 above. The nature of the Company's business is referred to at paragraph 8 above. It was FTV that approached Mr Tuckwell about the possibility of investing in the Company (paragraph 3.2 of the Amended Order of Justice). At that time, the Company was relatively small.

89 Mr Tuckwell accepted in evidence that the investment of FTV (as to the first $5 million) assisted in the growth of the business.

90 Several months of negotiation between FTV and the Company led to all of the then shareholders, including FTV and Mr Tuckwell, entering into the Shareholders' Agreement on 20 th October 2006. This agreement is important, as it was negotiated by professionals on behalf of an expert investor and would be expected to contain the agreed rights of the shareholder who negotiated the agreement. At the same time and as a consequence of FTV's investment, the Company adopted a revised Memorandum and Articles of Association. Mr Cukier of FTV accepted that it was FTV's lawyers who took the lead in negotiating the terms of the Shareholders' Agreement. Mr Cukier became the FTV representative on the Board.

91 It is pleaded at paragraph 3.9 of the Amended Order of Justice that, “the terms of the Shareholders' Agreement and the amended Articles, in particular the provisions relating to a ‘Liquidity Event’, were consistent with FTV's expectation”. This was the expectation that the Company would pursue a Liquidity Event (the precise terms of which we will consider below) by way of a public offering of the Company or a sale of the Company – either as a share sale or a sale of the assets — permitting the shareholders (including FTV) to achieve an exit from the Company at that stage and a return on their investments.

92 The Shareholders' Agreement provided specific rights to preferred shareholders only. It also defined Liquidity Event as “(i) a Qualified Public Offering, (ii) a Sale of the Company or (iii) the commencement of the winding-up of the Company”.

93 *“Sale of the Company”* was also defined as a:

> *“bona fide, arm's length sale to a Person, or to a group of Persons involving (i) a sale of assets pursuant to which such party or parties acquire all or substantially*

all of the assets of the Company and its Subsidiaries on a consolidated basis in one transaction or series of related transactions, (ii) any sale of fifty per cent (50%) or more of the Shares in one transaction or series of related transactions, or (iii) a reorganisation which accomplishes one of the foregoing".

94 The Shareholders' Agreement provided for various restrictions on the transfer of shares commonly known as *"tag along"* and *"drag along"* rights. We will return to these where relevant below. However, such rights did not apply to *"Permitted Transferees"* which were, in short, *inter alia*, a transfer of shares to an affiliate or partner of the investor shareholder, the term *"affiliate"* also being defined in the Shareholders' Agreement.

95 The Shareholders' Agreement provided that any person who is not a holder of shares at the date of the agreement who subsequently becomes a holder of shares shall execute and deliver a Deed of Adherence to the Company, making them subject to the terms of the Shareholders' Agreement. Such a deed was executed by Millennium and Susquehanna when they became shareholders through the purchase of shares from FTV.

96 The Shareholders' Agreement gave holders of preferred shares a number of rights. They included:

(i) The right to Board representation on the part of the investor shareholder holding the majority of the Preferred Shares (i.e. FTV). The Shareholders' Agreement identified this person as Ben Cukier. The right to representation was limited to *"so long as any preferred shares remain outstanding"*.

(ii) A basket of other rights was set out, in particular at Clause 11 of the Shareholders' Agreement. A number of "required consents" were listed preventing the Company from, so long as the preferred shares remained outstanding, *inter alia* altering the Memorandum or Articles, repaying capital assets to members, taking any steps to effect the merger, consolidation or combination with any other company, purchasing securities in any other company, permitting the Company to cease or propose to cease to carry on its business, making investments or liquidation of any investment made by the Company and so on. These were referred to as *"blocking rights"*.

(iii) Preferred shareholders, so long as they held at least 10% of the issued preferred shares, were also provided with various information and inspection rights.

97 The Shareholders' Agreement was to terminate by the joint written consent of the holders of a majority of the existing shareholders' shares and the preference shares and would come to an end upon the occurrence of a Liquidity Event.

98 The Shareholders' Agreement was subject to an 'entire agreement' clause, which provides that:

“This Agreement, including the Annexes hereto, contains the entire understanding of the Parties hereto with regard to the subject matter herein. Except in the case of fraud, no Party shall have any right of action against any other Party to this Agreement arising out of or in connection with any draft, agreement, undertaking, representation, warrant, promise, assurance or arrangement of any nature whatsoever, whether or not in writing, relating to the subject matter hereof made of (sic) given by any Person at any time prior to the date of this Agreement except to *the extent it is repeated in this Agreement.* The Parties hereto, by mutual agreement in writing, may amend, modify and supplement this Agreement.”

99 The Shareholders' Agreement has not been amended.

100 As to the Memorandum and Articles of Association, the Articles define a Liquidity Event in identical terms as the Shareholders' Agreement.

101 Importantly, the Articles of Association also give specific rights to holders of preferred shares. These are extensive provisions and it is not appropriate to set them out in detail. But in summary they provide preferred shareholders with, in the case of the directors resolving to declare and pay a dividend, dividend rights in preference to any dividend on ordinary shares; and on a Liquidity Event, reduction of capital, winding up or other return of capital, the holders of preferred shares shall be entitled to an amount equal to the issue price per share in preference to the holders of ordinary shares.

102 Significantly, at any time after 1 st September 2011 (i.e. five years after becoming preferred shareholders), FTV was entitled to redeem in full all of its preference shares at “ *fair market value*”. Fair market value was the cash proceeds that the holder of the shares would be entitled to receive following a hypothetical liquidating distribution of the Company where the aggregate proceeds would be distributed equally at a value determined by an independent investment bank. In summary, this was a right of redemption at a *pro rata* value of the Company in respect of the preferred shares. Ordinary shares were not redeemable in the same way. Indeed, preferred shareholders were entitled to exit the Company at the higher of two possible sums, namely either a proportionate undiscounted fair market value of their shares in the Company, or the issue price of their shares plus interest at a compound rate of 8% per annum.

103 Preferred shareholders also had the right to convert the preferred shares to ordinary shares once they had held their shares for three years from the date of the adoption of the Articles of Association. A complicated *“Conversion Ratio”* for the preferred shares is set out in the Articles of Association. The effect of the Conversion Ratio was that the party exercising its option to convert shares from preferred shares to ordinary shares would do so at a price based upon the Company's AUM at the time of conversion; the higher the AUM, the higher the conversion price, and so fewer ordinary shares would be issued to the converting preference shareholder. Moreover, those preference shares issued pursuant to

'put' arrangements were subject to a 20% premium to the conversion price. Accordingly, FTV received 38,068 ordinary shares on funds 'called' ($5 million) and 28,280 ordinary shares on funds 'put' ($5 million) at an average price of approximately $151 per ordinary share.

104 The circumstances of FTV's conversion of its shares from preferred to ordinary (various witnesses from the United States described ordinary shares as *"common"* shares) is considered further below. The effect of election is that all of the rights that FTV had as a preferred shareholder were automatically extinguished.

105 A practical effect of the Conversion Ratio was referred to in Mr Tuckwell's Answer, which was not challenged (paragraph 35). In his Answer, Mr Tuckwell said that as a consequence of conversion in November 2009, FTV obtained 66,348 ordinary shares amounting to approximately 34% of the share capital of the Company. Had they converted in the second half of 2011, shortly before an IPO might have been expected, Mr Tuckwell said that FTV would have only obtained 20,000 to 25,000 ordinary shares (in fact, Mr Tuckwell subsequently amended his calculations, indicating that FTV would have received just over 31,000 shares – still fewer than half the number of ordinary shares that they did receive). Two of the witnesses who gave evidence on behalf of FTV, Mr Cukier and Mr Bernstein, said that FTV converted its shares in expectation of a Liquidity Event — whether as defined in the Shareholders' Agreement or otherwise. Mr Cukier said that throughout his and Mr Bernstein's discussions with Mr Tuckwell, FTV was explicit about its expectation that the Company would pursue such a Liquidity Event. Although we heard a good deal of evidence about FTV's expectations in relation to an IPO or a Liquidity Event, much of that evidence was of little assistance to us as it was accepted by FTV that there was no contractual obligation on the part of the Company or Mr Tuckwell to pursue either an IPO or a sale of the Company. Mr Cukier accepted that there was no contractual obligation on the part of the Company to pursue such a Liquidity Event. Mr Tuckwell, in evidence, accepted that he knew that private equity firms such as FTV would wish to exit the businesses that they invested in in order to realise a return, and that he appreciated that FTV was investing with the expectation of such an exit. Mr Cukier accepted when he was cross-examined that the Shareholders' Agreement could have been agreed in different terms. For example, he accepted that it could have been agreed that the Company was required to take reasonable steps to conduct an IPO within a certain period of time.

106 In Mr Cukier's evidence he confirmed that not only was FTV a sophisticated investor, but also that those on behalf of whom it had invested were also substantial, sophisticated businesses such as pension funds, endowments and banks. It was established that Mr Cukier and indeed most, if not all, of the witnesses as to fact called on behalf of the Plaintiffs' had a personal financial interest in the outcome of the proceedings. However, in the view of the Court, those interests did not colour the evidence that they gave.

107 Owing to the growth of the Company, even though FTV only invested $10 million, its internal records showed that by late 2009, it valued its holding at $100 million. This was a consequence of the growth of the Company during this period and indicated an internal rate

of return ("IRR") on an annual basis of some 143%.

108 All the Plaintiffs accepted that each of them made investment decisions on the basis of an Investment Memorandum, referred to in the course of the trial as an IM, which each of them had internally produced.

109 The IM that FTV prepared for the purpose of considering the investment in the Company showed that they expected a *"5-year redemption"* and that the Shareholders' Agreement gave them a Board seat and *"significant blocking rights"*. As to the Company, they described it as *"a small group of young and hungry entrepreneurs who enjoy great team dynamics and look to Graham [Mr Tuckwell] as a leader"*. When considering the risks and *"mitigants"*, the IM stated that *"FTV will have a minority position on the board and in voting; no ability to force change"*. This was said to be mitigated by provisions in the Shareholders' Agreement.

110 The Court fully accepted that when FTV made its investment it held various expectations, but none imposed or could be argued to have imposed a contractual or any other duty on the part of the Company or Mr Tuckwell to pursue either an IPO or a sale of the Company.

The Company's purchase of GBS from Gold Bullion Holdings

111 The Company's purchase of GBS in July 2008 from Gold Bullion Holdings ("GBH"), which is owned as to two-thirds by the World Gold Council and one-third by Mr Tuckwell, was not mentioned in any of the parties' pleaded cases or addressed in any detail in the evidence before us until towards the end of the trial, when both experts gave oral evidence in relation to its significance. But it is, in the view of the Court, an important matter, principally because of its impact on the Plaintiffs' claim that the Company should be wound up on the just and equitable basis.

112 As to the history of the purchase, Mr Tuckwell said in his statement that by mid-2006 the Company had established two Jersey companies, namely Oil Securities Limited and Commodity Securities Limited and arranged for the securities that they issued to be listed on the London Stock Exchange, but at that time the Company had no product to match the GBS gold securities which Mr Tuckwell had launched with the World Gold Council previously. The Company decided that it needed its own gold product. Mr Tuckwell said that the World Gold Council decided that it would be advantageous for GBH to sell GBS to the Company in return for receiving payment over time, comprising a series of fixed payments representing 9,850 ounces of gold per annum and variable payments which increased with increases in AUM. The payments made by the Company are made as to two-thirds to GBH and one-third to Mr Tuckwell. Mr Tuckwell described, and this was not challenged, the acquisition of GBS as a *"huge coup"* for the Company, as at the time the AUM of GBS was $2.4 billion and the acquisition made the Company by far the largest issuer of gold securities in Europe. It had the effect of doubling the Company's AUM from

$2.1 to $4.5 billion and increased the Company's standing in the market. Indeed, by the time that the purchase was completed in June 2008, the AUM of GBH had risen to $3.6 billion.

113 Mr Cukier, at paragraph 133(f) of his witness statement, described the *“semi-annual deferred consideration payment to”* GBH in relation to the Company's 2008 acquisition of gold products from GBH as being one of the Company's *“biggest liabilities”*. He said that the consideration was payable semi-annually until March 2058. He added:

> *“In addition, subsequent to the transaction an option was exercised entitling the World Gold Council to 3,283 ounces of gold payable semi-annually from March 2058 in perpetuity”*.

114 As indicated, this was not a matter that was the subject of cross-examination of any of the witnesses as to fact (although the Court did ask questions of Mr Cukier and Mr Tuckwell). However, as will be explored in greater detail when the evidence of the experts is considered, it is said by Mr Cliff, the expert called on behalf of Mr Tuckwell, that crystallisation of the Company's liability to GBH, which Mr Cliff was instructed by Mr Tuckwell would occur on a winding up, is at the very least a substantial impediment to the winding up of the Company.

FTV's conversion of preference shares into ordinary shares

115 FTV converted its preference shares in the Company to ordinary shares at the very earliest opportunity, in November 2009, in order to take advantage of a favourable Conversion Ratio. By doing this, FTV was able to obtain a far greater percentage of the ordinary shares than it would have done if it had kept the preference shares until a later IPO / sale of the Company.

116 The consequence of this decision was that FTV abandoned its rights as a preference shareholder including its right to a guaranteed exit after holding the preference shares for five years at, at the very least, the *pro-rata* value of its shares.

117 There was no doubt that FTV understood that it was giving up the rights that it had carefully negotiated through its lawyers as contained in the Shareholders' Agreement.

118 The decision to convert was not the subject of extensive discussion within FTV. In evidence, Mr Cukier said that the discussion as to whether or not to convert the shares from preference to ordinary shares occupied the FTV's investment committee for no more than ten minutes and the realisation that the conversion would lead to loss of rights occupied a small segment of that time. Mr Cukier said:

> *“We did discuss that we would lose the special protections for the preferred*

> *shares.* It wasn't a very controversial discussion. I don't remember the specifics. It was a quick discussion… five to ten minutes".

119 Evidence to a similar effect was given by Mr Bernstein, who when asked whether FTV, when it chose to convert in November 2009 and to give up the right to redemption of its shares, took the risk that there might not be an exit from the investment, replied: " *We gave up that right*". Mr Bernstein was also asked about FTV's decision to convert and he said:

> *"I think it was a simple decision.* I think that the — there were three key components to our conversion: the seniority, the ratchet and our rights. And if you look at it, the seniority is good in the downside when we felt the company was making good progress, was profitable and didn't feel that was worthwhile, we obviously owned more of the company by converting sooner rather than later and so economically it was in our best interest to convert."

120 One of the principal submissions made on Mr Tuckwell's behalf at trial was that these proceedings, so far as FTV was concerned, were an attempt to regain the rights that they relinquished by converting their preference shares to ordinary shares. Mr Tuckwell said that FTV gave up a parcel of significant rights on conversion, including the right to a guaranteed exit after five years as a shareholder. These rights were given up on conversion so that FTV could own a far bigger share of the Company in the expectation of making a great deal more money. Mr Tuckwell's written submissions state:

> *"It [FTV] cannot seriously expect the Court to come to the rescue now or to be taken seriously in complaining about the absence of the things it chose to give up rights to by converting for naked economic reasons"*.

121 A second consequence of FTV's conversion, which was clear from the evidence the Court heard from Mr Tuckwell and events that will be referred to in more detail below, is that it was one of the triggers informing what became, from Mr Tuckwell's perspective, a burning resentment of FTV, which in return for an investment of $10 million had ended up owning in excess of a quarter of a company which ultimately was worth hundreds of millions of dollars. It was one of the events that led Mr Tuckwell to describe FTV, on more than one occasion in evidence, as a *"vampire squid"*. Prior to conversion, Mr Tuckwell had also been angered by the decision of FTV to *"put"* the second $5 million of their investment. Mr Tuckwell's evidence was that the Company only needed the first $5 million that it had 'called' from FTV, and not the second $5 million that FTV agreed and was entitled to require the Company to accept as a further investment by FTV in the Company's preference shares. The consequence of the investment of the second $5 million (albeit at a slightly less favourable conversion rate to FTV as the money was *"put"* and not *"called"*) was that, in the view of Mr Tuckwell, FTV became entitled to even more shares in return for an investment that the Company did not need, or to the extent that those funds were needed, they were not needed from FTV but could have been procured on better terms for the Company.

122 The consequence of the conversion from Mr Tuckwell's perspective was explained by him in his evidence as follows. We quote this extract in its entirety as it is at the core of Mr Tuckwell's case [day 12, page 137]:

> *“Now, had they stayed the distance and said: okay, we — we're running a fund, we invested halfway through the 10-year cycle or later, Graham, you know we need our money out after five years or whatever, fine, we'll get your money out after five years.* Stay as the preferred shareholders and you are absolutely guaranteed to be cashed out. But no, no, no, no. They didn't want to do that. Having put the shares to us, which we really didn't want, what they said is: okay, in my opinion, they had to sit down and say: okay, here are the three alternatives: the company is either — we either do convert or don't convert and if we convert, what happens? There are three alternatives. If we convert, we could be monetised through an IPO. We have ordinary shares, minority shares in a Jersey company. It doesn't take too many phone calls to work out that you've got very limited rights.
>
> *Second alternative is the company gets sold in a trade sale, so having converted to ordinary shares under alternative one, the IPO, bingo, pay day, terrific.* Second one, the company gets sold in the trade sale, it was never anticipated to sell the company by assets. It was always anticipated as we did in the State Street documentation and the documentation with Goldmans to sell the top company shares to a buyer.
>
> *That, once again, would have given them full — well, not NAV, but it would have given them an equal share, because all shareholders get treated equally.* They get the equal share. Assume it's a NAV.
>
> *And the third alternative was there is no sale and they're left with minority shares and if they want to liquidate them, they have to sell them in a market process in the way they conducted it with Sandler O'Neill, but this time, if there was no prospect of an IPO or a trade sale, in other words, if I decided: hey, I'll just keep the company running, then clearly those shares were going to go at a massive discount to NAV.*
>
> *I mean, that is just straight commercial business sense and it's not very hard for them to have sat down and said: okay, what's the probability of an IPO?* What's the probability of a trade sale? What's the probability of neither happening?
>
> *Now, I've done some numbers on this and it's pretty clear that under most scenarios you could run, it made full commercial sense to convert as early as possible, to grab as many shares as possible and to take the risk of the unlikelihood of getting out at a big discount to NAV, but if you've got an 80 or 90% chance of a trade sale or IPO happening and you've got a much smaller chance of being locked in as a minority, it is still a very, very good deal commercially to convert and to take on that bargain and risk.”*

123 FTV purchased additional shares from smaller shareholders at the same time as the

conversion, and it is said by Mr Tuckwell that these were clearly purchased at a substantial discount to their then value. FTV purchased 2,755 shares from each of Nik Bienkowski and Hector McNeil at $1,170 per share on the 6 th November 2009 which, as was accepted, gives an implied value to the Company of $275 million. That was regarded by FTV as a substantial discount at the time of purchase as was made clear by an FTV internal presentation dated October 2009, which referred to the transactions as being at a 64% – 73% discount against a projected exit value. Further, additional purchases were made by FTV at the time when the AUM of the business was increasing. In June 2010, they purchased 13 shares from Nik Bienkowski at £700 per share ($1,029 per share); 811 shares from Hector McNeil at the same price; 29 shares from Mr Garcia at the same price of £700, and 178 shares from Mr Garcia at £625 per share. Whether or not these were purchases at discounts that reflected the minority status of the shares being purchased or the lack of liquidity of the shares in a private company they were certainly, so far as FTV was concerned, shares purchased at a discount against what they thought was the true value of the shares at the time.

The secondary sales by FTV to Millennium and Susquehanna

124 The dates of the secondary sales and the number of shares sold are set out in paragraph 10 above.

125 The 2011 secondary sales, although supported by Mr Tuckwell at the time, led to further resentment of FTV on his part. The circumstances of the sales are also important, in particular as regards Millennium and Susquehanna's claimed expectations in relation to the flotation or sale of the Company and, at the time of the sales, what FTV claimed was an unreasonable demand by Mr Tuckwell for personal compensation in respect of the time the Company spent assisting FTV in the sales process.

126 FTV engaged New York investment bank Sandler O'Neill to assist it in marketing the sale (of approximately one third of its shares in the Company) to a number of prospective purchasers and Millennium and Susquehanna were in effect successful bidders in that process. During this process, the principal representatives from Millennium and Susquehanna were Max Chee and Vincenzo La Ruffa respectively. Both gave evidence and the Court found both to be impressive witnesses.

127 Prior to making the purchases that they did, Millennium and Susquehanna received information from FTV and also carried out direct due diligence of the Company. This included meetings with both Mr Tuckwell and representatives of FTV. Both Millennium and Susquehanna formed the reasonable view that it was likely that there would be an IPO and / or sale of the business in the near future. Both investors saw the Company as extremely promising in terms of its prospects having regard to recent growth and further expected growth of the Company's AUM.

128 In relation to both companies, Investment Memorandums (IMs) were prepared internally by each Millennium and Susquehanna for their respective investment committees. Millennium was an unusual investor in that its primary business is in making secondary purchases such as this investment, not providing seed capital in the way that FTV does and did. Millennium's IM showed that they expected to make a 2.5x return upon their investment within thirty-six months. They expected an IPO in the second half of 2011. Mr Chee said:

> *"There is always the third option in venture capital, we like to joke there's three exits M&A and IPO and bankruptcy.* We don't like to talk about the third one, though."

129 The IM recommended that Millennium purchase up to 10% of the ordinary shares being sold by FTV at a price of $3,021.28 per share, which implied an equity valuation of the Company of $734 million and an enterprise valuation of $704 million. The IM said the authors of the report, which included Mr Chee, were *"enthusiastic"* about the opportunity to invest in a rapidly growing company. In 2010 alone, the Company's revenues increased by 73% and AUM grew by 58% to $26.4 billion. The IM identified various risks in investing in the Company including the concentrated ownership with the CEO (Mr Tuckwell) owning nearly 50% of the Company (in fact that was wrong as Mr Tuckwell owned 54% of the shares or thereabouts, directly or indirectly) and the fact that a reduction in AUM could delay or derail plans for the IPO. Indeed, this is something that occurred in September 2011 when AUM fell by 17% in a single month.

130 Mr Chee did not agree that Millennium paid a discounted price for the shares. However, when valuing the shares Millennium would take into account and did take into account the liquidity of the shares and said that it is typical to take a liquidity discount against valuations of private companies, which reflects the fact that shares in private companies are less *"liquid"* as they are more difficult to sell. In evidence, Mr Chee agreed that this was a *"liquidity discount"* which was no different to other secondary purchases that Millennium made. Nonetheless the anticipation, according to the IM, was that the Company would *"go public"* at a value between $1.3 billion and $2 billion representing a return of between 1.7 and 2.7 times to Millennium, if Millennium chose to sell in an IPO. It might of course continue to hold its shares or even buy further shares at that stage.

131 Mr Chee did accept what was put in Mr Tuckwell's pleading (paragraph 47 of the Answer) to the effect that the secondary sales were at a price which was a discount to what each of FTV, Millennium and Susquehanna believed would be the likely price in the IPO then anticipated as taking place later in 2011. Mr Chee added that as the IPO did not occur this was all rather speculative as it was a discount to a hypothetical value that no one could determine at the time. But nonetheless he said *"it's a cogent argument that there was a discount"*.

132 Mr Burstein also gave evidence on behalf of Millennium. He said that this was the largest transaction that Millennium had ever been involved with. He was asked about the Securities Purchase Agreement ("SPA") pursuant to which Millennium purchased the

shares from FTV. This agreement itself contains an important provision referred to as the "*No Market*" clause as that is the title of the relevant provision in the SPA. This provides:

> *"Such Buyer acknowledges and agrees that there is currently no market for the Purchase Securities and that the Company has no obligation to apply to list the Purchase Securities or any of its Ordinary Shares on any securities exchange or national market, and, consequently, such Buyer should assume that it is very unlikely that any market for the Purchase Securities will ever develop.* Such Buyer understands and agrees that no Seller has made any representations or warranties to such Buyer respecting any such listing or the Company's intentions with respect thereto."

133 Mr Burstein said he was familiar with the clause and said it was a familiar document to anyone involved in his business and was designed to avoid risk. He said:

> *"I don't think anyone would contest that there was a requirement for the Company to hold a public offering or to list our shares."*

134 However, Mr Burstein went on to say that this was without prejudice to his understanding as to the obligation of directors to comply with their fiduciary duties. His evidence was that he had read the Shareholders' Agreement to which Millennium adhered and he said he was aware of the fact that when Millennium was purchasing ordinary shares from FTV it was buying without the suite of rights that preferred shareholders would have. He also said that he was impressed with the strength of the Independent Directors on the Board.

135 As to Susquehanna, the IM that its executives had prepared expressly recognised the risk attaching to becoming a minority shareholder in a private company. Mr La Ruffa headed the team that drafted the IM which went to the Susquehanna investment committee. Mr La Ruffa confirmed that this was an unusual investment for Susquehanna. The percentage shareholding (2.99%) was smaller than most investee companies with which Susquehanna was concerned. Susquehanna would normally purchase preference shares rather than ordinary shares. Such preference shares normally came with various protective rights, including exit rights. Generally, Susquehanna would also seek a seat on the Board of Directors. Susquehanna was aware that FTV had had preferred rights which they had lost when they converted their shares into ordinary shares.

136 The Susquehanna IM indicated that the Company was planning an IPO in late 2011 / early 2012 and had strong prospects, with an investment in the Company expected to be profitable. Amongst the risks attached to the proposed investment, the IM stated that Susquehanna was, "buying a minority share with no structure, limited rights, and no Board seat which could limit its ability to defend its interests". For regulatory reasons connected to this purchase, Susquehanna could not buy more than 2.9% and accordingly there was no eligibility for a Board seat or information rights. The note went on:

> *"Moreover, we will not be receiving a liquidity preference or dividend.* As such,

> we will not benefit from any form of downside protection and will be at the whim of the board and major shareholders for those months leading up to the IPO. [Susquehanna] has negotiated full information rights and an observer seat should the Company not go public by the year end 2011"

137 In 2013, Mr La Ruffa was party to an internal email exchange within Susquehanna in which there was a discussion about the fact that they had invested in common (ordinary) shares which they felt was *"justified"* at the time because they felt that the Company was going to be sold in the near future. One of the parties in the conversation said *"Either way we made a bet"*. The same participant in the conversation later observed *"We will both have grandchildren before we exit"*.

138 As indicated in the introductory paragraph to this section it was during this period that, on FTV's case, Mr Tuckwell made an unwarranted demand for personal compensation. The context for this was that the Company was on any view reassured that the sale process would involve minimal strain on the Company's management, which could remain focussed on the IPO. But this was not how things turned out. At the time both Mr Tuckwell and Mr Quigley (then the Chief Operating Officer of the Company) were irritated by the volume of work relating to the secondary sales with which the Company had been burdened.

139 An email exchange between Mr Quigley and Mr Cukier on 9 th February 2011 illustrated the extent of the problem that was being created by due diligence requests being dealt with by the Company. Mr Cukier asked if there were "any data requests that aren't otherwise necessary for the IPO". Mr Quigley replied *"Cute answer. How about 30+ NDAs for starters? Seriously though this sale process is creating additional bespoke work…."*.

140 It was plain from Mr Tuckwell's perspective that he saw FTV as the principal beneficiary of the secondary sales. This is unsurprising as they received approximately $64 million for selling a third of shares which they had purchased for $10 million. Mr Cukier accepted that it was *"a very good price to sell the shares at"*.

141 Mr Quigley said that at that stage, in order to reflect the time spent by Company staff on the sale process, Mr Tuckwell had suggested that *"we log our time spent and bill FTV as a re-charge"*. FTV failed to make such a proposal. Ultimately this led to the sending of an email by Mr Tuckwell at 5 a.m. on 16 March 2011, two hours before representatives of Susquehanna and Millennium were due to board flights to Jersey for two days of due diligence at the Company's Jersey headquarters.

142 Before looking at the terms of the email, it is helpful to consider the description of it in the FTV evidence. Mr Cukier describes it as *"Mr Tuckwell's unprecedented demand for a personal fee"*. He went on to describe this as *"the most extreme example of management misbehaviour that I have ever encountered"*. It was described as *"hostage taking"*. Mr Cukier regarded it as a demand for a fee equivalent of 7% of the proceeds of sale

(approximately $4.5 million) which was to be paid to Mr Tuckwell himself and other members of the Company management team. Mr Garman, a partner of FTV who also gave evidence, said that Mr Tuckwell's demand was " *shocking and completely unacceptable*" and was again a demand for a fee of *"approximately $4.5 million to be paid to himself and other unnamed [Company] executives"*. He described it in an email at the time as *"a blackmail proposal"*.

143 We note that FTV chose to withhold the information as to this demand from the entities to which it was trying to sell its shares, namely Millennium and Susquehanna, until after they had purchased their shares from FTV.

144 What Mr Tuckwell actually said in his email was this:

> *"Ben*
>
> *As we reflect on the amount of work that FTV has imposed on the company and the distraction to our business it has caused – just to help FTV in its desire to sell shares now rather than await the IPO – I feel we have reached a point where FTV should be making a contribution reflecting the benefit arising to FTV*.
>
> *When you first approached us about helping out we agreed to reluctantly, in the expectation that we would not be required to spend huge amounts of time on this.* Unfortunately, a great deal more time than agreed has been expended to date and we are now being asked to host two full days of due diligence. The latter was not part of the deal and I will need a great deal of convincing today to pursued (sic) me that it should go ahead as scheduled. For the last two days we have been tied up with the lead managers and we do not want to do the same again later this week. I agreed to and did give a series of presentations to buyers in New York but there was no agreement that any further company presentations would be required let alone two full days of due diligence visits in Jersey and London.
>
> *If FTV were to sell shares in the IPO it would be charged a fee of around 7%*. I think only fair in all the circumstances that if FTV wishes to sell shares now with any further help of the company, FTV should pay an amount in lieu thereof by way of a contribution to the executives that have helped to enrich FTV. The amount would not be payable to ETFS as such (otherwise I and FTV would get most of the benefit) but would be held on trust for other executives as a reward for their efforts. The allocation of the amount would be decided by me in consultation with Mark and Tom (and they would not be substantial beneficiaries, if at all).
>
> *I should be grateful if you and your partners could come back with a suggested contribution that you think is appropriate*.
>
> *I apologise for raising this now but various comments and events recently have highlighted my focus on this.* Perhaps it is something that FTV could have

offered without us having to suggest it.

We should nail this down before the guys get on the plane [sic] or we can just postpone the visit until we nut this out.

Graham"

145 Mr Tuckwell's case is that they were misled by FTV as to the extent of the due diligence work. He said that it had created a *"ton of work involved with the Company"* at a time when the Company was extremely busy. He agreed that the secondary sales were to the Company's benefit to the extent that perhaps it did fix a floor for the price the shares might realise on an IPO. However, he said that it was clear from the email that he was seeking a contribution to the time spent by other executives assisting in the secondary sales and not himself. Further, he said he was clearly not asking for a 7% fee, but only asking for a *"contribution"* to the executives. He used the word *"contribution"* on three occasions. He expressly stated that he did not want the sum to be paid to the Company otherwise he and FTV would get most of the benefit (as the holders of the vast majority of shares). In evidence, Mr Tuckwell said that he had not contemplated that FTV would pay $4.5 million and that he had no expectation that any such contribution would be seven figures. Mr Tuckwell said that the reference to 7% of proceeds in his email was simply a marker for the purpose of FTV suggesting what the contribution should be. Mr Tuckwell said in evidence that a fee of 1% of sale proceeds would have been *"more than adequate"*.

146 Having regard to the email correspondence, we accept what Mr Tuckwell says about the content and meaning of this email, and judge the interpretation placed on the email by the FTV witnesses to be exaggerated and incorrect. Nonetheless, the timing of this email, at 5 o'clock in the morning, as representatives of Susquehanna and Millennium were about to fly to Jersey, was significant and, in our view, calculated to exert unreasonable pressure upon FTV.

147 The secondary sales proceeded without FTV agreeing to make any contribution as requested by Mr Tuckwell. It is said on behalf of Mr Tuckwell that these events are of little relevance as they do not give rise to any pleaded relief, in the sense they are not suggested to be acts that amount to unfair prejudice. That is correct so far as it goes, but this was a significant turning point in the relationship between Mr Tuckwell and FTV, particularly so far as Mr Tuckwell is concerned. Mr Tuckwell was infuriated by the refusal of FTV to contribute. He said that the management team were "up to pussy's bow in trying to do all the work that was needed to get this IPO out the door" and the sale process put the IPO in danger owing to the amount of work that was occasioned. Mr Tuckwell described this as being one of the straws that broke the camel's back and from this point onwards the cordial relationship between Mr Tuckwell and FTV was at an end. He was to say in evidence that FTV " *lost me that day*".

148 We concluded that Millennium and Susquehanna, although doubtless they had an expectation that the Company would soon list or be sold, were aware of the lack of liquidity

inherent in purchasing such securities, the Court noting, as they warranted at section 4.08 of the SPA that they were "a sophisticated….entity familiar with transactions similar to those contemplated by this Agreement". They carried out their own diligence and had they wished to receive any promises direct from the Company then they could have negotiated the same – indeed they did execute a signed agreement between themselves and the Company on 7 April 2011 which provided, as set out above, for observer status at the Board and certain information rights if an IPO did not occur before the end of 2011.

The abandonment of the IPO and the sales process

149 Between 2011 and 2012 various alternative sale opportunities for the Company were considered which were discussed at various Board meetings. For example, at the March 2011 Board meeting it was reported that a timetable had been produced for the IPO and a Form-1 would be filed in May 2011, which it was. This is an important stage in the IPO process. This document was comprehensive and filed with the Securities and Exchange Commission on 11 th May 2011. It was 187 pages in length and provides detail of the anticipated public offering of shares in the Company. An enormous amount of work went into producing this document and generally readying the Company for an IPO. The form F-1 identifies various risk factors attaching to the business of the Company. These include:

(i) The fluctuation in commodity prices, particularly gold. 96% of the AUM was invested in commodity ETCs. Commodity investments, especially in precious metals such as gold, may be subject to decline in commodity prices.

(ii) The Company had experienced rapid growth, which may be difficult to sustain. This growth was from $60 million in AUM in December 2005 to approximately $27.5 billion AUM as at March 2011, during which period the Company had increased its number of products from 1 to 250 and expanded its listings from one stock exchange to ten worldwide.

(iii) Specific risks in relation to the structure of the Company included the fact that Mr Tuckwell "will be able to control or significantly influence our corporate actions". This included the election of directors, significant corporate transactions, changes of control of the Company and sale of substantially all of the assets of the Company: "These actions may be taken even if they are opposed by other shareholders, including those who purchase ordinary shares in this offering".

150 Prospective investors were also told:

"The provisions of Jersey corporate law and our Memorandum and Articles of Association have the effect of concentrating control over certain corporate decisions and transactions in the hands of our board of directors".

151 Page 91 of the document, which identified the *"principal and selling shareholders"*, listed

all the shareholders in the Company, but the number of the shares to be offered was blank. In fact, at no stage, it appears, was there any agreement as to the number of shares to be offered to the public or the identity of the shareholders whose shares were to be the subject of that offering.

152 At the Board meeting in August 2011, the Board reviewed the possibilities open to it, namely a trade sale or an IPO. One potential purchaser, State Street, had withdrawn from the sale process and another consortium of buyers called Carlisle was still in negotiations, although FTV, Millennium and Susquehanna doubted that Carlisle was a credible buyer. Mr Chee felt that the fact that Carlisle was thought to be a credible option showed that the Plaintiffs needed to be more involved in the Company's strategic discussions as he thought that they had valuable experience which Mr Tuckwell was lacking.

153 By September 2011, growth in the Company had slowed, but Millennium still understood that the Company was focussing on an IPO in early 2012.

154 By now Mr Tuckwell seemed to be concerned about a number of matters including the fact that, as is standard with IPOs, his shares would be locked up for a considerable period of time, whilst FTV might achieve further liquidity at what, in his view, would be his expense. In October 2011, Mr Tuckwell decided that there should not be an IPO, but he would continue to explore a sale. This was Mr Tuckwell's personal decision, as he accepted in evidence, and was not discussed at Board level. Mr Chee said that it ought to have been, and that should have been after obtaining feedback from the Board including the Independent Directors. We agreed that would have been the best approach, but the abandonment of the IPO and the discontinuance of the sale process is not the subject of any allegation of wrongdoing on the part of Mr Tuckwell, and it is not suggested that the circumstances in which this came to an end is evidence of unfair prejudice.

155 In respect of the sales process, the Board agreed in October 2011 to appoint Goldman Sachs to pursue, in effect, an auction of the Company. Although various potential purchasers were identified by Goldman Sachs in early 2012, ultimately none proceeded. Mr Cukier, in his witness statement, blamed Mr Tuckwell for attempting unsuccessfully to negotiate certain sales himself without sufficient third party assistance. Mr Cukier said that the Company was *“unsaleable”* without a new CEO in replacement of Mr Tuckwell. Mr Tuckwell said that the failure to arrange a sale was principally due to the fall in the AUM consequent upon the steep decline in commodity prices. Accordingly, a decision was made not to continue with the sales process and to focus on the business. It was not necessary for us to make a finding in relation to these competing accounts as to why the sale process ground to a halt.

156 In December 2011 the Company produced for a Board meeting a memorandum on the sale process including a spreadsheet indicating how the sale proceeds would be distributed to shareholders. Mr La Ruffa of Susquehanna considered the spreadsheet in his evidence. He described this as a *‘waterfall’* document which set out what was going to

occur with the proceeds of sale. He said that the spreadsheet showed the *'distributable proceeds to shareholders after obligations paid'*. When he was asked by the Court whether his understanding was that there was to be no difference between common shareholders (i.e. ordinary shareholders) he replied, " *I can say that with a moral certainty*".

The LTIPs

157 LTIPs are Long Term Incentive Plans providing for the issuance by the Company of new ordinary shares in the Company to its executives.

158 The evidence and arguments in relation to the LTIPs will be considered reasonably briefly. Indeed, none of the instances of unfair prejudice asserted by the Plaintiffs prior to the Sales, including the LTIPs, Mr Tuckwell's proposal for a buy back of some of his shares, Mr Tuckwell's removal of Mr Cukier from the Board and the transfer of shares to the Tuckwell Foundation, will be dealt with at great length. Regrettably, collectively these issues occupied several days of evidence (including at least two days of cross-examination of Mr Tuckwell) and none of these matters, in the view of the Court, either individually or collectively, amounted to or led to unfair prejudice to the Plaintiffs. However, all four matters are pleaded as instances of unfair prejudice in the Amended Order of Justice.

159 There were different types of LTIPs with different vesting conditions. Some *"vested"* simply by the executive remaining within the Company until the vesting date, whereas others only vested upon the Company reaching certain performance targets – the better the performance, the greater number of shares are vested.

160 Compensation comprised a combination of base salary, annual bonus and LTIPs. The LTIPs could comprise a significant proportion of that compensation. Timothy Armour ("Mr Armour"), an Independent Director of the Company who was on the Board between early 2011 and late 2013, whom the Court regarded as a very impressive witness (except where his memory let him down), said that there was a particular focus on compensation during the period that he was a director, and that is certainly revealed by the Board minutes and associated email correspondence. Mr Tuckwell says that the award of LTIPs was *"always a source of contention"* within the Company and that is borne out by the other evidence in the case. There were clearly conflicts between executives, Board members and shareholders in relation to this matter. Within the Company, executives were divided for compensation purposes into three levels, and for 2011–2012 the top level was Mr Tuckwell, Mark Weeks ("Mr Weeks") and Mr Quigley (L1s), the other senior executives (L2s) and the rest (L3s). For L1s, the LTIPs had two essential elements: Restricted Stock Units ("RSUs") which were awarded for remaining with the Company for a certain period of time, and Performance Stock Units ("PSUs") which were, as the name indicates, performance related. The PSUs were awarded on a sliding scale with the number that might vest ranging between zero and the maximum potential award.

161 Mr Tuckwell accepted in his statement and in evidence that the documentation in relation to the award of these LTIPs was patchy. Mr Tuckwell said, *"nothing was really nailed down as it should perhaps have been and it took a long time to formalise anything for any of the L1s as regards their LTIPs"*.

162 The LTIPs were particularly important to Mr Tuckwell as he received no compensation by way of salary or bonus – his only compensation from the end of 2010 onwards would be LTIPs.

163 Mr Armour memorably said the discussions about LTIPs were *"very loosey-goosey"*, a description that Mr Tuckwell was content to accept when he gave evidence.

164 In summary, the Plaintiffs say that Mr Tuckwell caused the Company to allocate and issue to him additional shares under the Company's LTIP scheme when such allocation had not been approved by the Board or its Remuneration Committee. Specifically, the allegations focus on:

(i) The issue in February 2011 of 700 shares relating to the 2010 LTIP award;

(ii) The issue in June 2011 of 700 shares relating to the 2011 RSUs under the LTIP plan that Mr Tuckwell proposed in February 2011;

(iii) The granting of LTIPs comprising 6,300 shares for the three years (or possibly 8,400 shares over four years) — 2011–2014 – 2,100 shares per annum divided into 700 RSUs and up to a maximum of 1,400 PSUs per annum; and

(iv) Proposals to *"accelerate"* those awards in the event of a trade sale of the Company.

165 The sums represented by these LTIPs were not insignificant, with a total value of the LTIPs which it was proposed be awarded to Mr Tuckwell exceeding $20 million.

166 The Plaintiffs argue that Mr Tuckwell in, as they claim, purporting to award himself the LTIPs, acted in breach of his duty to the Company, conducted the affairs of the Company in a manner unfairly prejudicial to the interests of its members, and by doing so conducted himself in a manner that contributed to a breakdown in the Plaintiffs' trust and confidence in his management of the Company.

167 We find that in relation to the 700 shares relating to the 2010 LTIP award, they were approved by the Board in February 2011 as recorded in the minutes.

168 As regards the other LTIPs, they were considered by the Company's directors during a number of Board meetings between 2011 and 2012. There were deficiencies in the

approval process and Mr Tuckwell accepted in his evidence that the LTIPs were never expressly approved by the Board during this period. As a result, towards the end of 2012 the Independent Directors, constituted the Remuneration Committee chaired by Mr Armour, and acting on advice from the law firm Carey Olsen contained in a memorandum, agreed that the shares already issued to Mr Tuckwell, in accordance with his LTIP entitlements, would be cancelled and there would be no further issuances of shares under the LTIP scheme but instead he would be remunerated in cash.

169 Mr Armour said:

> *"My opinion, Graham did nothing nefarious in putting together a recommendation for himself to have this award.* The issue is it was not run in a very disciplined, orderly with a good process. It got sort of thrown out in a spreadsheet in January – in February, or March meeting, the first meeting I attended. We sort of talked about and kicked it around. It was not approved. It was just very casual…. it just wasn't a thorough disciplined process and so you end up with the kind of murkiness you read about here, where Graham said that everybody knew about it and you have the Board member saying: I don't remember a specific meeting where we approved that amount of money."

He went on to say:

> *"I just think Graham's LTIPs for example just didn't get the attention and the priority it deserved.* And, you know, I bear a responsibility for that…. But I think we all did."

170 Mr Armour added that Board meetings were not efficiently run and:

> *"I would say my experience on the Board was that the efficiency of the amount of information provided versus the relative importance, there was asymmetry and an example, we would start the meeting, we would have a whole day meeting after a long flight and we would talk stories and sales and whatever and as we got to the end of the meeting some of the important stuff would roll out."*

171 The LTIPs story concludes with the meeting of the Remuneration Committee held in California on 3 rd December 2012, chaired by Mr Armour in the presence of Mr Chee who joined by telephone from elsewhere in the United States, and with a partner of Carey Olsen Jersey in attendance. It is clear from the contents of the minutes that they were drafted by Carey Olsen. The minutes noted that Mr Tuckwell considered (and the non-executive directors who were directors at the relevant time concurred) that his remuneration in respect of the period of 1 st January 2011 to 31 st December 2012 had previously been agreed with the Company. Such remuneration was to take the form of fully paid up shares in the Company, and the amount of such remuneration would depend on whether certain performance and other conditions were met in respect to the relevant years of service. The minutes noted that certain allegations had been made by FTV, including that there had

been irregularities in the approval of the remuneration to be paid to Mr Tuckwell, in particular that the Board had not formally approved such remuneration and consequently the issue of shares to Mr Tuckwell in payment of such remuneration had not been authorised. The minute noted that FTV had not raised any issues in relation to the compensation awarded to other senior executives – only Mr Tuckwell. The minute also noted the recent negotiations between FTV and the Company in which FTV had sought to *"clarify and enhance certain shareholder rights"* – those negotiations had been terminated. The Remuneration Committee, on the footing that the Board would proceed with the proposal that Mr Tuckwell forgo the remuneration originally agreed (i.e. the LTIPs), considered a proposed Service Agreement between the Company and Mr Tuckwell, which would set out the terms of his employment, and recommended to the Board that, in the event that they proceeded in effect to cancel the LTIPs, Mr Tuckwell should be awarded remuneration for the two-year period 1 January 2011 to 31 December 2012, totalling £1,990,000 and £1,760,000 respectively, such sums to be paid in cash.

172 The recommendations of the Remuneration Committee were approved by the Board of the Company during a meeting held on the same day. Mr Tuckwell did not vote on the recommendations. Mr Tuckwell said:

> *"It seemed better all round that I should give up the LTIPs and have the Board set pay for the period in question.* As a result, the LTIP shares were cancelled. As a result, FTV, to my mind could not say that they had been prejudiced in any way by any technical defect as to the award of the LTIPs."

173 We agree. In cross-examination Mr Cukier accepted that nowhere in his statement did he say that FTV had suffered any prejudice as a result of this episode. Accordingly, there can be no claim on account of unfair prejudice. All that can be said is that this particular matter led to further deterioration in the relationship between FTV and Mr Tuckwell.

Mr Tuckwell's proposal for a buy back of some of his shares

174 In 2012, after the failure of the IPO and trade sale processes, Mr Tuckwell proposed a scheme to provide employee shareholders with liquidity for their shares. This was partly in consequence of the widespread disappointment within the Company that it had failed to sell and that those executives who held shares would not be achieving the value that they thought they would. It was also partly a function of the fact that many executives, including two who gave evidence, regarded themselves as receiving salaries lower than they could command elsewhere, which they were happy to accept in the anticipation of realising the value of their shares.

175 Mr Tuckwell originally included within this proposal that some of his shares in the Company (as opposed to the shares under his LTIPs, which were still an issue as the Board had not yet cancelled them) be purchased up to a value of approximately $24 million. However, after receiving the opposition from the Board, in particular from Mr Cukier,

Mr Tuckwell ultimately withdrew this suggestion.

176 The Plaintiffs plead that in causing a proposal to be put to the Board that would, if implemented, have resulted in the Company providing to Mr Tuckwell, but not other significant shareholders, liquidity for part of his shareholding, Mr Tuckwell sought to prefer or benefit his interests over other shareholders and in doing so, *inter alia*, breached his duties to the Company and misused his fiduciary powers.

177 The rationale for the re-purchase was set out in a memorandum prepared by Mr Quigley and sent by Mr Tuckwell to the Board on 5 th May 2012, which detailed the reasons in favour of the re-purchase summarised above. At that stage, the proposal was that there be annual share buy backs with members of staff entitled to sell to the Company up to 25% of their vested shares. Mr Tuckwell would participate in the scheme as he was also an executive, not only a shareholder. However, owing to the size of his shareholding, he would benefit to a much greater extent than other individuals.

178 . Mr Cukier said that the effect of the proposed share buy back would be that if the Company spent $31 million buying back shares, two-thirds of this sum would be allocated to Mr Tuckwell. The proposed purchase price was $2,750 per share. FTV considered it to be unacceptable that Mr Tuckwell would receive a buy out at a very good price, while other non-management shareholders were, "trapped in our investment without any apparent prospect for liquidity".

179 Mr Chee of Millennium proposed that Mr Tuckwell should only be allowed to participate in his role as CEO and not as a majority shareholder and hence be limited to approximately two times what, on average, the other executives could receive. Initially Mr Tuckwell did not accept this. Mr La Ruffa of Susquehanna shared Mr Chee's concerns.

180 Mr Cukier said that any share buy back should exclude Mr Tuckwell as he already had sufficient shares in the Company to be incentivised to work to make the Company successful. There were various discussions amongst directors, and one of the Independent Directors, Dr Vince FitzGerald ("Dr FitzGerald"), expressed the view that all members of management, including Mr Tuckwell, should be able to participate in the share buy back, subject to a cap which would limit Mr Tuckwell's participation. At this time, in May 2012, Mr Cukier met Mr Tuckwell in London, and during their conversation Mr Tuckwell said that he planned to *"reconstitute the Board"* by removing Mr Cukier and two other directors, leaving the three Independent Directors (Dr FitzGerald, Dr Graham Birch ("Dr Birch") and Mr Armour) and adding three staff members in addition to himself. This would mean that the independent majority of Board members would be lost. He also explained that, whilst he would provide ongoing information to the three Plaintiff companies, he would not allow them to have any role on the Board. Mr Cukier objected to these proposals along with the other proposals in relation to the share buy back. Mr Tuckwell replied that he did not wish to remove Mr Cukier from the Board because FTV objected to the share re-purchase, but rather because *"FTV screwed itself"* when it failed to provide a share pool for management

out of the secondary sale proceeds.

181 Ultimately, matters appeared to be resolved at a meeting of the Board on 15 th June 2012, when it was agreed that the share purchase would go ahead, but only as a one-off event, with Mr Tuckwell entitled to participate and receiving up to 44% of the share re-purchase payments. This was supported by the three independent members of the Board, Dr FitzGerald, Dr Birch and Mr Armour. The position of Mr Chee on behalf of Millennium was different from that adopted by FTV. He thought that Mr Tuckwell should participate in the share buy back, but as an executive, not a shareholder. Accordingly (Mr Chee was not a Board member at the time of the vote) it was only the FTV director, Mr Cukier, who opposed the share buy back scheme that was approved by the Board on 15 th June 2012.

182 The response of FTV to this resolution of the Board, as accepted by Mr Armour when he gave evidence, was to threaten to sue the Board if Mr Tuckwell was involved in this buy back scheme. The evidence of Mr Armour was to the effect that the Independent Directors were attempting to hold the ring between the minority shareholders on the one hand and a demanding majority shareholder/CEO on the other. Mr Armour put it in these terms:

> *"I think the Board was playing an ongoing role to prevent Graham from what I call raiding the cookie jar.* Graham wanted liquidity for himself and it was outsized relative to the size of the Company and I think the Board – we had constant battles with this, where he would say: I need to take care of my people and then the plan would come up and a spreadsheet with a big huge number for Graham and you're like: Graham you don't need the relief, your people need the relief. You're incented (sic) to stay here and you're the owner."

183 The Court agrees with Mr Armour's observation in his witness statement:

> *"My impression was that Mr Tuckwell had always had 'liquidity envy' over the fact that FTV had sold part of its shareholding in the Secondary Sales, and had thereby earned a very good return on their investment (which paid for their investment several times over)."*

184 Mr Armour said that Mr Tuckwell resented the fact that FTV had received a return before he did. He brought this up often, saying that:

> *"FTV's return was earned off the back of his work without FTV having done anything to earn it."*

185 In FTV's letter to the Board dated 2 July 2012, it was alleged that:

> *"Numerous events have occurred during the past 18 months involving Graham Tuckwell using his position as majority shareholder and CEO of the Company to attempt to benefit himself at the expense of, and in a matter that is unfairly*

prejudicial to, the other shareholders of the Company, including the undersigned."

186 The letter went on to refer to the LTIPs, to the share re-purchase, including the latest proposal which had been agreed by the Board, and Mr Tuckwell's proposal to remove "dissenting Board members and replacing them with non-independent directors loyal to Mr Tuckwell". The letter particularised FTV's complaints and in relation to the share re-purchase they suggested that such re-purchase:

"…should in principle be effected pro rata across all shareholders, and not in a manner that excludes and discriminates against all non-management shareholders, including FTV, which is entitled to pro rata participation in any sale by a shareholder."

187 However, without derogation from this principle, FTV said that it "may be prepared to support a one-time, limited re-purchase of management shares (if the scope and terms of the proposal are acceptable, and excluding shares held by Mr Tuckwell) due to the present, extraordinary circumstance, created in large part by Mr Tuckwell himself". The letter went on to demand that the Company should immediately search for a new CEO to allow Mr Tuckwell to *"focus on his shareholdings and Board duties"* and to provide for "contractual information and inspection rights and the like for all major shareholders". Finally, the letter expressly reserved all rights and remedies of FTV.

188 This was plainly a threat of litigation and understood as much by Mr Tuckwell and the Board. Ultimately the share re-purchase was agreed unanimously by the Board at a meeting in August 2012, after Mr Tuckwell accepted on 19 July 2012 that he would not be included in the share re-purchase at the time. The executives other than Mr Tuckwell received a one-off purchase of one-third of their shares.

189 As Mr Tuckwell pleads in his Answer, and we agree, ultimately, *"nothing happened as regards Mr Tuckwell"*. Accordingly, there was no prejudice to the Plaintiffs and thus no unfair prejudice.

Mr Tuckwell's removal of Mr Cukier from the Board

190 In summary, in September 2012, Mr Tuckwell caused the Board to convene an EGM at which he voted to remove Mr Cukier from the Board. It is claimed that he did this in order to extract revenge on FTV and in particular upon Mr Cukier for their:

(i) Refusal to pay any form of compensation to the Company's executives for their work in the due diligence on the secondary sales, and

(ii) Failure to support the share buy back proposal, and more generally as part of the hostilities that had developed between Mr Tuckwell and FTV since the decision in 2009 to convert their preference shares into ordinary shares and their significant financial gain – in short, what Mr Armour called *"liquidity envy"*.

191 The Board meeting took place by telephone on 7 th September 2012 with a lawyer from Mourant Ozannes, acting for the Company, advising the Board that they were required to convene a shareholder meeting. Though members of the Board had reservations regarding the removal of Mr Cukier, they voted in favour of calling the EGM to remove him. The removal took place at an EGM on 27 th September 2012.

192 The Plaintiffs contend that the removal of a director in these circumstances is conduct of the affairs of the Company. We agree. Mr Tuckwell says that FTV gave up its rights to appoint a director in 2009 when it converted its preference shares to ordinary shares, that Mr Tuckwell as a majority shareholder has a right to appoint whom he likes to the Board, and that Mr Cukier was removed after FTV threatened litigation against the Company in July 2012.

193 As Mr Tuckwell accepted in evidence, his difficulties with FTV went further than those set out in his pleading. He said:

> *"the relationship with FTV started to deteriorate when they tried to snaffle Nik and Hector's shares early on at the end of 2009, it is, when they left and then it had deteriorated markedly because of them putting all their shares and severely diluting us.* It had deteriorated markedly in their refusal to acknowledge any cost or expense *or damage that they had inflicted on the Company by their sale and this was yet another straw breaking the camel's back or more particularly, probably girders breaking the camel's back…*.. It was the culmination of many things."

194 In evidence Mr Tuckwell did not deny the accuracy of Mr Cukier's account of the conversation that they had had in May 2012 in which Mr Cukier was told by Mr Tuckwell that he was removing FTV from the Board because FTV had " *screwed itself*" during the secondary sales process by not providing a share pool for management. He did not challenge the proposition put to him, that it was *"only a matter of time"* before he removed FTV from the Board. Removal of Mr Cukier was simply, so far as Mr Tuckwell was concerned, part of his revenge upon FTV for refusing to make a " *contribution*" to the Company's executives in the secondary sales process. When being cross-examined about Mr Cukier's removal, Mr Tuckwell also said:

> *"They sold a third of their shares for seven times what they bought them for and there's no spirit of generosity.* I mean, sir, he lost me that day. I mean, because sometimes a person does something where it identifies their character and that's it. And from that moment, I thought, this person's character is not one that I like. But, we put up with it, so that's what – FTV screwed itself, that's probably reasonably accurate."

195 Mr Tuckwell went on to say that he regarded Mr Cukier as *"disruptive"* and not fulfilling his role as a director. He was content for Bob Huret of FTV to replace Mr Cukier if nominated. In fact, this did not occur and Mr Chee of Millennium was appointed to the Board to represent the minority shareholders. Although the removal of Mr Cukier was an act of the Company, there is no pleading of breach of duty (and therefore no assertion of unfairness) and no assertion of *"prejudice"* and accordingly we make no finding of unfair prejudice.

The transfer of shares to the Tuckwell Foundation

196 In summary, certain shares in the Company were transferred by Mr Tuckwell to the Tuckwell Foundation ("the Foundation"), a charitable entity, in breach of the Shareholders' Agreement. That is undisputed. FTV (alone) refused to waive the breach. Accordingly, the transfer was voided. The gift was made as part of a tax saving scheme in order to assist Mr Tuckwell with Australian tax liabilities, but would also have had a significant charitable benefit as well. The Tuckwell scholarship programme was funded by the Tuckwell Foundation and supported students at the Australian National University.

197 The Plaintiffs claim that in May 2013, FTV discovered that nearly two years earlier in June 2011, the Company had registered a transfer of 17,633 shares from Mr Tuckwell to a foundation that he and his wife had established in Australia called the Foundation in breach of the Shareholders' Agreement. The nature of the breach was that Mr Tuckwell should have sought shareholder approval for waiver of the right of first refusal and tag-along rights in respect of any past or future share transfers between Mr Tuckwell, Rodber (another shareholder owned by Mr Tuckwell and his wife) and the Foundation. FTV had not approved the transfer to the Foundation and Mr Tuckwell had not sought any such approval; the purported transfer accordingly did not comply with the provisions of the Shareholders' Agreement. The consequence was that other shareholders were deprived of their opportunity to exercise either their right of first refusal had they wished to acquire the shares Mr Tuckwell was transferring, or a tag-along right to participate in the proposed transfer had they wished to sell shares at the price.

198 Mr Tuckwell's intention was not only to transfer the shares to the Foundation, but also to re-purchase those shares bit by bit over time in order to provide the Foundation with cash which it would use for charitable purposes. This process began in January 2013 when Rodber purported to purchase 1,633 shares from the Foundation.

199 If there needed to be a nail in the coffin in the relationship between FTV and Mr Tuckwell then this was it.

200 This transfer was in breach of the Shareholders' Agreement but all the other shareholders, bar FTV — even Millennium and Susquehanna — were happy to waive the breach.

201 Mr Cukier justified FTV's stance on the footing that this was a clear example of Mr Tuckwell failing to abide by the terms of the Shareholders' Agreement. FTV claimed that this was Mr Tuckwell attempting to obtain *"liquidity"* by way of the indirect (albeit substantial) saving on Australian capital gains tax that would be achieved by transferring the shares to the Tuckwell Foundation. Mr Tuckwell telephoned Mr Cukier directly on 20 th March 2013 to invite FTV to provide its consent to the transfer of shares to the Foundation. This he refused to give.

202 But Mr La Ruffa on behalf of Susquehanna, Mr Chee on behalf of Millennium, and the independent Board members all believed that FTV should have consented to the transfer to the Tuckwell Foundation.

203 Mr Armour's evidence was of assistance to the Court. When asked whether he approved the waiver of the breach he said:

> *"I did approve it.* I still thought it was the right thing to do. My opinion is the backdrop is you are in a poisonous environment. You have an owner that owns 50, 60 per cent and everyone's walking on eggshells. You've a private equity firm that feels like they've been trampled on and so there's a lot of anger and upset in the room. And in the middle of this Graham I thought did something that wasn't by intention, he ran afoul of these rules and we should have just made it happen and just supported him and for whatever reason I think FTV got lawyer advice to say don't approve of this because if you make – if you separate from your Shareholders' Agreement on this, you're doing it on others. That was a mistake. It just adds to the anger. Graham was already poisoned by liquidity envy over FTV to begin with and this just made it worse and I think we went from a terrible situation to an even worse situation and my opinion is I tried to talk FTV out of this, but I think their lawyers sort of said you can't run afoul of your Shareholder Agreement."

204 Mr Armour said that he did not think the transfer to the Foundation was in any way improper. He added:

> *"…..when he moved from Australia he had a huge tax liability and in order to take care of it, he kind of killed two birds with one stone and he also had a great charity that educated a lot of kids that otherwise might not have gone to university, so it's a sad thing and I think FTV felt a little conflicted on that themselves, but it shouldn't have happened. It just created resentment in the room and I just think, you know, it's a marriage gone bad at that time."*

Mr Armour's reference to a *'marriage gone bad'* was to the relationship between Mr Tuckwell and FTV.

205 Mr Chee agreed that he thought the transfer to the Foundation was acceptable. He said:

> *"I thought the intention of a transfer and what Graham was doing was fine and, you know, you see these sort of exceptions for transfers all the time and the principle of it was fine and I was very supportive of the principle of it."*

206 . The Board minutes for 15 th March 2013 show that Mr Tuckwell proposed that the Board consider waivers being applied to transfers in respect of any past or future share transfers between Mr Tuckwell and any of his Family Group entities (including Rodber Investments Limited) and the Foundation. The Board was *"strongly supportive of the charitable nature of the Foundation and noted the extremely positive press it and via association, the Company, had recently received in the global press"*.

207 It was resolved, with Mr Tuckwell as an interested party abstaining, to approve the waiver for the Foundation. The Board minutes show that Mr Chee and Mr La Ruffa, on behalf of their respective shareholders, confirmed they were happy to agree to the waiver. The Board agreed that Mr La Ruffa and Mr Chee should speak to Mr Cukier with the aim of obtaining FTV's approval to the waiver. This was unsuccessful.

208 The Court was troubled by the fact that neither in this Board meeting nor subsequently did Mr Tuckwell volunteer to the Board that not only had he transferred the shares to the Foundation but that he had already, in January 2013, transferred the first tranche of shares from the Foundation to Rodber. He merely said that he was prepared to transfer the shares back from the Foundation to himself and/or Rodber. In evidence, Mr Tuckwell accepted that he knew that the provisions in the Shareholders' Agreement had not been complied with; and it was clear to the Court that a waiver had been sought without revealing to the Board that the transfer to Rodber had already occurred. Mr Tuckwell said that he was seeking a waiver *"in anticipation"* of a buy back.

209 In evidence, Mr Tuckwell accepted the description of Rodber Investments Limited as a family office / investment vehicle jointly owned by himself and his wife. In January 2013, Rodber paid about Australian $5 million for 1,663 shares in the Company from the Foundation. He accepted that he knew that the Shareholders' Agreement would have applied to any sale of shares in the Company by the Foundation to Rodber, and that the tag-along rights for first refusal under the Shareholders' Agreement would have applied to that transaction. Mr Tuckwell agreed that the other shareholders were not informed of the Rodber transaction that took place in January 2013 at the time. There was no evidence that Mr Tuckwell had informed the March 2013 Board meeting that in fact the Foundation had already transferred shares to Rodber by way of a sale. The members of the Court formed the opinion that Mr Tuckwell misled the Board in March 2013 by omission in this regard.

210 Ultimately, in view of FTV's refusal to consent at the Board meeting on 21 st June 2013, Mr Tuckwell agreed that the transfer of shares to the Foundation from Rodber was void as being in breach of the Shareholders' Agreement. The Board agreed to resolve that the share transfers be reversed in the Company's books. Accordingly, the matter was resolved

subject to a further resolution at the Board meeting on 4 th September 2013, when the Board agreed that the transfers be removed from the share register and FTV be informed of the same by letter. It was also resolved at this point that the Company make a one-time offer to purchase FTV's shares for $40 million. The offer was not accepted.

211 At about this time Mr Armour resigned from the Board, partly owing to the state of the relationship between FTV and Mr Tuckwell.

212 As to the Court's conclusions in respect of the claims made by the Plaintiffs in relation to the Foundation (which are pleaded in terms of unfair prejudice), we agree with the plea at paragraph 77 of the Answer filed by Mr Tuckwell:

> *"(1) Mr Tuckwell tried to transfer some shares to his charitable foundation, the Tuckwell Foundation*.
>
> *(2) The transfer was never effective as a matter of law*.
>
> *(3) In any event, if it had been, it was reversed*.
>
> *(4) Even if the transfer had taken place, it is not suggested that this would have prejudiced the Plaintiffs in any way."*

213 It is noteworthy that, notwithstanding the events summarised above, in 2016 Millennium chose to purchase further shares in the Company from other minority shareholders. The circumstances of those purchases we will briefly consider when we deal with the evidence relating to valuation and discount below.

The Sales: was this a Liquidity Event?

214 During 2017, once AUM had again increased, Mr Tuckwell pursued opportunities to sell the Company or its constituent parts. By mid-2017, Mr Tuckwell had formed the view, which was agreed to be a reasonable view at the time as was confirmed in evidence to us, that greater value would be achieved by selling the constituent divisions of the business rather than by selling the Company as a whole.

215 By early November 2017, Mr Tuckwell had negotiated the sale of the European ETC business to WisdomTree Investments Inc ("WisdomTree"), representing the lion's share of the business, for $528 million. At about the same time it was agreed that the European ETF business would be sold to Legal and General Investment Management (Holdings) Limited ("LGIM") for $48 million. An offer to purchase the ETFS Australia business in January 2018 was rejected by Mr Tuckwell without consultation with the Board. Finally, the Company's US business was agreed to be sold to Aberdeen Asset Management ("Aberdeen") for $50 million.

216 These three Sales completed in March and April 2018 respectively. The total consideration for the Sales was approximately $626 million.

217 Collectively they represented virtually the whole of the value of the Company, as the Australian business had little or no value at the time.

218 The Sales were significant for a number of reasons. First, so far as the Plaintiffs and other minority shareholders were concerned, this was the long-awaited event when they would finally receive a return on their investment as, in their eyes, the Sales effectively brought the *raison d'être* for their investment to an end.

219 Secondly, it is argued that the Sales amounted to a *“Liquidity Event”* as defined.

220 Thirdly, various things were said and discussed either in correspondence or Board meetings between late 2017 and early 2018, which are fundamental to the Plaintiffs' claims.

221 The Plaintiffs claim (Amended Order of Justice paragraph 8.5) that the Sales comprise a ‘Sale of the Company’ and a ‘Liquidity Event’ in accordance with the Articles of Association and Shareholders' Agreement. (The relevant terms of the Shareholders' Agreement and the Articles of Association are set out at paragraphs 96 to 101 above.) They say this because the Sales were dependent upon each other and they accounted for 98% of the revenue of the Company and 97% of the Company's AUM – the only income earning asset remaining being the Australian ETF business accounting for 2% of the revenue and 3% of AUM. In particular, they said that the Sales were to a *‘group of Persons’* and were *‘related transactions’*.

222 The Plaintiffs say that the Sales were pursued by Mr Tuckwell and the Company on the premise that each sale was part of an overall strategy to dispose of the Company's assets.

223 Mr Tuckwell denies that the Sales were to a *‘group of Persons’* or that they involved a *‘sale of the assets pursuant to which such parties acquired all or substantially all of the assets of the Company in one transaction or a series of related transactions’*. It is argued that the Sales were to separate buyers in separate, unrelated transactions. In any event, it is argued that the issue is of no relevance. The rights granted to preferred shareholders relating to a Liquidity Event are no longer applicable as there are no longer any preferred shareholders. Indeed, the only consequence of this being a Liquidity Event would be a termination of the Shareholders' Agreement, which itself is not pleaded as having any particular consequence.

224 In cross-examination, Mr Tuckwell accepted that the Sales needed to be done in a *‘joined up way’*. He also accepted that the parts of the business needed to be sold off in a *‘coordinated way’*. He went on to say that it would have been possible simply to sell the two

European parts of the Company and keep the US and Australian components.

225 We concluded that this was not a Liquidity Event as defined in the corporate documents as, although the sale of the assets was to parties which ' *acquired all or substantially all the assets of the Company*' and these were in our view a *'series of related transactions'*, the Sales were not to a *'group of Persons'* as defined. The purchasing entities were simply not connected to each other in our view. This meant this was not a Liquidity Event in accordance with the Shareholders' Agreement and the Articles.

226 In any event, even if the Plaintiffs were right on this point, we agree with Mr Tuckwell that this would be of no consequence as it would not give rise to any additional or particular rights as to a distribution of the proceeds of any sale.

227 However, we also concluded that this was, in common parlance, a *'liquidity event'* and, on any view, the Plaintiffs anticipated a distribution and Mr Tuckwell led them to believe that they would receive a distribution.

The Sales: Mr Tuckwell's refusal to discuss the distribution of the proceeds

228 The Plaintiffs plead at paragraphs 9 to 11 of the Amended Order of Justice that the Sales and their completion, the forced resignation of the Company's remaining two Independent Directors, the change in the Company's business to what Mr Tuckwell described as a *'family office'* against the wishes of the Plaintiffs, and the associated proposal to purchase the Plaintiffs' shares at a heavy discount, were part of a scheme designed to drive the Plaintiffs out of the Company at the best possible price for Mr Tuckwell and not at a fair price to the Plaintiffs. For reasons that will be set out in the following sections of the judgment, we broadly accept this analysis as it is supported by the contemporaneous documentation and the evidence that we heard from the key witnesses, in particular Mr Tuckwell.

229 As long ago as 2010, Mr Tuckwell (and he accepted that Mr Cukier's note was accurate) had told Mr Cukier in a Board meeting in Guernsey that if Mr Cukier continued to support a certain proposal he would:

> *"Forget about the IPO and instead turn [the Company] into his 'family office'….*
> Mr Tuckwell said that it was his Company and he could do what he liked.
> *Although it was almost ten years ago now, I clearly remember the threat: stand in my way and I will make sure FTV never gets paid."*

230 Mr Tuckwell made similar comments from time to time over the years. Mr Tuckwell accepted that he was at this time aware of his duties as a director. When being asked about a note that Mr Bernstein had made of a telephone conversation on 10 th November 2017 (the note is set out in more detail below), Mr Tuckwell said:

> *"I said, and I'm sure it's right, that I will behave in a manner that complies with my fiduciary duties, which, as I understand it, is to act in the best interests of the Company, which I think is reasonably similar to your terminology of was acting for the shareholders as a whole…."*

231 During this period, Mr Tuckwell gave the impression to the Plaintiffs that the planned Sales would result in a pro-rata distribution to each of them. We find that he intended to convey that belief to them.

232 At the Board meeting on 11 th January 2017, the minutes record that Mr Tuckwell "stated that he was keen to start a process to find an outside entity to buy shares in the Company giving liquidity to the PE firms and possibly some liquidity to him". In the same Board meeting Mr Tuckwell confirmed that he wished the Sales process to take place in the second half of 2017 as he was planning to retire to Australia then.

233 On 4 th June 2017, there was an email exchange between two executives in the Company who held shares. One asked the other, Mr Weeks the CEO, if there was any chance that the forthcoming Sales would result in their shares being " *paid out*". Mr Weeks replied:

> *"He [Mr Tuckwell] was making mischief again saying he'd hold the $700m in the Company, and run the Company as a family office investing in PE opportunities.* He said FTV could take him to court, he'd replace all the Directors etc etc. It wasn't said with venom though…."

The other executive replied:

> *"Bigger issue is not that they sue him but they sue for an injunction to stop the deals.* Someone will eventually need to make him aware of that risk."

This risk, of which Mr Tuckwell presumably became aware at some point, may in part have explained his reluctance to reveal the terms upon which he was prepared to purchase the minority shareholders' shares until after the Sales were complete in the spring of 2018.

234 This email exchange was put to Mr Tuckwell, who agreed that if Mr Weeks had attributed these comments to him then it would have been a *'reasonably accurate reflection'* of what he had said. In the autumn of 2017, a firm offer for the European ETC business was received from WisdomTree. WisdomTree indicated that they would need the consent of the shareholders holding over 10% of the shares to the transaction. This was relayed to the Plaintiffs by Mr Tuckwell.

235 It was only the fact of WisdomTree requiring the consent of the Plaintiffs that led Mr Tuckwell fully to disclose to the Plaintiffs the terms of the sale to WisdomTree. Mr Tuckwell convened a telephone conference on 10 th November 2017 during which he provided an

overview of the sale to WisdomTree. Mr Tuckwell said that he did not want FTV to be involved in the process of sale, but WisdomTree had forced him to seek their consent, that he did not want to specify how the shareholders would receive liquidity following the Sales and that he wished for the Company to buy shareholders out at different prices as he had thought that many of the small shareholders would be willing to accept a low price in order to achieve a return on their shares.

236 The Plaintiffs refused to consent to the sale unless they firstly obtained information about the sale, to which Mr Tuckwell regarded them as being not entitled (paragraph 267 of his first witness statement), and secondly Mr Tuckwell accepted their plan to distribute the proceeds of sale to shareholders.

237 Mr Tuckwell asked Mr Chee, who by then had left Millennium but was still a director of the Company, to work with the Plaintiffs to produce a written plan setting out what they wanted.

238 Mr Bernstein made a note of the call with Mr Tuckwell on 10 th November 2017. Mr Tuckwell did not dispute the accuracy of that note.

239 The note set out what Mr Bernstein was told about the WisdomTree purchase and its terms. Under the title *'Big Issues'* he said:

> *"Graham didn't want us to get involved but WT has now asked about shareholder sign off*.
>
> *Graham doesn't want to specify how the liquidation will happen*.
>
> *He doesn't want to do distributions of proceeds due to tax implications*.
>
> *He wants to buy out shareholders at different prices – thinks he can buy out some really small shareholders cheap*.
>
> *Wants to see how badly people want liquidity*.
>
> *Very wishy washy on timing and discounts*.
>
> *Says WT won't release shares to shareholders – wants to deal with one party on registered offering after lock ups*.
>
> *Says he has been too busy to focus on shareholders – been working round the clock to get this done at an amazing price*.
>
> *Says we should rely on fiduciary duty*.
>
> *All shareholders told him on the call that this was not acceptable if he wants our sign off*.
>
> *We need to come up with proposal for how this should work or what we want*

him to commit to on liquidity or buy back.

Time is of the essence."

240 This led to Millennium, through its lawyers, Dentons, to produce late the same night a draft of a Distribution Agreement with respect to the payment out of the sale proceeds. The draft agreement, *inter alia*, provided for the minority shareholders to receive a pro-rata per share distribution of the cash proceeds received from the WisdomTree transaction and in due course a *pro-rata* share of the cash proceeds derived from sale of the WisdomTree shares.

241 Mr Chee's evidence was that at no point in the sale process did Mr Tuckwell give any indication that the proceeds of the WisdomTree sale, or any other sale, would be used other than for the purpose of a *pro-rata* distribution of the same to shareholders.

242 Crucially, in the context of the discussion that Mr Bernstein had with Mr Tuckwell as set out above, and the Distribution Agreement prepared by Millennium's lawyers, on 10 November 2017, Mr Tuckwell sent Mr Burstein of Millennium an Excel spreadsheet entitled *'ETFSL Sale Values'*. Millennium sent this on to Mr Chee and representatives of the other two main minority shareholders. The spreadsheet shows the total value of the Company broken down by subsidiaries including the cash and share proceeds from the sale of the European ETC business to WisdomTree, the sale of part of the business to LGIM and the sale of the US business. In respect of the WisdomTree shares, the spreadsheet reflects a three-stage lock up (as was agreed with WisdomTree) with the proceeds of sale of the shares becoming available in equal parts in June 2018, December 2018 and June 2019. The spreadsheet shows a lengthy tax escrow in relation to a proportion of the proceeds of the sale of the European ETC business. Finally, a *'per share value'* is calculated using a simple pro-rata division of the total value of the Company, reflecting the fact that there was only one class of shares in the Company. Mr Chee anticipated a full distribution of the proceeds of sale *pro-rata* amongst the shareholders of the Company. Mr Wolfe said that the spreadsheet gave him and Susquehanna reassurance that a pro-rata distribution of some kind would be made, notwithstanding Mr Tuckwell's previous comment about a minority discount. After Mr Chee had instructed Dentons to draft what became the Distribution Agreement, but prior to the draft being received, he spoke to Mr Tuckwell on 10 th November 2012. Mr Tuckwell agreed to sign a *'distribution document'* at the Board meeting on 12 th November, but only if the document was a *'principles based document'*. He told Mr Chee that they should expect full legal documents from Mr Martyn James ("Mr James"), the Company's lawyer, and assured him of his intentions using words to the effect of *'Look Max, I'm not going to fuck you guys over'*.

243 When he was cross-examined about this spreadsheet, Mr Tuckwell said it certainly looked to be his spreadsheet and he was almost certain that he would have created it. He agreed that for the purpose of his spreadsheet " *all the shares are valued the same*". There was no mention on the spreadsheet of a minority discount. When Mr Tuckwell was pressed

on the fact that he provided a per share value in respect of the sale proceeds he said " *It made sense, because it helped people get their mind around what was the overall value of the transaction*". Mr Goldman's evidence, to the effect that the spreadsheet ' *implies that we get our dollars back – plus a few nickels*', was put to him. Mr Tuckwell said that he could understand that. Mr Tuckwell would not accept that he was intending to convey to Mr Burstein that there would be a *pro-rata* distribution of the proceeds of sale. We find that that was precisely what Mr Tuckwell intended.

244 On receipt of the draft distribution agreement from Millennium on 11 th November 2017, Mr Tuckwell wrote to Mr Chee, copied to Millennium, and said " *We'll go through the doc tomorrow if that's ok*". Mr Tuckwell accepted in evidence that he did not tell Mr Chee at this time that he had already agreed with WisdomTree that FTV's and Millennium's shareholder consents would no longer be required. Mr Tuckwell said " *there must have been a reason for that*". He did not give one. It was put to him that Mr Tuckwell never intended to go through the distribution agreement document at the Board meeting the following day. Mr Tuckwell did not give a clear answer to that question. But we agree with the Plaintiffs – Mr Tuckwell did not intend to consider this document at the Board meeting the following day and he was, as Chairman of the Company, deliberately misleading the Plaintiff shareholders when he suggested that he intended to do so. Mr Tuckwell made a further promise in similar terms when chairing the Board meeting that took place on Sunday 12 th November 2017.

245 This Board meeting was principally concerned with the WisdomTree sale. Prior to the Board meeting and in order to avoid giving the Plaintiffs the comfort they sought in relation to the distribution of the proceeds of the sales, Mr Tuckwell persuaded WisdomTree to dispense with its wish for minority shareholder consent to the transaction by providing WisdomTree with an indemnity against any claims that may be brought by any other shareholders of the Company against WisdomTree. To fortify this indemnity, he unilaterally agreed to an additional $4.5 million of the sale proceeds being held in escrow for twelve months.

246 In the view of the Court, that decision was not in the interests of the Company. It was not discussed by the Board and ought to have been. It was simply a tool designed to avoid giving further comfort to the Plaintiffs in relation to the proceeds of sale.

247 The transcript of the meeting on 12 th November 2017 is instructive. It is perhaps helpful to consider what was said at the meeting with the benefit of Mr Chee's evidence in mind. He said:

> *"So Mr Tuckwell's strategy, and again this is in hindsight, was that he didn't want to discuss any distribution, because he was planning to withhold the distribution of the shares and in any scenario, in my experience, the Company is sold, you distribute the shares.* It's not a very controversial situation….. Mr Tuckwell was concerned about his tax ramifications, if there were just a pro-rata

> distribution. He wanted it to be structured as a buy-back. So, you know, it's interesting, because the concerns I had at the time wasn't that Mr Tuckwell wasn't going to distribute the shares and it was a question of: okay, if there were things like an escrow, or things like a lock up and there is a share buy-back, let's get the mechanics correct. And we're at the point of victory here, with the Company and we're selling the shares and receiving the proceeds, so, you know, it's interesting looking back in hindsight, I didn't expect him to actually not distribute the shares in fact. It's something quite foreign that he would attempt to do so."

248 He went on to repeat that it was his assumption that the distribution of shares and the proceeds of the cash would be distributed pro-rata once ancillary issues were resolved, such as the continued existence of the Australian subsidiary that was *'illiquid'*. He said:

> *"I didn't believe necessarily that Mr Tuckwell would be so obstinate and try to extract value from the other shareholders by, you know… withholding the funds."*

249 At the end of his evidence, Mr Chee explained that he would have expected, after the Sales, pro-rata distributions of the cash between shareholders and then pro-rata distributions of the shares in WisdomTree when they became available after lock up.

250 We were shown extracts from the transcript of the Board meeting on 12 th November 2017 in evidence. During the Board meeting, Mr Chee pressed Mr Tuckwell on the position of the minority shareholders and asked for Mr Tuckwell's *'thoughts'* on the draft distribution agreement. He also said:

> *"if this were a regular M & A transaction… once the Company is sold…the proceeds are distributed to the shareholders of the Company.* My understanding in this case is that it is different because of the large shares, and because of WisdomTree and how they want to do it…. but I think that the philosophy is to the extent that the minority shareholders can control their destiny with respect to the proceeds, in a pro-rata and fair and sensible way, that is sort of what we are asking for."

251 Mr Tuckwell interrupted Mr Chee and said the focus should be on approving the transaction. Contrary to what he said in his email the previous day, Mr Tuckwell now said that this was a discussion " *I have been wanting to have once we actually sell the business*". Mr Tuckwell went on to say that:

> *"There are lots of protections for minority shareholders under English law, which is Jersey law, so we can go through that, but we have to get through today"*.

252 Mr Tuckwell also said during the meeting that he was:

"happy to support a buy-back of all of their [FTV] shares early on,…we will talk more about this tomorrow."

253 Mr Chee understandably took from this discussion that the Plaintiffs were being told that they had to put off the discussion of exactly how they would be able to receive liquidity until the following day because of the urgency of approving the WisdomTree transaction.

254 The Board supported the Sales. The Plaintiffs trusted Mr Tuckwell that liquidity would be discussed the following day.

255 During the meeting, Mr Tuckwell explained that WisdomTree was taking over the majority of the Company's liability in gold to the World Gold Council, but there would be an annual obligation of 350 ounces remaining to be paid out of the Australian subsidiary. Mr Tuckwell said that this would go on " *forever*". It would only terminate if the Australian entity was sold.

256 Mr Chee went on to draw to Mr Tuckwell's attention a note from Brad Bernstein of FTV in relation to the proposed Sales, indicating that Mr Bernstein wanted the minutes to reflect that the Board was going to, in accordance with its fiduciary duties, ensure proper liquidation and distribution of the proceeds of Sales to all shareholders as soon as possible, as that way the transaction would be in the best interests of the shareholders. Mr Tuckwell indicated that he disagreed with that because a distribution of the proceeds " *just destroys me from a tax position to have distributions and I am happy to support a liquidation by buying people's shares back, so that effectively I will end up with 100% of the Company*".

257 Mr Chee said that the word *'liquidation'* could be replaced by ' *redemption*', which would cover a share buy back.

258 Mr Tuckwell appears to have agreed to this proposal so long as it did not go in the minutes of the meeting that were to be disclosed to WisdomTree. It is clear from the minutes of the meeting that most of the participants had very little opportunity to read and understand the proposed WisdomTree transaction in advance of the meeting. The Plaintiffs had only had details for about two days and the Independent Directors appeared to be learning about most of the details for the first time during the meeting. Mr Chee said that the usual process for such a significant transaction, which was after all the sales of the majority of the Company's assets, would have been to have one of the Independent Directors fully involved in the sales process. But no complaint is made about the price which Mr Tuckwell achieved and no pleaded complaint is made about the lock up of the WisdomTree shares agreed, although this has not been a success for the Company owing to the decline in the value of the WisdomTree shares since the Sale, as will be explored below.

259 As to the Board meeting that took place the following day on 13 th November 2017, Mr Tuckwell obfuscated again. When the matter of shareholder return was raised he said:

> *"I cannot get my mind around this stuff too much yet because I feel that I am jinxing it.* Now that we have signed, I am in a slightly better mental place to actually think about it, but also I feel I would much rather talk about it in far more detail when we actually get the money just in case something happens."

However, that was postponing the discussion for several months – ultimately March 2018. Perhaps in truth Mr Tuckwell was concerned that FTV would issue proceedings preventing the Sales if he revealed his true intentions at this time. Mr Tuckwell went on to say that they should set a Board date for the end of March and that he would:

> *"Start to put together some papers and thinking on the monetisation, cashing out, how different people might get their shares.* I may come out with an offer to some of the smaller shareholders almost immediately, because that dividend actually provided me with the first lot of cash I've had for quite some time…. I think my overall sense is that the smaller shareholders might be better be done by me just offering to buy them up…. I think for the larger shareholders, obviously, it has to be done by the Company."

He said that:

> *"If I'm buying all the shares back, then it becomes my family office."*

260 He singled out FTV saying:

> *"I feel they have been riding on our coat-tails, not contributing and getting all the economic benefit.* So, I would like to get them out sooner rather than later."

He said:

> *"we can trade papers on these different ideas and get different pieces of advice on it as to how to fix people."*

261 Mr Chee reminded Mr Tuckwell that Millennium had produced a draft agreement relating to distribution within twenty-four hours and pointed out that what was proposed was very straightforward. Mr Chee said:

> *"We scrambled to get something out for you….* It felt reasonable."

262 Mr Tuckwell said:

> *"it was an interesting structure and I think it is absolutely worth considering."*

263 In fact, in our view, Mr Tuckwell never had any genuine or *bona fide* interest in what was being proposed by the Plaintiffs.

264 Dr Birch, one of the Independent Directors, said:

> *"my sole interest is to make sure that people are treated fairly, because I am not like Millennium or anything.* My only role in this really is to try and stop people being robbed."

265 Dr FitzGerald, the other Independent Director, asked:

> *"When will we have a richer discussion about this?"*

266 Plainly both Independent Directors expected to be present and involved in the process of ensuring that the minority shareholders received a fair distribution or equivalent. Mr Tuckwell replied by saying:

> *"I will start putting together some papers over the next few weeks."*

This he did not do, or if he did, he did not disclose them to the Plaintiffs or, it seems, the Independent Directors.

267 Dr Birch went on to say that FTV wanted to have something in the minutes about " *equitable treatment of shareholders in distribution of assets*". He added: " *I'm not saying we should put those actual words in*". Mr Tuckwell said " *I think that what you have just said is fine*". Mr Tuckwell also mentioned that there were a number of laws that existed to protect minority shareholders.

268 So, Mr Chee and the observers representing the Plaintiffs would have left the meeting believing that the Board as a whole had committed to the *'equitable treatment of all shareholders'*; that their interests would be protected; that Mr Tuckwell would produce some papers in the next few weeks; that there would be a discussion about the matter and that the Independent Directors would be involved in ensuring equitable treatment of shareholders.

269 On the Plaintiffs' case, and, we find, on the evidence, none of these things happened.

270 Although Mr Tuckwell did not have the inclination to deal with shareholder distributions at this meeting, he was able to consider his own position and thought that for his work in promoting the Sales he should be compensated. He said *'I am not providing my services to FTV for nothing'*. He said he would come back with a proposal and subsequently, after the meeting, he asked for $8 million. The directors, according to the minutes, agreed with the principle of a compensatory payment to Mr Tuckwell, and decided to discuss what sum was appropriate at a subsequent meeting.

271 The minutes of the meeting did not reflect what was agreed in terms of *'equitable'* treatment of the shareholders, but they did reflect the fact that Mr Tuckwell agreed that the

Plaintiffs' proposal was " *interesting*" and could be considered alongside others in the period prior to closing, and that Dr Birch had said that " *as a non-executive director he was very focused on making sure that all shareholders were treated fairly*".

272 The decision to postpone consideration of the issue of distributions / share buy backs, taken at these two Board meetings, were plainly acts of the Company and were decisions led by Mr Tuckwell. They were also, we are satisfied, unfair, in that Mr Tuckwell was putting his own interests above those of other shareholders and breaching his duty to act in the bests interests of the Company as a whole by, *inter alia*, misleading the other directors and shareholders as to his and, through his control of the Board, the Company's true intentions in relation to the proceeds of sale. Whether these breaches ultimately caused 'prejudice' to the Plaintiffs we will consider below.

The removal of the Independent Directors

273 The Independent Directors had made it clear that they regarded it to be their duty to protect the interests of all shareholders as well as the interests of the Company itself. After the Sales had been completed, they pressed Mr Tuckwell to give consideration to the distribution of the proceeds of the Sales. Mr Tuckwell, in his capacity as chairman, forced them to resign in order, the Plaintiffs claim, to avoid the risk that they would out vote him in relation to any resolution of the Board in respect of distribution of the proceeds of the Sales.

274 Mr Chee said in his witness statement that he believed that:

> *"Mr Tuckwell's removal of the Independent Directors was motivated by their expressions of concern about the treatment of the minority shareholders."*

275 Mr Tuckwell's written evidence was that he accepted that he asked Dr FitzGerald and Dr Birch to resign. He said in his first witness statement:

> *"I felt they might try to push me where I did not want to go… they, understandably, were more interested in obtaining an accommodation between the parties than what I might consider was the right result for the Company and for me… I felt it was now the right time for me, as majority shareholder, to have board control, so that other directors could not, for example, outvote me and cause a distribution against my will….* There is no obligation on me to have independent directors, and there is no reason to be in a position where I can be outvoted on the board where I do not have to be."

276 Dr Birch and Dr FitzGerald had served on the Board for many years. They felt they had a duty to ensure fairness as between all shareholders. They expressed this in clear terms as set out above and as considered further below. As set out above, both Independent Directors had made it crystal clear at the meeting on 13 th November 2017 that they were

keen to ensure that there was an equitable distribution of the proceeds of Sales. Dr Birch had said his *'sole interest'* was to make sure that people be treated *'fairly'*. This was said in the express context of wishing to ensure that the shareholders received a fair allocation of the proceeds of the Sales.

277 Mr Tuckwell accepted that the Board had a duty to be fair and equitable to all shareholders (day 13 page 148). Mr Tuckwell was worried that the Independent Directors may have thought a pro-rata distribution would be fair in the circumstances. Mr Tuckwell's perspective was that was unfair, particularly in the case of FTV, which had already " *grabbed twice as many shares, in my opinion, for their own benefit"*. He said that had FTV received 31,000 shares on conversion, he would have been " *happy to pay them pro-rata on that basis*". This is an interesting admission on the part of Mr Tuckwell who appears to have wanted to punish all minority shareholders simply owing to his loathing of FTV – he would have happily have paid them 'pro-rata' had they converted their preference shares to ordinary shares at a different time and with different consequences.

278 On 28 th November 2017, Mr Tuckwell wrote to Dr Birch and Dr FitzGerald, copied to Mr James, the internal lawyer at the Company, providing a note of advice from counsel in relation to the Company's duties and obligations with regard to the proceeds of the Sales. This email did not mention removal of the Independent Directors. Dr Birch replied thus:

> *"I am quite keen to get to the bottom of what responsibilities I have as an Independent Director.* My understanding is that I have a duty to all shareholders irrespective of the size of their shareholding."

He wanted to know whether it was correct that the Board as a whole had the responsibility for determining the mechanism and timing of distributing the surplus capital, and if this was correct then presumably the Board as a whole would determine the terms offered to shareholders in a buy back scenario. If these two assumptions were correct, and a majority shareholder dissented from the strategy set out by the Board, then Dr Birch asked if the majority shareholder would replace the Board with a more agreeable board. Dr FitzGerald regarded these as *'excellent questions'*. On the same day, 28 th November 2017, Mr Bernstein spoke on the telephone to Dr FitzGerald. Mr Bernstein expressed his concerns regarding the timing and process of a distribution and Dr FitzGerald responded that, "he and the Board were committed to finalising a plan before the March Board meeting to distribute the proceeds of the sales to shareholders".

279 There was an exchange between the two Independent Directors and Max Chee on 8 th December 2017, in which Dr Birch said that he was:

> *"…concerned about the direction of Graham's thinking.* Graham seems to be exploring the idea with counsel that his shares (as majority owner) are some how worth more than other peoples' shares (minorities). As an Independent Director my duty seems to be clear – all shareholders need to be treated in the same way. There is only one class of shares. Right now it would need a Board

Resolution to implement any capital return plan. So if we hold firm on the issue of equity fairness then minorities are protected. However there is always the chance that Graham will *replace us a Board Directors.* Hopefully it won't come to that and GT will be advised by counsel that all shareholders are equal."

280 Mr Tuckwell, commenting on this email, accepted that it would need a Board Resolution to implement a capital return plan and that he could be outvoted on the Board at that stage.

281 Mr Tuckwell went on to answer the question " *You wanted the Independent Directors off the Board by the time liquidity was decided, didn't you?*" with a single word: " *Yes*".

282 Shortly after this time, Mr Tuckwell appears to have decided to sack the Independent Directors. This presumably would have been after Dr Birch reassured Mr Bernstein of FTV (in an email dated 6 December 2017) that:

> *"I agree with you that ETFS should be able to begin developing its capital distribution plans in parallel with disposing of the assets and I'll be pushing for that….*
>
> *Only you can be the judge of the best way to protect FTV shareholder interests.* However in the first instance I would think it is the job of the independent ETFS directors to do this."

283 In January 2018, Mr Tuckwell not only met Mr Cukier in New York and made various direct threats to him which we will refer to below, but also produced a document dated 29 th January 2018, which set out Mr Tuckwell's vision for the future of the Company. It began by describing the Sales and the need for a " *fundamental rethink*" of the plan for the Company going forward. The document says:

> *"One simple plan would be to gradually wind down the company and to distribute cash proceeds to shareholders as and when they are received…."*

284 In the document, Mr Tuckwell said this process would take a period of seven years to complete, owing to the amounts held in the tax escrow. The document also explored a *'PE type Plan'*, a ten to fifteen year business plan for the Company involving less involvement from Mr Tuckwell, but a younger team of executives building up stakes in businesses and products that they find and support, rather like a private equity firm. The document recognised that *'many of the current shareholders will have an expectation of the Company providing them with liquidity for their shares, given the small likelihood of secondary market demand'*. In respect of *'directors'*, the document says that once the transactions close, the current directors could be thanked for what they had done and a line drawn under their involvement with the Company prior to the next phase beginning. Exiting shareholders would be offered liquidity " *at fair market value*". In relation to such market value, it was said that Mr Tuckwell, " *will be taking advice from at least two firms as to what might be the fair*

market value" of the shares. The document said, " *given the very limited rights of minority shareholders an assessment of the appropriate discount will require some work and discussion*". Contrary to what Mr Tuckwell said at the Board meeting in November 2017, the note said that Mr Tuckwell was:

> *"….not proposing to offer future liquidity by way of another buy back resolution if the price put forward in mid 2018 by GT is not accepted by a shareholder."*

285 A table within the document illustrated the effect of purchase of shares in the Company at a discount to net asset value of between 0% and 40%. That document listed the three Plaintiffs together and then, surprisingly in relation to other minority shareholders, three are described as *'bad'* and three are described as *'good'*. When he was cross-examined, Mr Tuckwell accepted that he wanted to apply different discounts for different groups of shareholders. Later he realised, or at least said he realised, that he would need to treat them all the same. The document produced in January 2018 was not provided to the Board.

286 Although the Independent Directors had expressed that they wanted to take advice on a number of issues, internal counsel for the Company, Mr James, wrote an email to Mr Tuckwell and others on 17 th February 2018 to the effect that the Independent Directors should:

> *"…only be taking advice on their personal position re resigning vs being removed.* Nothing more. You need to have control of the board (through your casting vote) at the time we come on to considering distributions / buy backs etc."

287 Mr Tuckwell accepted in evidence that Mr James said that he should have control of the Board so that he could control the decision in relation to a distribution or buy back.

288 The Independent Directors were now invited to resign. Dr Birch made his position clear on 26 th February 2018 and said " *I completely agree that I should step down at the point 'Newco' is formed*", i.e. he accepted that he need not be involved in the new business. But he added:

> "However I feel queasy about stepping off the Board until such time as you have reached your agreement with the key large shareholders about when / if / how a capital return is made. Its (sic) my instinct that outgoing directors have some sort of duty towards shareholders of 'Oldco'."

289 At this time, Mr Tuckwell had already instructed KPMG to act for him in relation to potential discounts for minority interests in the Company.

290 . The Independent Directors were still members of the Board at the next Board meeting on

14 th March 2018. By now, one of the Sales had closed and the two other sales were to close in April. Mr Tuckwell said that persons and entities who no longer wished to be part of the business should be bought out ‘at fair market value’. He said the concept of fair market value:

> *“….is not a simple one. It is obviously based on what the underlying value of the business is or what the underlying assets of the company are, but for shareholders who are not in control of the company they have got limited rights as compared to my position as a majority shareholder.”*

291 He went on to explain some of his rights and then said:

> *“that leads me to conclude that the minority shareholders have a valuation that is a discount to underlying value.”*

He then went on to refer to various literature and websites which explained such discounts. He said that KPMG had agreed to produce a report that he had commissioned personally. He said they could not be commissioned by the Company as they were the auditors, but they were happy to accept instructions from Mr Tuckwell. He said that when KPMG produced their report the other shareholders could either accept it or come back and say:

> *“Well, actually, we are a fair way away from that, but it is a discussion and we can sit down at the time and talk about that.”*

292 . Mr Chee suggested that a better route would be for the expert to be jointly instructed as this would increase ‘ *everyone's confidence in the report itself, if we split the fees and if we have some input into it*’. Mr Tuckwell said that he was happy with this *and* “ *I'm not wanting this to be an adversarial process*”. Mr Tuckwell said that he had not yet commissioned KPMG to do the report and they had just given a proposal. He said he was happy to go into a process of *saying* “ *OK why don't we commission two from people or whatever, get a couple of different views and we will split the cost of the exercise*”.

293 Mr Tuckwell said “at the end of the day it has got to be a price that I am happy with, a price that these guys are happy with”.

294 Dr Birch said “ *From my point of view as an Independent Director my duty is to see that fairness is a reality*”. Dr FitzGerald said “ *Ditto me*”. Dr Birch continued “ *So I am very interested in having something that is fair*”. Mr Tuckwell said “ *Sure*”. Dr Birch said “ *And that is why having some sort of third party assessment of that fairness is a pretty good thing from the Independent Directors' point of view, rather than you say one figure and they laugh at it and then we have a deadlock where nothing can be done*”.

295 Mr Chee also suggested an arbitration process might be helpful to identify if there should be a minority discount. Mr Tuckwell said that as a starting point there needed to be acceptance that there would be a discount for minority interests. He said the Company was

not required to buy back shares, that he was “ *not trying to absolutely screw everybody over*”, but the starting point could not be a pro-rata distribution.

296 Mr Tuckwell said:

> *“Unfortunately what you have got here is the legacy of a very hostile shareholder who has been completely unproductive and negative”*

a reference to FTV. He added:

> *“I'm not going to be generous to FTV.* If we can find a situation where ok FTV wander out at one particular price and that leaves you guys in a slightly better position pro-rata then I am happy to look at it, but do not underestimate my negativity towards FTV given what they have done to us. They have contributed bugger all to us over all these years. They have caused us an enormous amount of grief. My starting point is one of somewhat negativity in terms of buy-back.”

297 Mr Jason Wolfe (Susquehanna's observer to the Board) said that the idea of getting a report was very constructive and that it should be a “ *collaborative process*”. Mr Tuckwell repeated that he was happy for there to be a third-party value established by a jointly commissioned report. Mr Wolfe said that it would be helpful to know what sort of discount he was talking about. 50% and 5% were discussed. Mr Tuckwell said:

> *“I am not talking about either of those.* I have not looked at this in detail because there is no need for me to look at it in detail. I am not talking 50% or 40%. But I am not talking 10%.”

298 Mr Burstein of Millennium said that most legal regimes bend over backwards to protect minority shareholders, but that he would be “ *very open to a compromise of everybody's interests' which allowed everybody 'to get something approximating the right amount of value that they should walk away from with a successful investment*”. Mr Burstein said that he thought that Mr Tuckwell was a “ *great entrepreneur*” and had made a success of the business.

299 Dr FitzGerald, later on in the meeting, but whilst the same subject was being discussed, said to Mr Tuckwell (it seems):

> *“You have tended to sound aggressive at times….* You may have a different Board if you cannot work with what the current Board is willing to support, but I guess from our point of view, certainly from mine, I would like the discussions that you have with the PE investors, including FTV in particular, who you single out for special mention, to come to some sort of agreement so that we can consider that on the face of it they consider themselves to be treated fairly and we can accept that. Because our duty as Directors is to look after the interests of the Company and its shareholders.”

300 Dr Birch added " *Not just past but future shareholders as well as current shareholders*". Dr FitzGerald said " *Yes, and that means fairness.* It does not necessarily mean equal, but it does mean fairness". Mr Tuckwell said " *Sure. Which should go on after today's meeting*".

301 The potential consequence of Mr Tuckwell's deep-seated hostility towards FTV was demonstrated by the following exchange between himself and Dr Birch:

> *Mr Tuckwell: "The bottom price I would like to pay is to FTV so by definition everybody is going to get that minimum offer is the answer."*
>
> *Dr Birch: "But, as we accept, Vince and I have to look out, we cannot single out as independent directors we cannot say 'Screw FTV'.* We have to be seen to being fair and looking after the interests of all of the shareholders."

302 Dr Birch went on to say to Mr Tuckwell that " *issuing ultimatums is not helpful*". He added that it was also unhelpful to say " *Oh well, if you don't like this then a nest of vipers awaits you*". Dr Birch said that the " *end point should be a successful negotiation*". Mr Tuckwell said he agreed with that.

303 The takeaway of the Plaintiffs from this meeting in March 2018 would have been that the shares were to be valued by a jointly instructed expert; that the Independent Directors would play a role in the process, and that there would be space for negotiation between the parties in order to achieve fair value.

304 None of these things happened. As soon as the Sales were completed in April, Mr Tuckwell wrote to both Independent Directors in identical terms on 7 th May 2018 asking them to resign as directors of the Company effective 8 th May 2018. He wrote in his capacity as chairman. Accordingly, this was an act of the Company. Mr Tuckwell said that if the request to resign was not accepted, then he would call an EGM to propose their removal from the Board.

305 Again, when questioned about these letters, Mr Tuckwell accepted he wanted the Independent Directors *'off the Board'* before any decision was made about a buy back offered to shareholders. When it was put to him that taking the Independent Directors off the Board took him closer to litigation he replied *'If you wish'*. Dr Birch replied to Mr Tuckwell saying " *As I've already told you, I would have preferred to remain a director until the successful conclusion of your discussions with other shareholders.* However, in view of the content of your letter I agree to resign….". Dr FitzGerald said that he had the same sentiments.

306 Mr Tuckwell confirmed that he now wanted and had control of the Board. This left the Board consisting of Mr Tuckwell and Mr Chee only, with Mr Tuckwell having a casting vote.

In procuring the resignation of the directors, Mr Tuckwell was not acting in the best interests of the Company as a whole and was exercising his powers as a director to benefit himself and prejudice the interests of the minority shareholders, placing his own interests above those of the Company. Accordingly, this was conduct which amounted to a breach of duty. Whether it was prejudicial conduct, so far as the Plaintiffs are concerned, we will deal with below. Even in the absence of the Plaintiffs being able to prove financial loss the Court might have been persuaded that the removal of the Independent Directors was prejudicial to their interests as shareholders, particularly in the context of the change in the Company's business which now occurred.

307 Finally, Mr Tuckwell accepted in evidence that he wanted the Independent Directors gone prior to the meeting he had scheduled with Mr Garman of FTV on 16 May 2018.

The change of the business of the Company after the Sales

308 Following the completion of the Sales in April 2018, the Company's business has on any view been substantially changed. The nature of the new business was set out in the January 2018 Memorandum prepared by Mr Tuckwell and sent to executives only, and not to the Board, referred to in paragraphs 283–285 above. Mr Tuckwell accepted that the change in the nature of the business was dramatic. The Company changed its name as referred to in the introduction above. Mr Tuckwell accepted that the new business was “ *a completely different business*” from the Company that existed when the Plaintiffs purchased their shares in it. Mr Tuckwell agreed that it was not his vision or the Plaintiffs' vision when they invested that the Company would become a private equity business. He agreed that the Plaintiffs would have no desire to be invested in other private equity funds being private equity investors themselves.

309 However Mr Tuckwell said:

> *“The fact that the minority don't like it is a simple fact of company law.* The majority rules where there is a difference of opinion. That's how efficient commerce works.”

310 Mr Chee said:

> *“the transition….* into Mr Tuckwell's family office of private equity investments, you know, we wanted no part of that. We had the Company sold and we wanted our distribution and we were being dragged into this new vehicle….”

311 Mr Burstein said:

> *“This new definition of [‘the Company’] was not one compatible with an entity that Millennium would ever have invested in.”*

312 Mr Tuckwell accepted that the Company's *'former business'* had come to an end and that he was drawing a line under it. It was put to Mr Tuckwell that he was exercising his powers as a director to cause the Company to carry on a business that he knew most other shareholders did not want to be part of. He said that was not correct because "shareholders holding a majority of the shares do wish this to be the business of the Company".

313 The context of the change of the Company's business also needs to be considered in the light of two conversations that Mr Tuckwell had with representatives of FTV in 2018.

314 The first was a meeting in New York in January 2018, when Mr Tuckwell called Mr Cukier to ask if they could meet. Mr Cukier was surprised given the history between them, but agreed to do so.

315 Mr Tuckwell accepted that Mr Cukier's account in his witness statement as to what occurred was accurate. Specifically:

> *"Mr Tuckwell ranted about how much he despised Mr Bernstein, who Mr Tuckwell said had been a terrible partner.* Mr Tuckwell then outlined his intention to turn [the Company] into his family office using FTV's (and presumably all of the other minority shareholders') funds to finance the investments that he wanted to make while he and the other executives took a sizeable carried interest. Mr Tuckwell variously said that his heirs would be dead before FTV ever saw a penny, but he could out wait FTV and that if FTV wanted any liquidity that it would be on the basis of a huge discount."

It was clear to us that by this time Mr Tuckwell had lost any objectivity when it came to his dealings with, and perception of, FTV, and that this ultimately was also to colour the way that he wished to treat the other minority shareholders.

316 Mr Tuckwell had two conversations with Mr Garman of FTV in March and May 2018. In a telephone call on 20 th March 2018, Mr Tuckwell explained that his plan was to keep the Company, but to operate it as a *'family office'* and to buy out the minority shareholders at a price reflecting a discount, and that he was personally engaging Ernst & Young (in fact, it was KPMG) to advise on the level of discount. Mr Garman said this was inappropriate and it was agreed that there would be a further discussion after the Sales process had been completed. Mr Garman told Mr Tuckwell that his fiduciary duties required him to treat all shareholders equally, which Mr Tuckwell acknowledged.

317 In May 2018, Mr Tuckwell was in America and he met Mr Garman. They played golf and then had dinner with Mr Tuckwell's wife. Mr Garman said that the Board's duties required them to distribute the proceeds of sale pro-rata. Mr Tuckwell reiterated that he intended to convert the Company to be his *'family office'*. At this stage, he said he was looking for a *'modest'* discount, which Mr Garman took to mean 10% or less.

318 Although the news of the conversion of the Company to a *'family office'* was delivered to shareholders, particularly FTV, as a threat, it has now occurred. By reference to *'family office'*, Mr Tuckwell appears now to view the decision as to choice of investments as one for him alone to make, and in the event that Mr Chee has disagreed with investment proposals he has used his casting vote. He knows that this is a new business that would not have been agreed to by the minority shareholders and probably not the Independent Directors. He knows that it has made shares in the Company very hard to sell and that they are now virtually illiquid. In our view, it would have been appropriate for Mr Tuckwell, as Chairman, to ask the Board to convene an EGM in order for shareholders to have the opportunity to consider the proposed change of the Company's business.

319 The decisions to adopt this new investment policy have been made at Board level and are plainly acts of the Company. Such decisions are acts which are unfair in that there has been a breach of duty. Mr Tuckwell, by converting the Company into a family office (his family), plainly preferred the interests of one shareholder (his interests) to those of the other shareholders. The Plaintiffs have also been financially prejudiced as they can no longer easily deal with their shares – the market for their shares has simply gone.

Attempting to require the Plaintiffs to sell their shares at a discount

320 The Plaintiffs plead and the Court, as indicated above, has accepted, that the Sales, the refusal to distribute the proceeds *pro-rata*, the removal of the Independent Directors and the change of the Company's business need to be looked at collectively as part of a scheme designed to induce the Plaintiffs to sell their shares at an unwarranted discount. The instruction of KPMG, the nature of those instructions and the fact that, contrary to the agreement at the Board meeting in March 2018, KPMG was not jointly instructed, nor was anyone jointly instructed, can be seen as part of that scheme.

321 Mr Tuckwell's answer to these claims is that the Plaintiffs are simply refusing to sell their shares at a discount which properly reflects the minority status they have always had. The Plaintiffs have no right to sell and Mr Tuckwell / the Company have no obligation to buy at a price which ignores the reality of their position. He says correctly that the Court is not convened in order to sanction a no-fault divorce i.e. an exit for minority shareholders just because they would like to leave the Company, still less one at an undiscounted price. He said FTV was well aware of the risk of this outcome when it converted its shares in 2009, and Millennium and Susquehanna knew of the risks when they purchased their shares in 2011.

322 Mr Tuckwell also says (and this is more or less accurate) that everyone who bought shares in the Company did so at a discount of one sort or another, whether a minority share discount or a discount reflecting the lack of liquidity for the shares.

323 We have already set out our reasons for finding that in 2017 Mr Tuckwell encouraged the

Plaintiffs to believe that they would receive a *pro-rata* distribution of the proceeds of the Sales, either by way of a distribution or a re-purchase of their shares in order to procure their cooperation in regard to the Sales, and that subsequently it was agreed that there would be a joint instruction of an expert to consider the extent of any discount and thereafter a process of discussion and negotiation with the minority interests protected by the Independent Directors.

324 By requiring the Independent Directors to resign, in effect sacking them, and changing the nature of the business, Mr Tuckwell drove the Plaintiffs into a corner, and that was his design.

325 As Mr Bernstein said:

> *"we want to be aligned around value maximisation with our partners, with our control shareholders, with the management teams so that we are all maximising value together.* The minute that a minority shareholder is forced to sell to the company, to the other shareholders, you're immediately put into a conflict where the people who control the company, who have the most information, are trying to buy you out at the greatest discount, and so it's almost impossible to achieve fair market value."

326 Mr Goldman was asked if he ever tried to negotiate any rights to distribution in the agreement setting out the conditions for purchase of shares in the Company. He replied:

> *"I'm not sure exactly what you're getting at, but I'll say this: Mr Tuckwell in every conversation that I had with him over the course of eight years assured me that he was looking out for our capital, that he would make us money.* He never once in those ten years and multiple conversations said to me 'Amir thank you for giving me $22 million so I can run a family office into perpetuity, where I extract the capital for myself and leave you stranded…. He was consistent, he induced us to invest, he knew we expected our capital returned and it's kind of as simple as that. It's the way the entire world operates. I mean, the two greatest inventions in the modern economy are the start-up and the venture capital and it only works if people stand by their word and by their obligations. I felt fully comfortable that under the laws of the island of Jersey we would not be abused and oppressed as shareholders."

327 These were not mere *'expectations'*. The Plaintiffs had been induced to believe that they would receive at best, a *pro-rata* distribution; at worst, equitable treatment and a fair value for their shares after the Sales of the Company's assets.

328 We find that Mr Tuckwell never intended to treat the shareholders equally. That is clear from the document that he produced at the end of January 2018, in which he thought it appropriate to describe three shareholders as *'bad'* – namely Mr Rhind, Mr Autier, and Mr

Quigley – all of whom had worked for the Company and left under a cloud; and three of the shareholders as *‘good’* – Dr FitzGerald, Dr Birch and Mr Weeks.

329 Although during the Board meeting in May 2018 he gave the members of the Board, including the Independent Directors and the observers appointed by the Plaintiffs, reason to believe that there was to be a fair distribution, Mr Tuckwell's real intentions were revealed by an email exchange he had on 1 st February 2018 with an individual who held a small number of shares and lived in Australia. The exchange begins with Mr Tuckwell offering Mr Walesby $2,000 per share in the context of creating a new share option plan for the Australian business.

330 In his reply, Mr Walesby said that he was, *‘taken aback’* as it was a reduction from an anticipated $3,000 per share (the *pro-rata* value of the shares after the Sales was estimated as being just over $3,000 per share). Mr Walesby said it was *‘disappointing’*. Mr Tuckwell replied, inviting Mr Walesby not to dwell on this. He added:

> *“You need to hear from me what is driving some of this, which is me getting the PE firms out asap at a cheap price.* The less they get paid the higher the value of the ETFS shares for all of us.”

331 When this was put to Mr Tuckwell, he said *‘fair market value, when I used the word ‘cheap’ it's cheap compared to the net asset value per share’*.

332 We find that Mr Tuckwell was determined to ensure that the Plaintiffs suffered a *‘cheap’* exit. Such an objective would be consistent with his approach to FTV as referred to above. When Mr Tuckwell was cross-examined about the price he was prepared to pay for FTV shares, he was asked about an email the Company CEO Mr Weeks had sent to another officer of the Company on 10 November 2017 in the context of the requirement of WisdomTree to obtain minority shareholder consent to the transaction. Mr Weeks said in the email:

> *“Very interesting to see Graham's poor decisions of the past coming home to roost – he has for the first time spoken to FTV today and unsurprisingly they are not simply going to roll over – he will now have to treat them in line with all other shareholders or they won't sign, which means WT will not get Board approval on Sunday.”*

333 Of course, Mr Tuckwell managed to avoid the problem by providing the indemnity to WisdomTree referred to above. When Mr Tuckwell was asked what Mr Weeks meant when he referred to *‘Graham's poor decisions of the past coming home to roost’*, Mr Tuckwell said:

> *“I think he's probably referring to, as it were, the war between FTV and me.…* I didn't want FTV to have peace with me.”

334 He was asked about Mr Weeks' reference to treating FTV in line with all other shareholders and whether it was his intention to treat FTV differently from all other shareholders. Mr Tuckwell replied:

> *“Yes and no. My intention was to – to the extent I was required to, and wanted to, buy FTV out. I absolutely had the desire to pay them the lowest price. I could do so while satisfying my obligations, fiduciary obligations, in other words – in other words, the minimum price that I could legally pay them.”*

335 The fact that, on any view, FTV were to be the major recipient of any buy back of shares was, in the Court's view, the principal driving force for Mr Tuckwell in fixing the price he was prepared to pay to purchase any shares held by the minority shareholders.

336 In 2012, Ernst & Young were engaged by the Company to provide a per share value of the Company in respect of an employee share remuneration liquidity proposal. The Plaintiffs criticise Mr Tuckwell for not instructing Ernst & Young again six years later, although we regard that criticism as misplaced, as Mr Tuckwell explained to our satisfaction why he instructed KPMG. Mr Tuckwell approached KPMG in February 2018 for the purpose of providing their advice on a discount for minority interests in the Company.

337 He attached a summary setting out the current position in relation to the Company. He agreed in evidence that it was necessary for KPMG to be given an accurate summary of the Company's position. In the *‘valuation brief’* that Mr Tuckwell prepared in respect to the Company, he set out a two page summary of the Company's current position, assets, intentions and wish of the minority shareholders to liquidate their shareholdings. He said *“The Company is a private company with no ready market in its shares”*. He said that in the past some shareholders had provided some liquidity “but those sales has [sic] often been done at a substantial discount to perceived underlying value”. He said one way for the minority shareholders to receive cash would be a gradual liquidation of the Company but this would take up to seven years. The other way for the minority shareholders to receive cash would be for the Company to buy back their shares. This required the consent of the selling shareholders (Mr Tuckwell said two-thirds of the remaining shareholders) — in effect an agreement on price between the private equity firms and Mr Tuckwell. Mr Tuckwell said that he was supportive of this being done at fair market value. The private equity firms would like to receive a net asset value return for each share, estimated to be $2,900 per share. However, Mr Tuckwell believed that fair market value for the minority shareholders is *‘a substantial discount to NAV because of their limited rights and GT's control rights’*. He summarised these as follows:

> *“GT, as the majority shareholder, has the following rights:-*
>
> - *to appoint all the directors and to remove any director*
> - *to remain as CEO and Chairman (with a casting vote)*

- *to determine the Business Plan*

- *to veto any proposed share buy-back*

- *to abolish the Shareholders' Agreement*

In essence, GT has total control over the company.

The question to be answered is, given all these circumstances: if GT and / or the Company were to make an offer to minority shareholders to buy-back their shares at FMV, what is an appropriate discount to NAV to arrive at FMV."

338 While there were some valid criticisms made by the Plaintiffs of the terms of these instructions, they were in the Court's view reasonably accurate. It was an over-statement to say that Mr Tuckwell had the power to *'abolish the Shareholders' Agreement'* as there had never been a finding or clear advice to that effect received by the Company. It was also inaccurate to say that Mr Tuckwell had 'total control over the Company' as he could not, for example, pass Special Resolutions with the shareholding of 58% that he had. He was not able, for example, to change the Articles and so on, and so did not have total control over the Company. The Plaintiffs also say, and there is something in this argument, that it was incorrect to suggest as he did that sales of shares had ' *often been done at a substantial discount to perceived underlying value*' as that was certainly not the Plaintiffs' case, but it was not on the other hand an unreasonable statement for Mr Tuckwell to have made.

339 The instructions were certainly short. Mr Tuckwell in part justified this by saying *'I wanted a professional report that was – where I could sit down with the other guys and say: 'Look, this is what KPMG came up with'.* Get another expert, similar expert'. This is not what ultimately happened. Mr Tuckwell certainly accepted that he knew that the question of his entitlement to abolish or alter the Shareholders' Agreement was heavily disputed. As to the suggestion that he had *'total control'* over the Company, he accepted that he failed to mention the rights in the Shareholders' Agreement which limit such control, for example the right of first refusal, tag-along and drag-along rights. Those were real limitations — as the events in relation to the Tuckwell Foundation clearly illustrated.

340 KPMG apparently did not receive a copy of the Shareholders' Agreement, but did receive a summary of shareholder rights. They also stated that the most recent sales of shares were carried out at a 53% discount to Net Asset Value but that they had not used this, directly, in their analysis. It is clear from the KPMG report that their summary of the *'shareholders' rights'* was drawn from the note that Mr Tuckwell provided in February 2018.

341 Bearing in mind the representations that Mr Tuckwell made at the Board meeting that took place the following month, it would have been helpful, transparent and consistent with what he claimed were his intentions at that meeting for him to have disclosed what he had told KPMG, particularly if he had any intention of obtaining a report that he would rely upon in negotiations, let alone in the way that he ultimately relied upon it.

342 The KPMG report is entitled *'Project Eagle', 'Minority Interests Discounts Report'* and is dated 1 st August 2018. The report is addressed to Mr Tuckwell personally at his home address and records that it is provided in accordance with their instructions dated 9 th April 2018. KPMG said that in preparing their report, their primary source had been the document entitled *'ETFS Shareholder Rights'* provided by Mr Tuckwell. It is not necessary to summarise the KPMG report in detail. No witness from KPMG gave evidence and we heard expert evidence from an expert called on behalf of the Plaintiffs and one called on behalf of Mr Tuckwell. This evidence and the reports from each expert were in significant areas diametrically opposed one from another and the evidence of each was in line with the expectations of their respective instructing parties. We mean no criticism of either expert or indeed KPMG when making this observation. It is perhaps, though, a function of the nature of instructions in such cases that they appear to yield results more or less in line with the expectations of instructing parties.

343 In any event KPMG observed, and both experts who gave evidence before us agreed, that when valuing a minority interest a discount is often applied to reflect the lower value of a minority shareholders' interests on a per share basis. There were two specific discounts; the discount for lack of ownership control ("DLOC"), and the discount for lack of marketability ("DLOM"). These discounts are, according to KPMG, generally held to be separate and distinct (although both experts before us agreed that they should be looked at and taken together in this case). KPMG opined that the two discounts are taken seriatim with the ultimate minority discount effectively being the product of the two discounts – one multiplied by the other. Having considered various studies, KPMG concluded that the range of the DLOM was between 14% and 45%, and for the DLOC, between 17% and 30%. The calculated minority discount based on these ranges for both DLOM and DLOC combined was between 28% and 62%. Various factors relevant to this Company pointed, they thought, to a discount range of between 45% and 62%, but as Mr Tuckwell would be advantaged by the purchase as majority shareholder there would need to be a *'takeover premium'*. These tend to average between 20% and 40%. KPMG decided that it was *'appropriate'* to apply the lower end of the takeover premium giving a minority discount of between 36% and 50%. This was averaged by Mr Tuckwell to provide 44%. KPMG thought it appropriate, when considering DLOC, to look at guidance supplied by the ACCA and case law as summarised by Her Majesty's Revenue and Customs ("HMRC") in their internal guidance, together with other studies. Such studies were also considered by Mr Tuckwell's expert in his report. It is of note that KPMG did not identify the fact that a substantial amount of the Company's assets were held in cash as being relevant to the DLOM or the DLOC. This is a matter which is consistent with Mr Tuckwell's expert evidence at trial. The DLOM relates to the liquidity of the shares according to KPMG and not (although this is not expressly stated) the liquidity of the underlying investments.

344 KPMG said that none of the minority shareholdings in the Company should attract a greater discount for DLOM than any other, which is consistent with the evidence of the experts at trial.

345 . Mr Tuckwell wrote to Millennium later that month to offer to buy its shares in the Company. Mr Tuckwell's offer, dated 24 th August 2018, was sent to Millennium and copied to Mr Wolfe of Susquehanna. It was not copied to FTV. Nonetheless, he said that he was willing to provide the Plaintiffs with a cash exit at fair market value calculated at $1,400 per share, against a net asset value of $560 million – $2,500 per share, less a 44% minority discount. Mr Tuckwell gave five days (including the weekend) for acceptance and said, " *I do not intend another offer will be made, on similar terms or at all, if you do not accept this offer by the stated deadline*".

346 This was, as Mr Tuckwell accepted in evidence, a final offer. Mr Tuckwell confirmed that in the event of it not being accepted it was *'off the table'*. Contrary to Mr Tuckwell's assurances to the Board in March 2018, this was not the beginning of a discussion; there was no disclosure of the KPMG report at the time; there was no attempt to reach a resolution and no attempt to instruct an expert jointly.

347 Although the email from Mr Tuckwell says that the offer was made in his personal capacity, it is clear from the Answer at paragraph 121 and from Mr Tuckwell's evidence, that it was the Company that would carry out the purchase as the Company had the funds to do so. In relation to this and various other aspects of the Plaintiffs' pleadings, it is said by Mr Tuckwell that the Plaintiffs have not pleaded their case and specifically that the *'body of the plea'* does not allege that Mr Tuckwell attempted to force the Plaintiffs to sell their shares at a substantial discount. This is simply not the case. All matters that the Plaintiffs in our view need to plead in respect of this matter are pleaded. Paragraphs 7, 8, 9 and 10 of the Amended Order of Justice — paragraph 10 in particular — expressly plead the matters relating to the KPMG report and the discount, and the overall scheme alleged by the Plaintiffs is pleaded again at paragraph 11, which specifically refers to paragraphs 9 and 10 of the Amended Order of Justice. This is not to say that there are not some deficiencies in the Plaintiffs' pleadings, but Mr Tuckwell's assertions in relation to those defects are, in summary, overblown.

348 The attempt to force the Plaintiffs to sell their shares at a substantial discount was indeed the culmination of a series of events engineered by Mr Tuckwell which were acts of the Company.

349 They were unfair in that they were breaches of the duties owed to the Company and without regard to the interests of the Company or the interests of the shareholders as a whole.

350 When Mr Tuckwell said during cross-examination that, *'I'd always understood that my duty as a director is to have regard to the interests of the Company as a whole.* I mean, it's nice if you can have regard to all shareholders if they're aligned with any particular decision', he to some extent gave the game away – from his perspective he was happy to act in the interests of the shareholders as a whole when they were aligned with his interests, but not otherwise.

351 Mr Tuckwell did not make good the promises he made to the Board in relation to the way in which the shares would be valued.

352 As regards the question of prejudice, no financial prejudice would arise if the KPMG conclusions were correct and the 44% discount on account of minority shareholding was correct. This is a matter that we will consider in more detail below when we evaluate the evidence of the two experts who gave evidence in the case. However, bearing in mind the way in which KPMG was instructed, there was always going to be a substantial risk that Mr Tuckwell would in any event fail to make an offer to purchase the Plaintiffs' shares which fairly reflected the value of those shares, even subject to a minority discount.

Mr Tuckwell's return to live in Australia

353 The Plaintiffs claim that when Mr Tuckwell left to return to live in Australia he had not established whether or not the Company's tax residency would shift from Jersey (where its tax rate is 0%) to Australia, where it would be subject to a much higher rate of tax. Only after Mr Tuckwell left Jersey for Australia and upon obtaining updated advice from Ernst & Young did the Company effect a restructuring of its investment operations, which were moved to a UK subsidiary in which Mr Tuckwell had no day-to-day role, but retained its bond and cash portfolios at the level of the parent company.

354 Mr Tuckwell's case is that the Company is not resident for tax purposes in Australia and will not become so; accordingly no prejudice has been suffered, or will be suffered as a consequence of his relocation there.

355 In August 2019, Mr Tuckwell informed the Board that he intended to relocate to Australia whilst continuing to exercise control over the Company. The effect of that proposal, if carried out, was that the Company would become Australian tax resident, the Plaintiffs say, and further they would become liable to Australian tax on dividends received from the Company or any funds received by way of a buy back of their shares by the Company.

356 It was only by reason of the insistence of the Plaintiffs, they say, that Mr Tuckwell took further advice and then took steps to prevent the change in tax residence of the Company. The Plaintiffs say that the risk of Australian tax residency was relied upon by Mr Tuckwell to cause a restructuring of the Company, such that its investment business was transferred to a UK holding company. This was prejudicial, the Plaintiffs argue, in a number of ways. This gave rise, it is said, to a UK tax liability and also reduced the Plaintiffs' oversight over the Company's affairs, which only exists at main Board level where Millennium and Susquehanna have a right to observer status.

357 The Plaintiffs say that by continuing to exercise management of the Company from

Australia Mr Tuckwell has created a risk which continues, namely that the Company will be found to be Australian tax resident.

358 Mr Tuckwell's relocation to Australia also put him in breach of his service agreement, which required him to work for the Company in Jersey. This agreement was retroactively terminated in May 2020 with effect from 1 September 2019.

359 Mr Tuckwell says that he left Jersey on 28 th September 2019 and arrived in Australia on 9 th October 2019; he is no longer resident for tax purposes in Jersey. On 8 th October 2019, certain assets of the Company were transferred to a UK holding company, pursuant to the advice given by Ernst & Young in September 2019. Mr Tuckwell said that the decision to return to Australia was taken by himself and his wife in 2018. In our view it was quite late in the day that advice was procured from Ernst & Young which indicated, in August 2019, that the Company was likely to become resident in Australia once Mr Tuckwell became a resident because of Mr Tuckwell's controls over the Company. Mr Tuckwell accepted that he was reluctant to relinquish control over the Company. Accordingly, the focus was to mitigate Australian tax by using a UK holding company to hold the shares in the companies in which private equity type investments were to be made. The tax issues were still up in the air when Mr Tuckwell left Jersey for Australia — he accepts that whilst he was on holiday *en route* to Australia he was still dealing with tax issues in relation to the Company, in respect of which there was a great deal of uncertainty.

360 Mr Chee said it was only at the 20 th August 2019 Board meeting that the Board learned that Ernst & Young had been engaged to advise the Company on its tax position in respect of the Company's possible new tax residency in Australia. This was obviously the best part of a year after Mr Tuckwell had decided to move back to Australia. Accordingly, the Board was only aware of the imminent move of Mr Tuckwell to Australia and the possible significant consequences for the Company a little over a month before Mr Tuckwell left Jersey. Mr Chee in his evidence said that he had been ‘ *surprised*’ to learn of these new plans, particularly the fact that the Company would become subject to income tax of 30% on its worldwide income. The tax status of the Company has always been important to it. Mr Chee noted at the Board meeting that had the Plaintiff shareholders had their capital returned to them when the Company's assets were sold, then this new possible change in the tax residency of the Company would have had no impact on them.

361 It was only during the Board meeting that Mr Chee learned of Mr Tuckwell's intention to cause the Company to transfer the portfolio company investments to a wholly-owned UK subsidiary during the next week. As an interim measure, on 10 th October 2019, Mr Tuckwell stepped down as CEO and told the November 2019 meeting. At that Board meeting, on 20 th November 2019, Ernst & Young gave a tax analysis supported by a slide show. It appeared that the Company could now retain its Jersey tax residence if Mr Tuckwell's involvement in operational matters was limited. As to the concern about investments being made at the level of the UK holding company, thus excluding the observers of Millennium and Susquehanna, Mr Tuckwell pointed out that the financing

decisions would still be made by the Board of the Company at quarterly meetings, and no investments could be made by the UK holding company without funding. Furthermore, Mr Chee was appointed to the Board of the UK HoldCo in June 2020, so as to provide investors with an indirect voice at that level via a director whom they plainly all trusted.

362 During the course of that Board meeting, Mr Tuckwell became irate at the number of questions being asked by Mr Burstein and Mr Wolfe on behalf of Millennium and Susquehanna respectively, and ultimately muted their lines so that they could no longer be heard. Mr Chee objected to this, and we regard this action as grossly inappropriate behaviour on the part of Mr Tuckwell. Mr Tuckwell then said he would consider whether or not the observers should continue to enjoy their observer status. This was an inappropriate remark to make, bearing in mind that these were rights that Millennium and Susquehanna had had since April 2011.

363 At the next Board meeting on 10 th March 2020, Mr Tuckwell confirmed that he was unable to take any material decisions on behalf of the Company whilst in Australia. As to the relationship between the Company and the UK HoldCo Boards, the Company would always receive a detailed briefing on all investments by the UK HoldCo and the Board of the Company could approve or decline the funding of such investments. It was at the March 2020 meeting that it was agreed that Mr Chee be appointed a director of the UK HoldCo. Mr Tuckwell declined to grant Millennium and Susquehanna observer rights at the level of the UK Company. The Board of the Company met in March 2020 and October 2020, and the board of the UK HoldCo continues to meet regularly.

364 The tax residency of the Company is one of the very few issues upon which the Company itself has taken a stance and has pleaded an Answer to the effect that, provided that its central management and control remain solely in Jersey and the Company does not carry on business in Australia, the Company should remain tax resident in Jersey and not tax resident in the UK or Australia. There are various conditions in relation to the continuation of residence in Jersey which must be satisfied and, as a result of the Company's implementation of the recommendations, the Company does not consider that it is Australian tax resident and / or that it is liable to pay Australian income tax.

365 Mr Tuckwell made the valid point that the Plaintiffs had failed to call any expert taxation or other evidence to the effect that the Company is now, or may be in the future, at risk of becoming resident in Australia for tax purposes.

366 Accordingly, this is an allegation which simply cannot amount to unfair prejudice, as there has been no prejudice to the Plaintiffs.

367 Nonetheless, in the view of the Court, Mr Tuckwell was reckless in moving to Australia without fully establishing the tax consequences that may have arisen for the Company. He should have taken, and should have ensured the Company took, proper advice well before

the move and should have taken steps, such as resigning from the Board, to avoid those risks before he left Jersey and not on arrival in Australia.

Date of valuation of the Plaintiffs' shares

368 The Plaintiffs contended that the shares should be valued at the date of the Sales in spring 2018. Mr Tuckwell contended that the date of valuation should be the date of trial. No other date of valuation was contended for.

369 The date of valuation is a matter for the discretion of the Court in the circumstances of a particular case (see Hollington at 8–60). Generally, the date of valuation is close to the date of trial unless there are circumstances which warrant a different date. In this case, the Plaintiffs argue that the Company ought to have been wound down shortly after the Sales took place. This is consistent with the Plaintiffs presenting a plan for distribution of the sale proceeds prior to the Sales being approved by the Board. The Plaintiffs say that this is fair bearing in mind the major change in the Company's business and the reduction in value of the Company's assets, principally a consequence of the fall in value of the shares in Wisdom Tree. In *Re Grafters* [2015] (1) JLR 144, the Royal Court held on the facts of that case that the general rule that the starting point for determining the date on which the shareholding should be valued applied, namely the date upon which the order for purchase of the shares was made. The Court observed that there would be many cases where fairness to one side or the other required the court to select a different date for valuation. Indeed in one of the leading cases on date of valuation referred to in *Re Grafters*, namely the English Court of Appeal decision in *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031, the Court of Appeal decided that the fairest course in that case was to value the company at the date of the first instance trial.

370 To select an earlier date than the date of trial would be unfair to Mr Tuckwell. The fall in the value of the WisdomTree shares is not attributable to him. It is asserted that the value of the Company has diminished since its change of business. However, this diminution in value, if there has been one, is not significant compared to the fall in the market for the shares in WisdomTree.

371 We did consider whether it was appropriate to value the shares at the date of the final Court order but decided not to do so because it was not argued by either party that we should; the expert evidence was not directed to the value of the shares at such a date, whereas it did consider the value in spring 2018, dates in mid-2020 and the value at the end of the trial on 13 th November 2020. Further, the value of the shares at the date of the order would be a matter of chance depending upon when the Court delivered its judgment, whereas the last day of the trial was a fixed date; there was perhaps scope for the parties to argue that the date of the Court order might be either the date when the judgment in draft was distributed or the later date, which was bound to be some weeks later, when the judgment was handed down in approved form, during which time the price of the WisdomTree shares may have increased or decreased significantly. Accordingly, the Court

determined that the Company and the shares in the Company should be valued at the date of trial.

The evidence as to the appropriate discount for the Plaintiffs' shares

372 Before reviewing the evidence that we heard it is helpful to set out some of the principles as revealed by the case law that was drawn to our attention.

373 As Hollington observes at paragraph 8–51:

> ***"Disputes between shareholders very often revolve around the value of the shareholdings in the company, not the question whether one side should buy out the other.*** Whether a discount should be applied for a minority shareholding will often be the stumbling block in resolving such disputes. Currently this is an unsatisfactory area of the law, given the uncertainty that prevails. Since the overriding objective is that the valuation be a 'fair' one in all the circumstances, perhaps certainty in this field is illusory."

374 It is agreed that in the case of a quasi-partnership, there is a strong presumption that shares are valued pro-rata with no discount applied. However, this is not such a case.

375 In *Strahan v Wilcock* [2006], at (17), Arden LJ (as she then was) in effect held that *"exceptional"* circumstances had to exist for there to be no minority discount. Distinguishing quasi-partnership relationships to other companies, she said *'It is difficult to conceive of circumstances in which a non-discounted basis of valuation would be appropriate where there was unfair prejudice for the purposes of the 1985 Act but such a relationship did not exist'*. In a different context she endorsed her view in the Privy Council in *Shanda Games Ltd v Maso Capital Investments Ltd* [2020] UKPC 2.

376 However, Arden LJ's views have not been followed in every case. For example, in *Re Sunrise Radio Limited* [2009] EWHC 2893 (Ch), which involved a small private company that was not a quasi-partnership, it was held that the petitioner's shares should be valued without a discount. The Court observed that a wrongdoing majority shareholder should not be unjustly enriched by the application of a discount.

377 . By contrast in *Irvine v Irvine* [2007] 1 BCLC 445, Blackburne J, following *Strachan v Wilcock*, held that a minority shareholding (49.96%) in a company which had none of the characteristics of a quasi-partnership, should be valued for the purposes of the share purchase order under section 459 of the Companies Act 1995, the equivalent to Article 141, for what it is, with a discount reflecting its minority status. The discount applied was 30% even though the two shareholders were brothers who were the sole directors and shareholders of the company. In that case, the court also held that the cash surpluses of the business also fell to be treated as an asset of the company like any other, subject to the

same discount as applied to the other assets of the business.

378 The Petitioners in *Irvine v Irvine* had contended for a discount of 10% – 20% to reflect the fact that the majority control that the Respondent had was only possible due to the gifting of a single share to him and to reflect the fact that, as a result of the buyout, the Respondent would become sole shareholder.

379 The Respondents had contended for a discount in accordance with the HMRC Share Valuation Manual (of which more below) showing a discount of 25% – 40%.

380 . The judge ordered a discount of 30% reflecting the fact that the Petitioner's shares gave him no greater control than a 30% stake would have conferred; the gift of a single share to give control was irrelevant as there were no conditions attached to the gift and the buyout had to proceed on the basis that the Respondent was a willing buyer. Blackburne J said at paragraph 39 of his judgment that although the shareholding was a 49.96% shareholding it provided no more control over how the majority shareholder could conduct the business than a holding of no more than, say 30% " *the petitioner's holding can block the passing of a special resolution but can achieve little more*". The respondents' expert took into account the HMRC Share Valuation Manual which the judge appears to have thought was appropriate and adopted a discount of 30% which was nearer the 35% contended for by the respondent than the 20% discount contended for by the expert for the petitioners. In respect of the cash surpluses, the judge said " *I consider that the minority discount should apply as much to the cash in the business (both notional and actual) as to the other elements of the business at the buy-out date*".

381 In *Fowler v Gruber* [2010] 1 BCLC 563 the petitioner, the respondent and a third shareholder left their previous employment and formed a company. There was an unwritten agreement between them which provided *inter alia* that the petitioner would own 40% of the issued share capital and that the respondent and the third shareholder should each own 30% of the shares.

382 At the end of 2000, the petitioner sold a quarter of his 40% stake to a fourth shareholder, and in 2002 transferred certain of his shares to a local authority, leaving him with a stake of 28.57%.

383 The respondent became the sole director and was effectively solely responsible for the conduct of the company's affairs.

384 However, he used money from the company to make excessive payments endangering the company's financial position and contrary to his duty to act in the best interests of the company for the benefit of its shareholders. The petitioner's claim of unfair prejudice succeeded. The petitioner invited the court to order that his shares be purchased at a fair price. The court determined that the arrangement between the parties was not a quasi-

partnership although it began as such but ceased to be when the petitioner sold his shares to an outside party. The court explained that the calculation of the appropriate discount was not a formulaic exercise, but an exercise in which professional judgment and experience is required and in which regard must be paid to a variety of factors. The court held that a discount of 60%, as contended for by the respondent, was inappropriate. The court considered expert evidence including the fact that if HMRC were to open negotiations for a discount in relation to the shareholding it would do so at 35–40%. In all the circumstances a 40% discount was appropriate.

385 In *Re CF Booth Limited* [2017] EWHC 457 (Ch), the court considered a minority shareholding in a company incorporated to carry on a family scrap metal business. The petitioners owned 27.4% of the company, the respondents owned 65% — four of them were directors.

386 The unfair prejudice found by the court was in respect of the non-payment of dividend income and the consequential negative impact on the value of the petitioners' shares resulting from the dividend and remuneration policies of the directors.

387 The court held that the no dividend policy was also intended to help the directors acquire the minority shares at a favourable price – the directors had breached their duty to use the power to recommend a dividend for the purposes for which the power was conferred. On the particular facts of the case, the shares were ordered to be valued at the date of the petition. As to the discount, expert evidence indicated that the appropriate discount should be between 30% and 40%.

388 The court held that a one-third discount should be applied. The court reasoned that minority holdings generally attract less than pro-rata value and the fact that the directors were to acquire the shares was not a reason to refuse a discount. The directors had held a majority of the shares and in a negotiated sale would be in a strong position to require a discount.

389 The court found the case of *Estera Trust (Jersey) v Singh* [2018] EWHC 1715 (Ch) and [2019] EWHC 873 (Ch) of assistance.

390 In this case (of which more below), the main shareholders of the company, a hotel business, were brothers and the trustees of a trust associated with them. One brother, Jasminder Singh, and associated trusts held the majority of shares.

391 There were two Shareholders' Agreements entered into in 1991 and 1993 respectively.

392 The petitioners, one of whom was Herinder Singh, complained of various matters including breaches of fiduciary duty by Jasminder Singh, such as diverting business

opportunities away from the Company to himself. The petition, alleging unfair prejudice, succeeded. Jasminder Singh had diverted business opportunities to himself and benefitted personally and bonuses awarded to him were excessive and amounted to a disguised distribution of profits in circumstances where the Company had not declared a dividend in favour of other shareholders. The Company was not a quasi-partnership and Jasminder Singh was ordered to buy out the petitioner's shares. It was agreed, as in this case, that the appropriate method of valuing the Company was its net asset value.

393 The petitioners argued for a pro-rata non-discounted valuation on the basis that they were unwilling sellers and that the purchasing respondents ought not to benefit from their wrongdoing.

394 The trial judge recognised that there may be circumstances where an un-discounted valuation could be appropriate in the case of a non quasi-partnership, but there was no presumption in favour of the same. The petitioners were not, as they suggested, unwilling sellers – they were willing to sell but only at a price that Jasminder Singh was unwilling to pay, namely a pro-rata share of the value of the company.

395 The respondents argued that the shares should be purchased at their market value – that is whatever price the shares would actually command if sold as a minority shareholding on the market and at the valuation date.

396 The judge rejected that submission as the shares were not being sold on the open market and if they were the price of the shares could be suppressed by various provisions in the Shareholders' Agreement.

397 The judge determined that a fair basis of valuation would be the price that would be likely to be agreed between commercially minded but reasonable persons in the actual positions of Herinder and Jasminder in notional arm's-length negotiations, having regard to any marriage value that would be released on such a sale and purchase.

398 Mr Tuckwell accepted, in an answer to a question from the Court, that that was the appropriate way of valuing the Plaintiffs' shares in this case.

399 The judge noted that the shares were not being purchased by an unconnected investor, but by Jasminder Singh or his trusts to whom the shares were more valuable as the purchase would have the effect of raising their combined shareholding above 75%. The purchase of the shares at their heavily-discounted, open-market value would create a windfall to Jasminder Singh. The same arguments run in this case – the effect of purchasing the shares will substantially reinforce Mr Tuckwell's position in the Company and enable him, for example, to pass special resolutions which demand a majority of two thirds of the shareholders voting in general meeting.

400 The Court identified that a minority discount for the market value of Herinder's Singh's shares was 45%. Collectively the petitioner's shares amounted to 19.89% of the issued share capital. The valuation was performed on the net asset value of the company. However, that 45% discount was subject to an addition representing one half of the marriage value that the respondent would receive as a result of acquiring the petitioner's shares resulting in an effective discount to net asset value of approximately 23%.

401 Two experts gave evidence before us. Both were accountants. Noel Matthews gave evidence on behalf of the Plaintiffs, and Paul Cliff on behalf of Mr Tuckwell.

402 Both agreed that the relevant approach to valuing the Company was on an assets basis – sometimes called a Net Asset Valuation. Mr Matthews explained that this was because the Company had sold most of its trading businesses in April 2018 in return for cash and shares in WisdomTree. Mr Matthews said that because there was only one class of share, a valuer's starting presumption would be that the shares are entitled to a pro-rata share of the equity value of the Company. The valuer would then need to consider whether to apply a premium or a discount to the pro-rata share – a controlling interest may command a premium, whereas a minority interest may be subject to a discount. Mr Matthews valued the Company's NAV at $690 million at 17 th May 2018, and $451 million at 31 st July 2020. The main reason for the reduction in value between the two dates is the significant decline in the value of WisdomTree shares during this period.

403 Mr Matthews said that there were three possible bases of valuation:

(i) Pro-rata value;

(ii) Equitable value – this values the shares at the price that would be expected to be agreed in a sale by the Plaintiffs to Mr Tuckwell or the Company taking into account the advantages and disadvantages of both parties. Mr Matthews concluded that a discount of 0 to 5% should apply if this approach is adopted; and

(iii) Market value – this values the shares at the price that would be expected to be agreed in a sale from a hypothetical willing seller to a hypothetical willing buyer, that is to say not taking into account the specific advantages and disadvantages of Mr Tuckwell and the Plaintiffs. In these circumstances he said that a discount in the range of 2.5 to 5% should apply.

404 Both experts agreed that a minority discount to a shareholding can be applied by reason of either or both of a DLOC or DLOM. Mr Matthews thought that Mr Tuckwell's contention that the Plaintiffs' shares should be sold at *‘fair market value’* equated to his *‘market value’*. Mr Matthews took the view that the context for the present valuation exercise is unusual because of the consequence of the Sales – the majority of the Company's assets were now in cash and this was not a company, in his view, with ongoing trading activities. He said it was unusual for a company to be principally holding liquid assets. Mr Cliff, when he gave

his evidence, did not accept this and gave the example of a mining company that was about to commence operations which would inevitably, in his view, be cash rich.

405 As to the difference in valuations from May 2018 to July 2020, Mr Matthews explained that this was principally caused by the decrease in the value of WisdomTree shares, which fell from $11.7 per share in May 2018 to $3.6 per share as at 31 July 2020. There had been a small but significant recovery in value by the time of the conclusion of the trial.

406 Both experts agreed that it was appropriate for the DLOM and DLOC to be considered together to produce a single discount in this case.

407 As to the DLOC, Mr Matthews said that the value of control is very specific to the circumstances of the particular company and the jurisdiction it operates in. He said that the DLOM referred to discounts for both marketability, i.e. the ability to sell an asset, and liquidity, the ease with which an asset can be converted to cash quickly without affecting the price achievable.

408 As to the distinction between the two concepts, Mr Matthews explained that a small number of shares in a listed company can be sold immediately at the prevailing market price, whereas a large block of shares in the same company may take some time to sell without depressing the market price. So the larger block of shares was marketable but less liquid – it may not be able to be quickly converted into cash without the price changing. Minority shareholders may face greater restrictions on their ability to sell their shareholdings and may find it difficult to convert their shareholdings to cash. This may apply even in a business holding only liquid assets. However, in Mr Matthews's view, this was effectively a discount associated with a lack of control – the DLOM for a minority shareholder in this context arose, he said, because of that shareholder's lack of control of distributions.

409 Mr Matthews was of the view that the extent of the DLOM was in this case affected by the fact that most of the assets in the Company were liquid. Mr Cliff, by contrast, said that that was not a relevant consideration – the focus was on the liquidity of the shares, not that of the underlying assets.

410 On the equitable value and market value bases, Mr Matthews concluded that the minority discount applying to the Plaintiffs shareholding would be *‘very low’*, principally because of the fact that the assets of the Company were largely held in cash and because the Company was a Jersey company, which provides equivalent protections to those enjoyed by minority shareholders in the United Kingdom. He also said that the availability of the just and equitable winding up as a potential remedy would also suggest no discount as such a winding up would be on a pro-rata basis. Further, he took the view that the historical sales of FTV shares to Millennium and Susquehanna followed a full marketing process and did not appear to have taken account of any minority discount – that suggested that the actual

buyers and sellers did not consider a minority discount applicable. Nonetheless, a small minority discount could still apply to reflect the shareholder's inability to influence the timing of distributions.

411 Mr Matthews did say that there were a number of factors that can affect the existence and size of discounts for lacking control or marketability, including the size of the shareholding being valued; the rights attaching to the shares; the prospects for returns for the minority shareholders; the nature, growth and risk prospects of the underlying business, and the circumstances of the assumed transaction between buyer and seller. It seemed to members of the Court that there were various flaws with the approach adopted by Mr Matthews. First, although the majority of the assets of the Company were held in cash, that did not really make the shares in the Company more marketable. The Plaintiffs are minority shareholders in a private company with very limited rights. FTV no longer have the rights attaching to them as preferred shareholders. The Plaintiffs knew the risks attaching to the minority status when they purchased or converted their shares (in the case of FTV). Simply because the Company's assets were held in cash did not mean that the DLOM in this case was solely, as suggested by Mr Matthews, a discount associated with a lack of control. The shares were, on the evidence in the case by mid-2018 very difficult to sell. Secondly, the fact that the shareholders had various statutory rights as minority shareholders only takes the Plaintiffs so far, as those rights are only available to them on a finding of unfair prejudice. The shares need to be valued on the footing that the Plaintiffs were not immediately able to realise the value of their shares by an unfair prejudice petition, which in any event is a long, complicated and expensive process in most cases. Thirdly, the fact that the *'just and equitable winding up'* remedy is available which would lead to a pro-rata distribution is, in the view of the members of the Court, neither here nor there. It is a different remedy from an unfair prejudice application and would generally not be ordered in the case of a company which is not insolvent.

412 Further, the reference to the fact that Millennium and Susquehanna did not appear to have purchased their shares at a minority discount was of little relevance. That transaction occurred in 2011 when the Company was about to be subject to an IPO or trade sale. The circumstances in 2018 and today are quite different. There is no immediate realisation of the shares likely absent an agreement with Mr Tuckwell or Court relief, no prospect of an early sale and, in any event, it is, for the reasons explored above. wrong to proceed on the footing that Millennium and Susquehanna did not purchase the shares on a discount. They fully expected the shares that they purchased, which were ordinary shares in a private company, to be far more valuable in the very near future – anticipating doubling or trebling their money in a very short timeframe.

413 Accordingly, it appears that Mr Matthews took into account and was heavily influenced by various factors which, in the view of the Court, had little or no weight.

414 In cross-examination, Mr Matthews accepted that Ernst & Young regarded it as appropriate to discount Mr Tuckwell's majority shareholding by 10% to reflect the fact that he held less than 100% of the shares in a private company. Mr Matthews also confirmed

that the *'only factor'* in his view which might give rise to a minority interest discount when applying equitable value or market value was the fact that the minority shareholder in the Company was unable to influence the timing of their returns.

415 Mr Matthews accepted that the minority discount which he suggested was appropriate applied both to the 2018 value and current value of the Company. Accordingly, notwithstanding the substantial lock ups of the WisdomTree shares and the difficulties in selling those shares (to this day they remain unsold), Mr Matthews said that the maximum minority share discount applicable in 2018 was 5%, which plainly would have not reflected the risk of the collapse in the WisdomTree share value which actually occurred, although this could have been reflected to some extent in a valuation of the WisdomTree shares at that point.

416 Mr Matthews appears to have given very little, if any, weight to the other factors which contribute to a DLOM in this case. Mr Matthews would not accept that the WisdomTree shares, as at May 2018, were *'not liquid'*. He said that they were *'relatively liquid'*, notwithstanding the fact that they were locked up and had a number of restrictions in the investor rights agreement made between the Company and WisdomTree. He was reminded that Mr Garman of FTV described WisdomTree as *'highly restricted stock in a small cap volatile company'*. Following the Sales in 2018, less than half of the total assets in the Company could have been described as *'liquid'*. Mr Matthews accepted that the liquid assets of the Company could be invested in illiquid assets overnight and that *"would change the potential minority discount"* on his analysis. Mr Matthews said that he had read the judgment in the *Estera* case, where the minority shareholders' shares were valued at a 45% discount before marriage value, and at 22.8% when that marriage value benefitting the majority shareholder had been taken into account.

417 The problem with Mr Matthews's evidence is there was an unspoken assumption on his part that because the assets of the Company were largely liquid then, one way or the other in reasonably short order, the Plaintiffs would be able to obtain access to a proportionate share of those assets. This is not how the Company was structured and not consistent with the very limited rights of minority shareholders in the Company. Indeed, it was an inevitable corollary of Mr Matthews's evidence that the minority discount for the Plaintiffs' shares was higher prior to the 2018 Sales because the assets held by the Company were at that stage not held principally in cash or listed shares that could be reasonably quickly, post lock up, converted into cash. This of course is not the reality – prior to the 2018 Sales, it was much easier for the Plaintiffs to sell their shares to each other and potentially third parties.

418 Mr Matthews told the Court that a typical minority discount for a trading company such as this prior to the Sales would have been between 20% and 30%. This figure did not take into account any marriage value. At the end of his evidence, it was also put to Mr Matthews that, accepting for the purpose of argument that the Company's assets were now largely liquid so that the only concern was a discount for lack of control, Mr Tuckwell's case was that without breaching any duties to the Company he would be able to lock the Plaintiffs in to

the Company indefinitely absent to an agreement of purchase for the shares. The Court asked Mr Matthews if he was saying in those circumstances that the maximum discount for the whole control is only 5%. Mr Matthews confirmed that he was not saying that. He said:

> *"I would accept that if one considers that Mr Tuckwell is right to be able not to pay anything out for a very long period of time then my conclusion on the minority discount of only up to 5% wouldn't be right.* I don't think it would be possible for the Plaintiffs or a minority shareholder in that position to go out into the market and sell their shares on the assumption that there'd be no prospect of exiting the business for a very long time."

419 The other matter that was considered by both experts separate from the potential minority discount attracting to the Plaintiffs' shares, was the valuation of the WisdomTree shares for the purpose of valuing the Company as a whole. This was the principal area of disagreement in respect of the value of the Company today, and the core question was whether or not the value of the Company's shares in WisdomTree should reflect what is known as a *'blockage discount'*. This discount would need to reflect the fact that even though the lock up provisions had expired, it would take some time to effect sales of large blocks of shares in WisdomTree having regard to the extent of the Company's shareholding in WisdomTree and the restrictions those shares were subject to. Mr Matthews accepted that the block of WisdomTree shares could not be sold quickly without depressing the share price in WisdomTree and that could give rise to a blockage discount.

420 Mr Matthews gave a DLOM or blockage discount for the WisdomTree shares as at May 2018 of 5%, but no blockage discount is applicable today, he says. Mr Matthews took the view that any discount arising now as a consequence of the time taken to effect the sale of a large block of shares in WisdomTree, and the restrictions that such sales are subject to, was fully counterbalanced by the fact that large blocks of shares can sometimes command a premium over the listed share price, for example if another investor was interested in acquiring a large tranche of WisdomTree shares in order to obtain greater influence over the Company, or even control the business.

421 . In this regard, Mr Matthews drew attention to the minutes of the Company's March 2020 Board meeting where Mr Tuckwell had observed that he expected WisdomTree to be taken over and that " *best value would be obtained in that future transaction*".

422 Mr Matthews accepted that he did not, in his report, calculate or identify the size of the potential premium that a purchase of WisdomTree shares might command because it would be a very difficult calculation to perform and he was not sure how one would, in practice, perform it. Mr Matthews also accepted that he had not tried to calculate the blockage discount for WisdomTree shares either. He simply concluded that there were two factors that worked in opposite directions and said " *I think it's reasonable in the circumstances to conclude that they counteract*". Mr Matthews went on to concede that there was a " *reasonable range of opinions one can have about that that could result in a modest premium or a modest discount*". However, he thought Mr Cliff's analysis overstated

the potential blockage discount, as it was high when benchmarked against some of the discounts referred to in Mr Cliff's own evidence.

423 Mr Cliff, like Mr Matthews, also gave evidence for a full day before us.

424 Mr Cliff also defined *'fair value'* and, what he called, *'equitable value'*. He said market value was equivalent to fair value and International Valuation Standards ("IVS 2020") defined market value as:

> *"the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."*

425 As to equitable value, this was relevant as the Plaintiffs specify that the Company or Mr Tuckwell should be responsible for buying their shares. In this scenario, the buyer is not hypothetical as is assumed in the definition of market or fair value, but has been identified. As Mr Tuckwell has effective control of the Company, Mr Cliff said that the equitable value was the same whether the Company or Mr Tuckwell were the buyer. IVS 2020 defines equitable value as:

> *"the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties."*

426 IVS 2020 further explains:

> *"Equitable Value is a broader concept than Market Value.* Although in many cases the price that is fair between two parties will equate to that obtainable in the market, there will be cases where the assessment of Equitable Value will involve taking into account matters that have to be disregarded in the assessment of Market Value, such as certain elements of Synergistic Value arising because of the combination of interests."

427 Mr Cliff's report was extremely detailed, and it is not necessary to summarise it extensively in this judgment. As to Mr Cliff's assessment of the appropriate minority discount to apply to the Plaintiffs' shareholdings, he described the various *'prerogatives of control'* that were available to Mr Tuckwell as the majority shareholder, including for example appointing directors, determining Company strategy, changing direction of the business, deciding whether to pay dividends and if so how much and when, to buy, sell, or hypothecate all or any of the Company's assets, repurchase outstanding stock or issue new shares and block any of these matters. However, Mr Tuckwell could not achieve any of these matters if they required a majority of two-thirds of the shareholders, nor could he amend the Articles of Association or wind up the Company absent such a majority. Unlike Mr Matthews, Mr Cliff said it is generally recognised that a discount to the pro-rata value of

a shareholding in a private company may be applied when valuing a minority shareholding. Mr Cliff's estimate of the NAV of the Company as at 26 May 2020 was $422.1 million, not significantly different from Mr Matthews's. The size of the minority shareholding discount can vary greatly. Mr Cliff went on to consider the relevant factors in determining the discount which are commonly considered, including the size of the shareholding; the rights and restrictions attached; the prospects of the Company; and the prospects for an exit. In relation to dividends, he noted that following the Sales of the income earning businesses in 2018, the earnings and dividends are likely to fall substantially. As to the prospects for an exit, Mr Cliff's starting point was very different from Mr Matthews. He said:

> *"[The Company] has no current plans for a liquidity event in which minority holdings would reasonably expect to exit at pro rata value… the current strategy of acquiring minority holdings in companies is at a very early stage and is also unsuitable for an IPO any time soon.* In the absence of a liquidity event, there is little or no market for the Plaintiffs' shareholdings."

This is because the shareholdings were not large enough to carry any significant influence over the Company's affairs under Jersey law, do not have any significant preferential rights and were subject to restrictions relating to transfer which makes the holdings illiquid.

428 Mr Cliff said that the key driver for the purpose of assessing the minority discount in this case was the absence of any market for the Plaintiffs' shareholdings. He agreed that the minority discount was a combination of the DLOM and the DLOC. Mr Cliff thought that the same minority discount should apply to the shareholdings held by each of the Plaintiffs because there was little or no difference between the Plaintiffs in terms of their rights and the restrictions attaching to their respective shares, and although typically a larger minority shareholding in a private company is more liquid than a small shareholding, the existence of tag-along rights in this case help mitigate this as smaller shareholders have the right to participate in sales of other shareholders' shares.

429 We found Mr Cliff's table, upon which he was cross-examined, setting out the expected level of discount for minority shareholdings in terms of the guidance available from public bodies in the United Kingdom, Ireland and Australia, including guidance from HMRC, to be of assistance.

430 The Court noted that the Plaintiffs with a total shareholding of approximately 35% tended to act collectively, and noted that the ACCA guidance said that in relation to a shareholding of between 26% and 49%, a discount of 30% to 40% was appropriate, the Irish tax authority in relation to a shareholding of over 25% suggested between 35% and 40%, and HMRC in relation to an *'influential minority holding'* (one that is able to prevent the winding up of a company and block other Special Resolutions, though is not able to control the day-to-day management by appointing directors) identified a discount of between 25% and 40% as being appropriate. Mr Cliff, correctly in our view, discounted the relevance of the 2011 purchases by Millennium and Susquehanna as they were transactions which occurred at a time when an IPO was contemplated, and the factors that may have determined the size of

any minority discount then were not similar to current circumstances. He went on to note that the 2016 / 2017 sales of small numbers of shares were at an implied discount to Net Asset Value of 53%. The Court regards this as an accurate assessment as the shares were sold for $700 per share when they were valued at about $1,500. Mr Cliff went on to say that at that time, i.e. 2016 / 2017, the Company was ‘ *more attractive to minority shareholders*’ because it paid a regular and significant dividend and there were greater potential exit opportunities than those that pertain today.

431 Mr Cliff generally agreed with the KPMG approach to assessing the DLOC and DLOM, notwithstanding the fact that KPMG looked at the two measures of discount separately whereas Mr Cliff (and Mr Matthews) looked at them together. Mr Cliff concluded that the appropriate range of discount to NAV of the Plaintiffs' holdings was 50 to 60%, with a mid-range of 55%. However, to value the Plaintiffs' shareholdings on an equitable value basis, the applicable discount should reflect the fact that Mr Tuckwell would immediately recognise a significant uplift in value in his shares as the shares in his control would not attract the same minority discount as those shares would held by the Plaintiffs. Mr Cliff initially sought to apportion this uplift in value between Mr Tuckwell's and the Plaintiffs in proportion to their respective shareholdings, which resulted in a premium to fair value of the Plaintiffs' shareholding of 46.6%. This, in his experience, he regarded as unrealistically high because Mr Tuckwell was the only buyer of the Plaintiffs' shares who would be prepared to pay any premium at all. Therefore he selected what he regarded as being a more realistic premium, in this case 25%, resulting in a discount from NAV for the Plaintiffs' shareholdings on the equitable valuation basis of 43.8%. Mr Cliff was assisted by reference to a study showing that the median control premium paid by buyers ranged from 25% to a little over 39% in most years. The outcome, although reached by a different route, was very similar to the conclusion reached by KPMG.

432 In evidence, he rejected the assertion that it was unusual to value companies consisting mainly of cash holdings. He accepted that today the liquid assets, to include cash, cash in escrow, bonds, investments and the WisdomTree shares, came to over 90% of the assets of the Company. Mr Cliff said that the discount that he had alighted upon was purely a commercial discount that he would expect on the facts of this case, and the guidance referred to in his report was general guidance which gave context and assistance. In cross-examination, Mr Cliff said that the fact that the vast majority of the Company's assets were liquid was simply not relevant. The cash was held for the purpose of future investment and the minority had no control over the destination of that investment. Mr Cliff did not accept that to reduce the marriage premium to 25% to the Plaintiffs' shareholding, when calculating the equitable value, was inappropriate as the reduction of the premium was because Mr Tuckwell had a *‘strong bargaining position’*. It was suggested that that position was a consequence of the conduct that the Plaintiffs complained of. Mr Cliff rejected this and said that the strong bargaining position held by Mr Tuckwell was because he was the only buyer who would pay a premium to market value for the shares. In any event, pursuant to the Shareholders' Agreement, Mr Tuckwell had a right of first refusal at any price if the Plaintiffs were to attempt to sell the shares to a third party. Generally, we agreed with Mr Cliff's approach to calculating the DLOC and the DLOM and the reasons for discounting the value of the Plaintiffs' shares, if not necessarily the conclusions that Mr Cliff reached in respect of

the value of those shares. We agree with his conclusion that the Plaintiffs' shareholdings are very unlikely to find an external buyer who is prepared to pay NAV or even, in the Court's view, near to NAV. We agree that Mr Tuckwell is the only likely purchaser of any shares at a premium to the market value. We agree with the reasons that he gave for discounting the value of the Plaintiffs' shares in terms of the lack of control the Plaintiffs have over the Company and the lack of marketability of those shares. As Mr Cliff said, there was no obligation on the part of the Company to buy the shares back; that is not one of the rights attaching to the shares. We do regard the extent to which he discounted the marriage value in this case as excessive.

433 As to the blockage discount in respect of the WisdomTree shares, Mr Cliff dealt with blockage discounts at greater length in his report than Mr Matthews. He explained that blockage discounts are applied to the value of a shareholding when the disposal of the entire block of shares at once would likely *'move the market'* and depress the share price due to an increased supply entering the market. Estabrook, in his chapter on blockage discounts, says:

> *"A pure blockage discount is typically substantially less than the lack of marketability discounts arrived at through restrictions stock studies.* Pure blockage discounts typically fall within a range of 0 to 15%, most often in the lower end of that range. Again, it is important to stress (1) that each case is based on its specific facts and circumstances and (2) that the use of averages or an analysis based on anything other than the specific facts and circumstances is perilous."

434 Pratt on Business Valuation Discounts Premiums (2nd Edition) notes that blockage discounts are typically under 15%, but have been as high as 25%. In order to estimate a blockage discount, and whether or not it is warranted, considerations include daily trading prices; volume and number of trades for a reasonable period before and after the valuation date; the volatility of the trading price; the stock market on which the shares are traded; the total number of shares outstanding and constitution of other shareholders; how much daily volume could be increased without impacting the price; performance trends and the number of market makers for the stock. Mr Cliff comprehensively considered each of these factors insofar as they related to the Company's shareholding in WisdomTree. In short, his analysis showed that there was a reasonable level of liquidity for WisdomTree's shares with approximately 1.5 million shares traded per day (the Company holds the equivalent of 30 million WisdomTree common shares); the share price of WisdomTree was more volatile than the wider stock market; WisdomTree shares are traded on the Nasdaq; the Company was in May 2018 the largest holder of shares in WisdomTree with an ownership of 9.9%, and as of May/July 2020 was the third largest shareholder. This, according to Mr Cliff *'indicates that* [the Company's] *is a very significant block which may have a limited market for purchase by a broker or a private placement'*.

435 If the Company disposed of 150,000 shares a day, it would take two hundred trading days to dispose of the shares. In Mr Cliff's opinion, this number of shares was the maximum

number of shares that the Company could dispose of each day without depressing the price. This would be burdensome, and there would be periods when the share price was lower than it is now. Indeed, even if that number of shares were to be sold each day, Mr Cliff says the share price would likely be negatively impacted.

436 As to the general performance of the WisdomTree shares, they have consistently underperformed the index and associated index.

437 There appear to be an average of 14 market makers for each Nasdaq stock providing liquidity and trading for each stock and therefore Mr Cliff has not increased the blockage discount for an insufficient number of market makers available.

438 Mr Cliff says that the shares could either be drip fed on to the market or sold in blocks. The risks attaching to the shares could have been hedged but this would have been expensive and did not happen.

439 Mr Cliff explored the possibility of *'call'* and *'put'* options which might have protected the Company to some extent against shifts in the market price for the shares. Ultimately, Mr Cliff concluded that as at 26 th May 2020 the blockage discount applicable to the Company's WisdomTree shares is 18.2%. This equates to the cost of a *'put option'* which would allow the Company to pay a premium in order to ensure that it could sell the WisdomTree shares in the future at a fixed strike price, i.e. a price which guarded against the risk of the share price falling. This would mean that the value of the WisdomTree shares as at 26 May 2020 would be discounted by $12.72 million from the listed value of $69.9 million.

440 After the trial, and in accordance with the order made by the Court, the experts provided a supplemental joint statement dated 2 nd December 2020 to update their valuations of the Company and the Plaintiffs' shareholdings in the Company in order to reflect the financial information available as at 13 th November 2020, the concluding day of the trial.

441 In short, the experts agree as to the value of the Company's cash ($2.7 million); cash in escrow ($33.9 million); bonds and investments ($339.2 million) and various other assets and all the liabilities of the Company. They differ on two matters. First, the WisdomTree shares which Mr Matthews values at $117 million, and Mr Cliff, owing to the blockage discount, values at $93.2 million.

442 They also disagree on the value of the shareholdings held in the companies now owned by the Company or its subsidiaries which Mr Matthews values at $74.6 million, and Mr Cliff at $37.7 million. In relation to this matter we did not hear argument or evidence and it is an issue which, one way or another, will need to be resolved. The total value of the Company on Mr Matthews's evidence is $489.4 million, and on Mr Cliff's evidence is $428.8 million.

The Court's findings as to the appropriate discount

443 Having regard to the authorities referred to above, we do not think that it is appropriate that there should be a presumption either for or against a discount being applied for the purpose of the valuation of a minority shareholding. It will depend upon the circumstances of the case. Each case is fact specific as the authorities show. Any basis of valuation must be fair in all the circumstances. The basis of valuation must also provide a remedy that is proportionate to the unfair prejudice suffered by the Plaintiffs. The prejudice suffered by the Plaintiffs is, ultimately, that the value of their shares has been suppressed, one way or another. The Plaintiffs are voluntary sellers and wish to sell their shares as soon as possible.

444 This is not an IPO or a sale of the shares in the Company and there is much in the submissions made on behalf of Mr Tuckwell that, FTV in particular, are seeking to regain rights that they gave away upon conversion of their shares from preference to ordinary shares in 2009.

445 In our view, making an order for the purchase of the shares on a pro-rata basis would not be justifiable in the circumstances. This is not a quasi-partnership, but an ordinary minority shareholding and the Plaintiffs have long known of the consequences of being minority shareholders in a private company. Accordingly, we do not accept that the Plaintiffs are entitled to a non-discounted valuation.

446 We agree with the evidence of Mr Matthews, and it is not challenged by Mr Cliff, that the Plaintiffs' shares should be valued as a single block of 35%. We also agree that the shares should be valued at their *'equitable value'*, taking into account the identity of the parties and the fact that Mr Tuckwell will benefit as a consequence of this transaction, and that there will be a *'marriage value'* for his shareholding consequent upon the transaction. He will now be in almost total control of the Company (there are still of course other shareholders who are not the subject of these proceedings), but will own over 90% of the shares, and be able to do exactly as he wishes, including amending the Articles and passing Special Resolutions. The Company will truly have, in effect, become a *'family office'* as he wishes.

447 We are conscious that it could be said that any discount to the valuation of the Plaintiffs' shares has the effect of benefitting the majority shareholder who has unfairly prejudiced the minority. Nonetheless, what the Court needs to do is to decide what is a fair price for Mr Tuckwell and / or the Company (we do not think it appropriate to differentiate between the two for these purposes) for the Plaintiffs' shares in the context of the unfair prejudicial conduct that they have suffered as shareholders. We agree with the court in (*Estera* [2019] EWHC 873 (Ch)) that a:

> ***"…fair basis would … be the price that would be likely to be agreed between commercially-minded but reasonable persons in the actual positions of [the Plaintiffs] and [Mr Tuckwell] in notional arm's length***

negotiations, having regard to any marriage value that would be released on such a sale and purchase."

In that case, the price that the judge thought was appropriate was the market value of the shares plus 50% of the marriage value that would result in adding those shares to the existing holding of the other shareholder. The acquisition of the plaintiffs' shares resulted in the respondent to the proceedings, together with associated trusts, having total control of the company with a combined shareholding above 75%.

448 In the *Estera* case, the petitioner contended for a discount for the illiquid minority shareholding of 18.7% and the respondent for a discount of 60%. The trial judge accepted that that the HMRC and other industry and academic publications could be regarded as *'broad guidance'* and noted that *'the range of the guidance is very broad'* (paragraph 106 of the judgment). In that case, the judge noted that there was no certainty as to when, if ever, a pro-rata exit from the company might be achieved. The same applies in this case. The judge in that case thought that it was of interest to the court, given the difficulty in valuing minority shareholders in privately-owned companies, that a sale of a minority shareholding in the company took place about ten years prior to the valuation date and examined that transaction. That transaction had an implied minority discount of some 45%. However, the judge noted the *'extent to which it is necessary to be careful when making assumptions in devaluing a transaction that is not a market transaction and when the facts available to the parties at the time and their private motivations are not fully known'* (paragraph 116). The judge concluded that a discount of 45% was justified having regard to the sources to which the experts had referred and *'seeking to moderate the views of the two expert witnesses by reference to the particular circumstances of the Company at the Valuation Date'*. The judge said: " *I consider that the general guidance establishes that a discount of 40–50% would be normal for a 20% shareholding where there is no control and only limited liquidity*". In that case, in 2014, the company had a good record of paying regular dividends and good prospects for growth and there was a prospect after about twenty years that there would be a corporate event that would enable the minority shareholder to exit pro-rata.

449 The judge went on to consider the 'majority premium' or 'marriage value'. The court noted that a discount was applicable to the majority shareholding, and accepted a discount of 10% for a 74.53% shareholding, which the court thought *'was high in the circumstances'* but noted in this regard that the evidence of the relevant expert was unchallenged and the published guidance referred to a 0% to 15% discount for a majority shareholding of between 50% and 74.9%. The court held that the price payable by the Respondents should be the discounted value of the Petitioners' shares (the market value) plus one half of the marriage value, i.e. one half of the discounted value of the aggregated holding of the shares of the majority and relevant minority, less the market value of the minority shareholding plus the value of the First Respondent's holding, taking into account his interest in and ability to influence the Second and Third Respondents and their holdings. The calculations were set out in a spreadsheet attached to the judgment which indicated that the calculations yielded a final discount of 22.8%. The judge gave the company six months to pay the price subject to a first instalment within twenty-eight days.

450 In this case, we have already set out in some detail the expert evidence and the Court's findings in respect of it.

451 Overall, having regard to the evidence we heard and the comparatives that are available to us, we have taken the view that the market value in this case for the Plaintiffs' shares is Net Asset Value less a discount of 40%.

452 To this, we must add/recognise the marriage value which will accrue to Mr Tuckwell as a consequence of the purchase of the shares. The shares are not being purchased by a hypothetical third-party buyer who is willing to pay market value, but by Mr Tuckwell or, possibly, the Company. Either way Mr Tuckwell will gain almost total control over the affairs of the Company with his indirect and direct holdings becoming in excess of 85% of the total shares in issue. Accordingly, as in the *Estera* case, in which the marriage value was split between the parties in order to value the shares on an equitable value basis, the marriage value of the two shareholdings needs to be recognised. For these purposes we do not propose to differentiate between Mr Tuckwell and the Company. The effect of this marriage value is to reduce the discount against Net Asset Value to 20%.

453 There are various ways of carrying out cross-checks in order to ensure that this approach is an appropriate one. An example of the cross-check is contained in the Schedule attached to this judgment which, in the example we have given, we have valued Mr Tuckwell's shares as subject to a 10% discount, the Plaintiffs' shares at a 40% discount, proceeding on the footing that Mr Tuckwell (not the Company) is purchasing the shares and calculated the marriage value accordingly. The marriage value is then divided between the parties, pro-rata to their respective shareholdings. Accordingly, the Plaintiffs in the worked example receive an uplift to the value of their shares proportionate to their shareholding as a percentage of the value of the combined shareholdings of Mr Tuckwell and the Plaintiffs, leading to a discount of just under 19%. There are various other calculations which the Court considered would be reasonable on these facts with slightly higher and lower discounts, all of which concluded with a final discount figure of between 18% and 22%. Accordingly, the fair approach is to value the Plaintiffs' shares at a discount of 20% to their pro-rata value.

454 The only other valuation matter of significance that remains for consideration is whether or not we should apply either a blockage discount or indeed a premium to the value of the WisdomTree shares, for the purpose of their valuation on a Net Asset Value basis of the Company. We carefully considered the evidence of the experts and took particular note of Mr Cliff's opinion that there should be such a discount, albeit he conceded that the discount that he was proposing was a high one, perhaps particularly so in the context of the decline in the value of WisdomTree shares that has occurred. Mr Matthews, on the other hand, put forward very cogent reasons as to why a large block of shares such as this, roughly 17.5% of WisdomTree's issued capital post-conversion, might command a premium over the listed share price, because of the potential for the holder to exert influence and control over the direction of the business or indeed its future ownership. We have concluded on balance

that it would not be appropriate to apply either a premium or a discount to the listed value of the Company's holding of WisdomTree shares, and accordingly order that those shares should be valued as at the prevailing market price on 13 November 2020, the last day of the trial, resulting in a value of $117 million.

Conclusions on winding up

455 Although it did not feature in the pleadings or the evidence given by the witnesses as to fact, the deferred consideration payable by the Company to GBH in relation to the gold product became a matter of significance in the context of the potential winding up of the Company. This was raised squarely in Mr Cliff's expert report and Mr Tuckwell's Skeleton Argument.

456 Mr Cliff's analysis was that the Company would crystallise a significant liability from the deferred consideration if it was wound up. Mr Matthews speculated that this could be avoided by a *'winding down'* which was a less formal process and where the Company could be kept going for the purpose of ensuring that the liability did not crystallise, and that the current contractual arrangements with WisdomTree continued. The Court is not empowered to order a *'winding down'* of the Company, but only a *'winding up'*. Nonetheless a lengthy period of winding down was something which Mr Matthews thought was possible. Another alternative he raised was a much longer winding up. The difficulty is that the deferred consideration was, on the evidence of both experts, payable *'in perpetuity'*. Another alternative was for new contractual arrangements to be agreed between the World Gold Council and WisdomTree, but there was no evidence before the Court that such arrangements would be agreed by those parties or what their terms would be. Mr Matthews said that:

> *"When the alternative is crystallising a liability of $150 million, then it seems to me that you would take whatever steps are necessary to avoid that.* And if that requires running the Company as a shell company for a long period of time, then that would seem to be a sensible step in the circumstances. As I said, I don't think in practice it would be forever. I think they'd manage to sort out some sort of arrangement to remove themselves from the back-to-back agreement."

457 In our view this was really no more than a matter of speculation, and the Court's task in drawing conclusions with any certainty in relation to this matter was made more difficult by the fact that the issue was not explored with any of the witnesses as to fact, not least Mr Tuckwell, who would have been best placed to deal with it. The fact is that a liquidator, as Mr Matthews accepted, cannot wind up a solvent company without paying off its creditors. The shareholders would be last in line and the creditors would need to be dealt with first. Mr Matthews accepted that under the deferred consideration arrangements the World Gold Council and Mr Tuckwell were entitled to annual payments from the Company, and accordingly were the Company's creditors for these purposes. The Company had back-to-back arrangements with WisdomTree requiring WisdomTree to pay most of these sums, and accordingly WisdomTree was a debtor to the Company for these purposes. The value

of the payments to Mr Tuckwell and the World Gold Council could increase depending upon the value of gold and the liabilities would, it was accepted, crystallise on liquidation. The liquidator would have no right to accelerate the payments from WisdomTree and once the Company was dissolved, WisdomTree would have no further obligations to the Company. So to wind up the Company gives rise to a possible crystallisation of a debt owed by the Company of at least $150 million. Although this was not explored in evidence, there might be every incentive for the World Gold Council and Mr Tuckwell to wish to receive payment on liquidation, depending upon arrangements made between them, and not make new arrangements with WisdomTree.

458 The Court was never shown the relevant contractual provisions as between the Company and WisdomTree or any other documents relevant to this issue, still less did we receive submissions upon them. As we said, during the evidence of Mr Matthews:

> *"We haven't got much evidence in this area and in view of the fact that you are seeking a just and equitable winding up and this is on one view an impediment to that….* we do need to know more about it. And it's unfortunate that at this late stage in the trial we are discovering something upon which we really haven't been addressed hitherto, let alone seen any of the underlying documentation."

459 Mr Cliff was clear that on liquidation or winding up of the Company, the Company would be required to discharge the value of its liabilities to Mr Tuckwell and the World Gold Council under an agreement dated 15 th September 2011 and could not compel WisdomTree to accelerate its corresponding liabilities to the Company. In these circumstances, the liability owed by the Company would be crystallised and the benefit of future payments from WisdomTree would be lost. Mr Cliff said that it was this assessed liability which led him to reduce the Company's value in his May 2018 valuation by $153.2 million. Mr Cliff accepted that he had not seen all the relevant underlying documentation but was giving evidence on his understanding of his instructions. Mr Cliff said the liability would increase if the gold price rose and accordingly it was a *'sort of unknown liability'*. Mr Cliff accepted it was possible that the liquidator could negotiate with the World Gold Council to remove the Company from the chain of payment of deferred consideration and accept payment directly from WisdomTree (save for the relatively small payment due from the Australian subsidiary of the Company). Mr Cliff expressed the view that nonetheless it would not make sense from a commercial perspective for WisdomTree to enter into such an agreement when it may have the opportunity of avoiding any liability on the liquidation of the Company.

460 It was said on behalf of the Company that it was a "solvent, viable enterprise employing a growing number of workers and is looking to expand its investments". Accordingly, although the Company was neutral in relation to the proceedings overall, it was said on its behalf that it was entitled to take a position on its winding up as it was a question so fundamental to its existence. The Company, through its counsel, opposed the application to wind it up on the just and equitable basis.

461 In view of the findings made by the Court in respect of breach of duty and financial prejudice, it would be open to us to order that the Company be wound up on the just and equitable basis, but this is on any view a case that is different from most cases where the Court exercises its jurisdiction to wind up a Company on that basis.

462 It was submitted on behalf of the Company that it was solvent, continues to trade and has prospects in view. It is investing in new businesses and may succeed. It has employees and directors who are committed to its success. The reason that the Plaintiffs seek a just and equitable winding up (and they accepted throughout the trial that their principal remedy was for the purchase of their shares under Article 143 of the Law) is that they seek an exit from the Company. The legislature has provided them an exit if they can prove unfair prejudice which they have done. Accordingly, we have concluded that it would not be just or equitable to grant a winding up of the Company. If for any reason the Court's orders made, consequential upon our finding of unfair prejudice, were not to be complied with, then this is a matter which we would be prepared to reconsider.

Conclusions on unfair prejudice

463 Accordingly by reason of the events that occurred in 2017 and 2018, which are summarised at paragraphs 227 to 352 above, the Plaintiffs have succeeded in proving to the Court's satisfaction that they are the victims of unfair prejudice in respect of conduct of the Company's affairs as members; such prejudice being unfair and involving breaches of the duties which Mr Tuckwell owed to the Company.

464 Our findings are that:

(i) from the time when the Sales were first in prospect, Mr Tuckwell pursued a scheme designed to drive the Plaintiffs out of the Company at the lowest possible price, which he attempted to achieve by:

(a) leading the Plaintiffs to believe that there would be a *pro-rata* distribution of the proceeds of sale (paragraph 242 above);

(b) repeatedly postponing discussion of the issue of distribution of the proceeds of sale (paragraph 272);

(c) securing the removal of the Independent Directors, who had made it crystal-clear that they wanted to ensure that all shareholders were treated fairly (paragraphs 273–307);

(d) unilaterally changing the business of the Company after the Sales to leave the Plaintiffs locked into a Company where it is extremely difficult for them to deal with their shares (paragraphs 308–319); and

(e) making an offer to the Plaintiffs to buy their shares, pursuant to a process that was flawed, and in any event different from the one that he promised the Plaintiffs that he would pursue, which led to a discount against *pro-rata* value of the Plaintiffs' shares that was far too low (paragraphs 320–352 and paragraphs 432, 451–453).

465 The scheme pursued by Mr Tuckwell has led to financial prejudice to the Plaintiffs. That financial prejudice amounts to 'prejudice' for the purposes of Article 141 of the Law. In this case it consists of the fact that the Plaintiffs are now, in accordance with Mr Tuckwell's wishes, locked in to a private Company with shares that are much less marketable than they were, owing to the new business which Mr Tuckwell has deliberately pursued, without regard to the interests of shareholders apart from himself; and by virtue of the offer that he has made to purchase the Plaintiffs' shares which on any view is far too low, and has been pitched at that level in order to punish FTV and to secure maximum advantage for himself.

Conclusions and Order

466 Accordingly, the affairs of the Company have been conducted by Mr Tuckwell in a manner that is unfairly prejudicial to the interests of the other shareholders in the Company, including the Plaintiffs.

467 Mr Tuckwell, or the Company, must purchase the Plaintiffs' shares in the Company at their Net Asset Value at Friday 13 th November 2020, subject to a discount of 20% to reflect their minority interests as shareholders in the Company. The relevant values for the purpose of the purchase of the Plaintiffs' shares are those set out in the joint expert report dated 2 nd December 2020. All these figures are agreed, with the exception of the valuation of the WisdomTree shares which we find are not subject to a blockage discount and accordingly are valued at $117 million. The only other matter in dispute is the value of the portfolio companies, where the experts are separated by the sum of $37.9 million. If the parties are unable to agree the value of the portfolio companies within 28 days of the handing down of this judgment, or 31 st January 2021, whichever is the sooner, then the matter is referred to the Master for assessment. We urge the parties to consider resolving this matter by negotiation, an approach which they appear to have eschewed to date.

468 The application to wind up the Company under Article 155(1)(b) of the Law is refused. If for any reason the purchase of the Plaintiffs' shares by Mr Tuckwell and/or the Company were not to occur within the delay ordered by the Court (four months) then the Plaintiffs are given leave to apply to renew their application to wind up the Company on the just and equitable basis.

469 If the valuation of the portfolio companies referred to in the paragraph above has not been agreed or determined within the delay of four months, then the Plaintiffs' shares are to be purchased at a price reflecting the judgment of the Court with the balance of the consideration owing to the Plaintiffs which is unresolved owing to the dispute as to the

value of the portfolio companies (if any) held in escrow pending resolution of that matter. In the event that Mr Tuckwell or the Company has failed to purchase the Plaintiffs' shares by 30 th April 2021 then Mr Tuckwell shall be liable to pay interest to the Plaintiffs at the Court rate on the said sum or part of the same to the extent that it remains undisputed or is held in escrow pending resolution of any dispute.

470 We do not propose to order any other further relief, but give the parties liberty to apply to seek further directions as may be necessary to ensure the execution of the orders that we have made.

471 Finally, notwithstanding the orders that we have made, there will remain a number of small shareholders in the Company who were not parties to these proceedings. As they were not parties, they do not benefit from the Court's decision. The Court would find it difficult to understand Mr Tuckwell's motives if, following this judgment, he were not to make a proposal to all shareholders who are not party to these proceedings to purchase their shares on the basis set out in this judgment — assuming that they wish to have those shares purchased by Mr Tuckwell or the Company.

Costs

472 We shall hear argument as to costs on a date to be fixed.

Schedule

Example of a cross-check of the decision to set the discount at 20% of net asset value, to account for the ‘marriage value’

1. We assume that the Company as a whole is valued at $X:	$X
2. We assume that the Company continues to have 225,760 ordinary shares in issue.	
3. We assume that Mr Tuckwell, directly or indirectly, continues to own 130,025 of the 51.835% of Company's ordinary shares, being about 57.594% of the total issued ordinary shares. We value these at a 10% discount, to reflect the fact that, though a majority of the issued shares, this shareholding does not give ‘total control’ of the company. So 57.594% of $X less 5.759% of $X:	$X
4. We assume that the Plaintiffs together continue to own 79,643 of the Company's 21.166% of ordinary shares, being about 35.278% of the total issued ordinary shares. We value these at a 40% discount: 35.278% of $X less 14.111% of $X:	$X
5. The combined value of these holdings, with the discounts that we have applied, is 73.001% of thus:	$X

6. We assume that in consideration for $Y 1, either:	
(i) Mr Tuckwell will from his own resources buy the Plaintiffs' shares, so 92.872% of increasing the shares Mr Tuckwell's owns to 209,668 being 92.872%, which we value without any discount, as that level gives effective total control; or	$X
(ii) the Company will buy back the Plaintiffs' shares, so reducing the issued 88.986% of share capital to 146,117 ordinary shares, and increasing Mr Tuckwell's ownership of those shares to 88.987%, which we value without any discount, as again that level gives effective total control:	$(X-Y)
We have concluded that it would be unusual to apply a discount to the value of a shareholding of 85% or more, because a holder of such a large majority of the shares of a company would have *de facto* total control over the affairs of the company, though we accept that it might be argued in some cases that a small discount would still be appropriate. We have concluded that in this case no discount should be applied to a holding above 85% of the issued shares.	
7. We calculate the 'marriage value' as being the difference between the figure at 6(i) 19.871% of above — 92.872% of – and the figure at 5 above — 73.001% of $X: $X	$X
8. We split the 'marriage value' between Mr Tuckwell and the Plaintiffs, pro-rata to 28.716% of their respective current shareholdings. So in addition to the 21.168% of $X given in 4. above, the Plaintiffs receive an additional amount of ((19.871% of $X) ÷ 209,668 x 79,643)) = 7.548% of $X	$X
9. The discount that the Plaintiffs will receive against the undiscounted 35.278% of $X of their shareholding is thus 6.562% of $X, which is an 18.601% discount to the 35.278% of $X.	

[1] $Y = 28.716% of $X