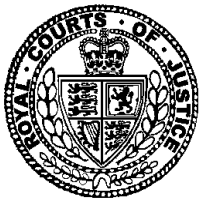

Neutral Citation Number: [2024] EWHC 3166 (Ch)

IN THE HIGH COURT OF JUSTICE **Petition No: CR-2023-000385**
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY AND COMPANIES LIST

IN THE MATTER OF BOX PROCESSING LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
Rolls Building, Fetter Lane, London

Date: 19/12/24

Before : I.C.C. JUDGE JONES (Sitting in Retirement)

Between :

VLADIMIR YANPOLSKY

Petitioner

-and-
(1) ROBERT MACMILLAN
(2) COLIN DOW
(3) BOX EBT LIMITED
(4) BOX PROCESSING LIMITED
(5) FETCHAM SERVICES LIMITED

Respondents

- -
- -

Mr Andrew McGuinness (EA Law Solicitors) for the Petitioner
Mr Marc Beaumont (Beaumont Legal Services Limited) for the Respondents

Hearing dates: 14-15 and 18-20 November 2024
- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 19 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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This judgment is handed down remotely by circulation to the parties' representatives by email and release to The National Archives.

The date and time for hand-down is deemed to be 10:00am on Thursday 19 December 2023

I.C.C. Judge Jones (Sitting in Retirement)

A) Introduction

1. The conviction of Mr Yanpolsky on 16 December 2019 and his resulting imprisonment from 24 January 2020 altered the whole dynamic of his relationship with his fellow shareholders, the only active Respondents ("Mr Macmillan" and "Mr Dow"), and with Box Processing Limited ("the Company"). He resigned as a director, had his employment contract terminated by letter dated 9 February 2020 with effect from the date of his conviction and 8,611 of his ordinary shares ("the 8,611 Shares") were converted to deferred shares of nominal value as recorded within filings at Companies House on 20 March 2020.

2. On 24 February 2022, almost a year after his release on 21 May 2021, the Company's Articles of Association ("the Original Articles") were amended ("the Amended Articles") by the majority, Mr MacMillan and Mr Dow. Applying the amendments, his remaining 1,389 ordinary shares ("the 1,389 Shares") were similarly converted and lost all their value. This led ultimately to the transfer of his shares and to Mr MacMillan and Mr Dow being able to sell the business in December 2022 through a hive up process for their sole benefit.

3. Mr Yanpolsky's ***section 994 Companies Act 2006*** ("***section 994***") petition ("the Petition") in essence asserts that unfair prejudice was sustained by him as a shareholder of the Company because his shares were expropriated, and he received nothing from the subsequent sale of the Company's business which ultimately produced a consideration of around £2.8 million for Mr MacMillan and Mr Dow. This, he contends, was despite the value of the business being principally attributable to the product ("the Product"), a software platform for the banking industry, he designed applying his knowledge, expertise and experience.

4. That is a basic description of the cause of action but it has not been easy to identify the precise grounds of unfair prejudice relied upon despite a list of issues having been produced as directed during case management anticipating potential problems. The need for precision can be identified from the speech of Lord Hoffmann in ***O'Neil v Phillips*** [1999] 1 W.L.R. 1092. He emphasised that whilst the Court's ***s.994*** jurisdiction and ***section 996 Companies Act 2006's*** ("***section 996***") discretion to grant relief are broad, legal certainty is important. The discretion does not involve *"palm tree"* justice, *"an indefinite notion of fairness"*. It requires the application of equitable principles. That means a petition must plead a cause of action with grounds that fully and properly set out the facts and matters relied upon to establish the principles relied upon. That is only fair to respondents.

5. Faced with a lack of clarity and/or precision within the pleaded case, Mr Beaumont, counsel for Mr MacMillan and Mr Dow, also drew attention to the principle addressed in ***Jacobs v Chalcot Crescent*** [2024] EWHC 259 (Ch) by Fancourt J with reference to the judgment of Dyson LJ (as he then was) in ***Al-Medenni v Mars UK Limited*** [2005] EWCA Civ 1041. Mr Justice Fancourt emphasised that adversarial litigation is fought based on the case as pleaded and he said this:

> *"It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judges [is] to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision ...*
>
> *where an issue has clearly not been pleaded and was not relied on at the start of the trial, I consider that the onus lies as much on counsel for the party seeking to rely on it as on their opponent to raise the matter with the judge and seek permission to amend"* (noting that the learned judge also set out the principles and guidelines which raise a high hurdle for such an application to succeed at trial).

6. This led to debate throughout the first day of the trial concerning the ambit of the Petition and to my requesting a written summary of the key matters relied upon by Mr Yanpolsky, as pleaded, concerning the existence of an agreement, binding representation or understanding ("the Hidden Shareholder Agreement") he relied upon. This was produced at the hearing for Mr Beaumont's consideration overnight. At the beginning of the second day, I was told that a document produced overnight by McGuinness, counsel for Mr Yanpolsky, was acceptable as a list of references by Mr Beaumont so that there would be no further argument, and the evidence could be called. At the same time, I also asked counsel to consider during the trial and in submissions to address (to the extent there was disagreement or necessary comment required) a list of key grounds I had produced that morning for discussion (unaware of Mr Beaumont's acceptance) to try to ensure everyone was "on the same page". There were no such submissions. Fortunately, therefore, consensus has been achieved based on the contents of both documents.

7. As a result, subject to drafting alterations appropriate for the judgment (in particular unbundling the original ground one to make two grounds to reflect the issues more accurately), the following are accepted by the parties as the key grounds relied upon by Mr Yanpolsky in the context of the following background:

> Background: The existence of an agreement, binding representation or understanding ("the Hidden Shareholder Agreement") at the time of his imprisonment whereby his contractual employment would be terminated and the 8,611 Shares would be converted to non-voting, deferred shares (by agreement not under the Articles) to hide from third parties his continuing involvement with the Company. In return he would continue to work for the Company for no consideration and the 8,611 Shares would be converted back into ordinary shares upon his release from prison.
>
> Ground 1: As a result of the Hidden Shareholder Agreement, "he retains and retained full equity" in the 8,611 and the 1,389 Shares and their deferment and/or expropriation was unfair and prejudicial to his interests as a member and shareholder.

Ground 2: Adoption of the Amended Articles was unfair and prejudicial to his interests as a member and shareholder and was a breach of the Hidden Shareholder Agreement.

Ground 3: The subsequent, purported passing on 7 March 2022 of a special resolution to convert his 1,389 ordinary shares to deferred shares was invalid. The required 75% majority was not achieved when Mr Yanpolsky retained his equity in the 8,611 ordinary shares pursuant to the Hidden Shareholder Agreement together with his 1,389 ordinary shares. As a result, but even if legally valid, the voting for and implementation of the resolution was unfair and prejudicial to his interests as a member and shareholder.

Ground 4: The transfer of the Company's business (assets and liabilities) to "newco" and the later sale of "newco's shares" owned solely by Mr Macmillan and Mr Dow was unfairly prejudicial to his interests as a member and shareholder.

8. The outcome of those key grounds will be applied to decide: first, whether Mr Yanpolsky has satisfied the requirements of section 994 to establish the Court's discretionary remediable jurisdiction under ***section 996 of the Companies Act 2006*** (***section 996***) If so, second, what, if any relief should be granted.

9. However, before turning to the Defence, bearing in mind the many issues that arose between the parties as to whether Mr Yanpolsky's case as presented at trial differed from the case in the Petition, it is necessary to dwell further upon the ambit of the Petition. The following paragraphs set out matters relating to Ground 1 that are derived from the references within the document produced by Mr McGuinness during opening which formed part of the above-mentioned consensus avoiding further submissions.

B) Further Particulars

10. A starting point is that Mr Yanpolsky acknowledges his conviction "of one count of Computer Misuse" concerning the data of Global Processing Services Limited ("GPS"), for which he served the required part of his three-year sentence between 24 January 2020 and 21 May 2021. At the beginning of his imprisonment, he received an email sent 24 January 2020 and a letter dated 9 February 2020 from Mr MacMillan which he (in summary) construed as a request for his continuing involvement with the Company to be hidden from those who might deal with the Company. That would be achieved, first, by him no longer being an employee and, second, by the conversion of some of his shares to deferred status so that he would no longer have to be registered at Companies House as a "person with significant control".

11. By his Part 18 Response in respect of the Petition, under the paragraph 9 and 11 requests concerning Ground 1, it is asserted (in particular) that:

    a) "*the case of the Petitioner could be argued with reference to promissory estoppel, proprietary estoppel (which applies to all forms of assets), estoppel by conduct and the detrimental reliance of the Petitioner undertaking substantial work … at the explicit request of the First Respondent without remuneration.*"

b) "*On the point of detrimental reliance the Petitioner avers that he continued to be an employee of the Company by his performance of substantial work while in prison. The Petitioner refers to Article 2(c) of the Articles of Association dated 2 July 2019 which define an employee as 'an individual who is employed by or who provides consultancy services to, the Company or any member of the group'. Although the directorship of the Petitioner was terminated, the Petitioner continued to provide consultancy services. It is therefore mistaken for the Respondents to argue that the employment of the Petitioner was coterminous with his directorship.*"

c) "*As to an implicit term not to cause unfair prejudice to the Petitioner, this arises by law namely section 994 of the Companies Act 2006. For the avoidance of doubt, it was an explicit term of the spoken variation that the shares of the Petitioner would be returned to him as ordinary shares or treated as ordinary shares as between the Petitioner and First Respondent, upon the discharge of his criminal sentence and release from prison.*"

12. The following can be found within the document produced by Mr McGuinness at the end of the first day:

> *"HIDDEN SHAREHOLDERS AGREEMENT ... PLEADINGS ABOUT AND REFERENCES TO THIS AGREEMENT*
>
> *BUNDLE 82-84: P Amended Petition dated 27 June 2023, paragraphs 5 to 11 inclusive [which includes: "Mr Yanpolsky relies upon the events and communications of January 2020 and February 2020 as proof of an agreement between himself and Mr Macmillan that (1) it was necessary or useful to minimize the presence of Mr Yanpolsky on the public record of the Company; (2) at the same time, Mr Yanpolsky and Mr Macmillan treated the exercise as pure presentation and that, in reality, there was no change in the relative positions of Mr Yanpolsky and Mr Macmillan ... the basis of deferment was agreement between the Petitioner and First Respondent and not pursuant to the Articles of Association dated 2 July 2019. There is no reference to the Articles in the communication of January 2020 and February 2020. The First Respondent refers to the Articles for the first time in his email dated 9 July 2021 (see paragraph 12 below). The point of deferment was purely to remove the voting rights of the Petitioner so that, as a matter of public record, he ceased to be a Person with Significant Control of the Company ... he retained and retains full equity in 8,611 shares as ordinary shares. This is a point of economic value. The Petitioner did not abandon his equity in the Company."]*
>
> *BUNDLE 126-131: P CPR 18 Response paragraphs Requests and Responses 1-11 inclusive [which include (amongst other matters): "work was done without remuneration and on the agreement and understanding (pleaded at paragraphs 8, 8.1 and 8.2 above) that the Petitioner retained his full equity in the Company ... The [Hidden Shareholder Agreement] was in part written and in part spoken (oral), being an informal (unwritten) variation of a written document namely the Box Founders Agreement Notes dated 15 May 2019... As varied, it was explicitly agreed that the shares of the Petitioner would revert to ordinary*

shares, or be treated as ordinary shares whether or not on the record, as between the Petitioner and First Respondent upon the discharge of the criminal sentence of the Petitioner and his release from prison …"

BUNDLE 32 List of Issues at paragraph 7: "Was the purported termination of Mr Yanpolsky's employment with BPL [the Company] in February 2020 effective?"

BUNDLE 24 Agreed Statement of Facts at paragraph 10 [which includes the following]: "[Mr Yanpolsky was] working full-time from the day of conviction (16 December 2019) until the day of sentencing (January 21, 2020) and then from the prison. The Petitioner was for the period of imprisonment an "Employee" as defined by the Articles dated 2 July 2019."

C) The Defence

13. Mr Macmillan and Mr Dow do not dispute that Mr Yanpolsky received nothing for his shares but they deny the expropriation was wrong and that any unfairness occurred.

14. The background pleaded in the Amended Defence (not settled by Mr Beaumont) asserts that Mr Yanpolsky's conviction was contrary to assertions of innocence made by him to Mr Macmillan from March 2017 when he first disclosed that he was being accused of having caused GPS a systems outage by hacking. Those assertions were maintained when the Company's shares were issued and allotted in the circumstance of innocence or guilt being *"an important issue for the First Respondent because the Company would be supplying software solutions and services to regulated financial services businesses and it would be a matter of concern to any potential customer of, or investor in, the Company if a person who was a shareholder and director in the Company and undertook software development and engineering was also a convicted hacker"*.

15. It is also pleaded that Mr Yanpolsky maintained his innocence after his conviction and resigned as a director, apparently, to concentrate upon his appeal. His employment was terminated by a letter dated 9 February 2020. This activated Article 15 of the Original Articles. It provided for the automatic deferment of 8,661 of Mr Yanpolsky's 10,000 ordinary shares in accordance with a prescribed formula. Article 7 of the Original Articles provided for the compulsory transfer of deferred shares for nominal payment. Mr Yanpolsky signed the stock transfer form effecting the conversion and notice was given to Companies House in March 2020.

16. It is pleaded that Mr Macmillan and Mr Dow accepted Mr Yanpolsky's continued assertions of innocence, lent him funds for advice on appeal, and *"sought permission from HM Prison Service to provide [him] with a limited consultancy role"* following his release via a new company formed for that purpose. That permission was refused.

17. The Hidden Shareholder Agreement is denied, as is any suggestion that there was any change of position at a meeting following Mr Yanpolsky's release on 22 May 2021 or in an email Mr Macmillan sent on 9 July 2021. As a fallback position, it is asserted that the Hidden Shareholder Agreement would not have superseded Article 15 and, therefore, would have been ineffective in any event.

18. The Defence then pleads that the Company's business developed and led to discussions from January 2021 with GPS to supply software solutions for their customers. GPS made plain, however, that it rejected any suggestion of Mr Yanpolsky's innocence and by January 2022 stated that *"it would not continue to work with the Company if the Petitioner was involved with it in any way"*. As a result, Mr Dow, *"who was the only investor in the Company at the time and whose continued involvement in the Company was crucial to its viability, was not prepared to continue making investments into the Company if GPS was not going to work with it."* This led him and Mr Macmillan to make what they described as "fair and reasonable" offers to buy out Mr Yanpolsky based upon valuations by the Company's auditors. They received no response.

19. This position caused them to vote for the Amended Articles and for a special resolution on 7 March 2022 to convert the 1,389 ordinary shares to deferred shares as the amended Article 15 permitted. By resolution passed on 30 March 2022, Mr Macmillan was authorised to execute a transfer form for the 1,389 shares. A stock transfer form transferring them to Box EBT Limited ("Box EBT") was completed and registered for 1,389 shares. It is accepted, albeit because of error, that until 7 November 2022 Mr Yanpolsky remained the holder of 8,611 deferred shares, although the Company's share register showed otherwise. That day the 10,000 deferred shares were purchased by the Company and cancelled.

20. Cutting through contradictions in the Amended Defence, in particular contrasting paragraphs 17 and 50B.2, but still (as will appear below) not entirely accurately, it is pleaded that on 7 November 2022 Mr Macmillan and Mr Dow transferred the Company's issued share capital (being the ordinary shares) to Bookham Services Limited ("Bookham"). They were the only Bookham shareholders (Mr Macmillan 10,000 and Mr Dow 4,001). On 14 November Bookham acquired the Company's assets and liabilities for no consideration as an intra-group transfer. Bookham's shares were transferred to Fetcham Services Limited ("Fetcham").

21. The concluding defences are that there was no unfair prejudice in the following circumstances: (i) Mr Yanpolsky had resigned as a director and Mr Macmillan, now the sole director, with the consent of Mr Dow decided to terminate his employment; (ii) It was not their actions but the automatic effect of Article 15 of the Original Articles that resulted in the deferment of the 8,611 Shares; (iii) The subsequent conversion of the remaining 1,389 of the Petitioner's ordinary shares resulted from the automatic effect of the Amended Articles; (iv) The amendment was justified following the Petitioner's rejection of a fair offer of compensation, and in any event by the jeopardy under which Mr Yanpolsky's continued association with the Company placed the financially troubled business, particularly in terms of its relationship with GPS; (v) As an alternative, any unfair prejudice that arose caused no loss because Mr Yanpolsky's shares had no value.

D) The Reply

22. In the Reply, support of Grounds 2-4, Mr Yanpolsky relies upon the following:

    a) *"Mr Macmillan referred to and relied upon new Articles of Association dated 24 February 2022 which contained the new concept of a 'Bad Leaver' (there*

being no such provision in the Articles of Association dated 2 July 2019) … the new Articles dated 24 February 2022 are not valid because of the [Hidden Shareholders Agreement] … the adoption of the new Articles dated 24 February 2022 was unfairly prejudicial to the Petitioner."

b) "*On 7 March 2022, by Special Resolution signed by Mr Macmillan and Mr Dow, the remaining 1,389 ordinary shares of Mr Yanpolsky were converted into 1389 deferred shares. In the result, all of the 10,000 shares of Mr Yanpolsky had become deferred shares. The Petitioner refers to section 283(2) of the Companies Act 2006 which requires a Special Resolution to be supported by not less than 75% of the votes. On the basis that the Petitioner retained his equity in the 8,611 shares deferred by agreement and in his 1,389 ordinary shares, there was no effective exercise of the legal majority of the First and Second Respondents.*"

c) "*Whether or not the Articles dated 24 February 2022 are effective, the decision of the First and Second Respondents to defer the remaining 1,389 ordinary shares of the Petitioner was explicitly unfair and prejudicial to the Petitioner. The Petitioner should be treated by the Court as retaining full legal and equitable rights in the 1,389 shares as ordinary shares.*"

d) "*In the premises, in relation to the Special Resolution of 7 March 2022 to defer the remaining 1,389 ordinary shares of the Petitioner, the Petitioner advances two distinct propositions: (1) the Petitioner retained full equity in his 10,000 shares which meant that there was no statutory majority able to support a Special Resolution; (2) if legally valid, the Special Resolution was explicitly unfair and prejudicial to the Petitioner*."

E) The "Skeleton Argument Application"

23. In addition to the above-mentioned debate concerning the true nature and extent of the allegations in the Petition, there was also an informal application made by Mr Beaumont for Mr Macmillan and Mr Dow to determine that the Petition made no assertion of bad faith against them when addressing their adoption of the New Articles. This arose because of the reference in Mr McGuinness's skeleton argument to the case of ***In Re Charterhouse Capital Ltd*** [2015] EWCA Civ 536, [2015] B.C.C. 574 which Mr Beaumont submitted raised the issue of bad faith for the first time and far too late for the purpose of any successful amendment application. In an oral judgment given at the time, I decided that it was not open to Mr Yanpolsky to allege that the decision to amend was made in bad faith, not being in the interests of the Company. This is a matter which will need to be considered further within the decision below because, as referred to by Mr Beaumont, when setting out relevant principles within his judgment, the then Chancellor, Sir Terrence Etherton, stated that: *"A power to amend [articles of association] will be validly exercised if it is exercised in good faith in the interests of the company"*.

F) The Witnesses – Assessment of Reliability

24. Mr Beaumont has asked me to bear in mind when considering the oral evidence the authorities addressing the issue of reliability of memory in particular the concept of "false memory". I have done so but should add in the light of the submissions that this does not require a judge to make findings of fact/causation. Whilst the potential for inaccurate memory (because of the manner in which memory works, although not necessarily, as evidenced by photographic memories) is to be borne in mind, normally it will be not only inappropriate to make such findings but impossible for a judge absent expert evidence to ascribe the cause of any conclusion of unreliability in that way. The potential for false memory is usually a factor to be taken into consideration rather than a medical assessment requiring a finding of fact.

25. A starting point for the decision is my assessment of the witnesses and their recollection based upon the way they gave evidence. Whilst this assessment is important, it has its limitations. There is the potential effect of the context of a court room and cross-examination of witnesses. Even the most genuine and honest person may have difficulty recollecting events a few years ago. For all witnesses the court must be concerned by the current understanding of false memory. There is also the feature, as a general observation, that it may be easier for the rogue, the accomplished liar, to appear genuine than for the innocent person under pressure. Those caveats, and there are other well-known ones which need not be expressly set out, mean that the assessment must be subject to consideration of the documents and the oral evidence, as a whole. However, assessment is still an important starting point.

26. Mr Yanpolsky gave his evidence first. His life has been turned upside down because of his conviction, imprisonment and loss of office, employment and shares in the Company. Whether this flowed from the offence the jury was satisfied beyond reasonable doubt he committed or whether, as he continues to assert, it flows from a miscarriage of justice, his evidence must be viewed from the perspective that his criminal record means he is to be considered a person of "bad character". That means that his propensity for crimes of a similar nature, for misconduct and for being untruthful is to be borne in mind when assessing his credibility. It does not in itself mean, however, that his evidence in this case or in any other circumstances will necessarily have been unreliable.

27. Mr Yanpolsky gave his evidence with clarity and on occasions with fervour. I was satisfied that he believes himself to have been unfairly dealt with by Mr Macmillan and Mr Dow. From his perspective, they have walked away with the value of the Company even though he was the architect of the Product upon which the business traded; its principal asset. Although this will need to be tested by reference to all the relevant evidence, including contemporaneous documentation, there is a danger that his recollection and/or understanding of events has been adversely affected by the mixture of turmoil and belief described. In all the circumstances and in particular the matters above (including bad character and false memory), his oral evidence must be assessed with great care and approached with caution.

28. Mrs Yanpolsky was not an easy witness to understand. English is not her first language, and her answers tended to become, as Mr Beaumont observed, lengthy soliloquies. Mr Beaumont was extremely critical of the fact that her witness statement was typed by Mr Yanpolsky and suggested this should cause it to be rejected. Bearing in mind how little

is said by her in that document, that may be thought a surprising critique. In any event her evidence in cross-examination expanded her recollections and made clear that the statement should not be critiqued as submitted. Indeed, I found her to be a witness who genuinely wanted to give her evidence to the best of her ability and truthfully. Nevertheless, and whilst recognising that she is a person of "good character", her evidence must be treated with considerable care since she too has been caught up in and adversely affected by the maelstrom of events that have resulted from the criminal process. Account must also be taken of the fact that her evidence of principal relevance was limited in the earlier witness statement (i.e. paragraphs 7 and 8).

29. Mr Macmillan is a man of "good character" and for that reason I will spend longer explaining the reasons for my assessment that his evidence must be considered with caution. He did not come across well at the beginning of his examination. That observation is subject to the recognition that this can be the result of pressure and nervousness, and I have borne that in mind. As an example, his explanation for wording used in an email sent to Mrs Yanpolsky on 27 January 2020 (to be mentioned later) was not terribly expansive or satisfactory. Later, I was also concerned by his approach to the work Mr Yanpolsky carried out for the Company whilst in prison. The Amended Defence describes that work as "alleged" and certainly seeks to undermine the claim that Mr Yanpolsky did anything substantial. Yet this can be contrasted with his own contemporaneous emails sent to Mr Yanpolsky at the prison. Their content makes the failure of his witness statement to acknowledge the work carried out concerning.

30. I also found Mr Macmillan's cross-examination evidence concerning why Mr Yanpolsky was working for the Company when in prison and what he was doing for the Company generally unsatisfactory. He came across as wanting to avoid any evidence that might give credit to Mr Yanpolsky for what he did for the Company despite it being plain he had continued to provide work of value for the Company having received specific requests for that work from Mr Macmillan. Whether that was because he wanted to ensure his case was preferred or to avoid criticism that Mr Yanpolsky contributed without any resulting commercial reward or for some other reason, it is of concern when assessing the reliability of his evidence.

31. As another example, Mr Macmillan at first tried to contend that the sale of the Company's business was to save the Company even though the plan implemented left it as an empty shell with himself and Mr Dow in effect receiving the value of its realised assets. However, upon appreciating the optics of that contention, he was able to explain that the case must be viewed from different time sequences. First, the financial needs of the Company once Mr Yanpolsky's conviction and sentence had been delivered. At that stage the Company had a developing product but needed customers. This required the removal of Mr Yanpolsky as a significant shareholder because of the inherent damage his conviction caused the Company when trying to contract. That was around February 2020, and he explained that by January/February 2022, the Company only had one customer.

32. That was the second stage, when the Company was haemorrhaging funds and needed continuing lending from Mr Dow. He was unwilling to lend more. GPS was a potential, significant customer/partner but would only enter into/continue in business/partnership with the Company if Mr Yanpolsky was removed completely as a shareholder. That, he said, caused himself and Mr Dow to offer to purchase Mr Yanpolsky's remaining shares based upon expert valuation from the Company's accountants. His failure to respond

caused them to adopt the New Articles and achieve automatic conversion of his shares to deferred shares of nominal value. He stated that he and Mr Dow were not trying to sell the Company at that stage, March 2022. Sale was not a reason for the New Articles and consequential deferment. It was not until the summer that discussions began with Paymentology and its parent, SaltPay, which resulted in the sale of the Company's business to Bookham, and then to SaltPay.

33. This explanation of different, earlier and later circumstances and his attribution of the Company's financial position and the need for customers as the cause of the Amended Articles with the resulting automatic deferment of the 1,389 Shares sounded far more reasonable. However, as will be seen, it will need to be tested against contemporaneous documentation. For example, the contents of emails between himself and Mr Dow might not marry with his oral evidence that the conviction was a serious impediment to Mr Yanpolsky's continuing involvement with the Company. There is also contemporaneous documentation between himself and Paymentology and the evidence of Mr Brewer (see below) which may cast doubt over whether the sale of the Company/its business was being considered at the time the Amended Articles were adopted. In addition, there is potential cause for considering whether his statement that he told Mr Yanpolsky in September 2021 that he could not return to work until his conviction was successfully appealed is contradicted by an email the next month.

34. For the avoidance of doubt, I make clear that I am not reaching any views on such matters at this stage. They are matters to be addressed further when reaching the factual findings below. However, there is sufficient cause for me to approach his evidence with caution and to ensure it is considered within the context of the evidence as a whole even though he is a person of "good character". I emphasise, however, that this approach concerns the issue of reliability and that I still approach his evidence from the perspective that he is a person of good character.

35. I found Mr Dow to be a straightforward witness and saw no reason to doubt his oral evidence, subject to, as with all witnesses, the need to test it against all the relevant evidence (in particular, against contemporaneous documentation).

36. There are three witnesses who were not required to attend cross-examination with the result that their evidence is unchallenged: Mr France; Mr Brewer; and Ms Wakefield.

37. Mr Isaacs, the sole appointed expert, attended court to answer questions of clarification. Neither side objected to the questions asked by the other. Mr Isaacs was a very impressive expert witness of share valuation. It was plain he had reminded himself of his report, instructions and relevant background papers. His answers were precise and clear. His knowledge and experience were very evident. Realistically, neither counsel could challenge his evidence in their closing submissions.

G) Closing Submissions

38. I will here only summarise the submissions to provide a flavour of what was argued. To the extent necessary, I will deal more fully with the submissions in my decision below. There are submissions that I need not address within that decision, principally (but not always) because the findings of fact mean they fall away. However, for those

that did not, I emphasise that absence of specific mention does not mean I have not considered them but that I have either rejected them, concluding they need not be mentioned or decided they do not take the matters in issue further.

39. Mr McGuinness submitted that the applicable law was trite and did not address it further than he had presented it in his skeleton argument. He submitted with detailed reference to the evidence that the Hidden Shareholder Agreement was established (either as to contractual agreement or to the existence of clear and unequivocal representations or understanding relied upon by Mr Yanpolsky. This included correspondence mentioning words (in their context) such as "just so", "only" and "time being" to be referred to in the decision) to his detriment including the continuation of his work for the Company at Wandsworth and Ford prisons.

40. Whilst dealing in depth with the evidence concerning that work, Mr McGuinness submitted that Mr Yanpolsky's employment (whether as employee or consultant) had continued during his imprisonment. He also pointed out that the later the date of termination, the less the number of shares to be deferred under Article 15 of the Original Articles. This he also relied upon for detriment but accepted it was not pleaded.

41. Mr McGuinness submitted that the existence of the Hidden Shareholder Agreement must necessarily mean that the deferment of the 8,611 Shares was an unjust and prejudicial action and result. It also meant, he submitted, that the resolution to adopt the Amended Articles was passed in breach of the Hidden Shareholder Agreement and despite Mr Yanpolsky being entitled to be treated in equity as a holder of 8,611 ordinary, voting shares. He submitted that articles should not be changed retrospectively to defeat the original constitutional documents, the Original Articles and Shareholders' Agreement, including clause 6.1 of the latter document. Mr Macmillan and Mr Dow could not rely upon the offers to purchase, made without reference to their dealings with Paymentology/SaltPay which would ultimately lead to the sale so profitable for them, to relieve them of the consequence that their subsequent actions were unjust and prejudicial.

42. Further or alternatively, he submitted, the deferment of the 1,389 Shares met the same criteria because it arose from the decision of Mr Macmillan and Mr Dow, as majority shareholders, to ultimately ensure that they were the only members of the Company and the only people who would benefit from the sale of the Company's business. Both deferments combined with the subsequent compulsory transfers were acts of unfair prejudice, the second deferment flowing from the wrongful resolution to adopt the Amended Articles.

43. Mr Beaumont presented some 20 points to justify the conclusions that the evidence of Mr Yanpolsky could not be relied upon and in any event did not establish the Hidden Shareholder Agreement whether viewed in terms of a contractual agreement, representations or understanding (whatever they may be). The claim in respect of the 8,611 Shares must fail on the evidence. The deferment was a direct result of the criminal conviction, imprisonment, resignation as a director, lawful termination of employment and the automatic application of Article 15 of the Original Articles. He submitted that the Petition's allegations of unfair prejudice were contrived claims. Mr Yanpolsky had accepted the Articles when becoming a shareholder including the ability by special resolution to amend them. There was nothing in the Shareholders' Agreement to

supersede Article 15, whether in the Original or Amended Articles, and Mr Yanpolsky was bound by the result of the application of the Company's rules.

44. During his submissions Mr Beaumont helpfully referred to several authorities concerning the standard of proof and reliability of evidence. They are well known and need not be mentioned specifically here but have been taken into consideration and applied.

45. Mr Beaumont submitted that the case concerning the 1,389 Shares must fail because it expressly or inherently relied upon bad faith contrary to the interests of the Company. That was excluded by the judgment on day one. Mr Macmillan and Mr Dow are to be treated as acting in good faith in the interests of the Company. That accords with their evidence that they acted appreciating the need of the Company to end Mr Yanpolsky's involvement to enable it to trade, raise investment and/or be sold. To achieve this, (having first offered to buy the shares at a fair value) they exercised their lawful powers to vote for the adoption of the Amended Articles. Their consequence was the automatic deferment of the 1,389 Shares and their subsequent transfer applying Articles 15 and 7 of the Amended Articles. There was no injustice or prejudice. Mr Yanpolsky was the author of his own misfortune.

46. Subject to those submissions, Mr Beaumont helpfully referred to the following (amongst other) principles of law he relied upon by reference to the notes in his skeleton argument:

a) There can be no "unfair prejudice" where the Petitioner brings prejudice on himself or where his involvement places the future well-being of the business in jeopardy (***Re Edwardian*** [2018] EWHC 1715 (Ch) at [412] and [414]).

b) It will not ordinarily be "unfair" for the affairs of a company to be conducted in accordance with the provisions of its Articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration: ***Starling v Climbing Gym Ltd*** [2020] EWHC 1833 (Ch) at [63].

c) 'Bad leaver' type provisions will not be supplanted in s.994 cases (***Durose v Tagco*** [2022] EWHC 3000 (Ch) at [151]).

d) ***s.21 of the CA 2006*** provides for a broad power to amend Articles that can only be constrained by the court if the Board has acted in bad faith (see generally the narrative at Hollington, Shareholders' Rights 10th ed. at pages 33-39). Bad faith is a very grave charge and a species of equitable fraud (***Armitage v Nurse*** [1997] Ch 241, 252-253 per Millett LJ, as he then was).

e) Conduct may not be unfair or a court may refuse relief in respect of it if caused by the petitioner's own conduct or warranted as a reaction to it (***Seneschall v Trisant Foods*** [2023] EWHC 1029 (Ch) at [145] (citing ***Re London School of Electronics Ltd*** [1986] Ch 211, 222B-C and ***Gray v Braid Group (Holdings) Ltd*** [2015] CSOH 146, where it was held not unfair to have removed a CEO dismissed for gross misconduct).

f) Even if the conduct is both "prejudicial" and "unfair", the Petitioner's conduct may nevertheless affect the relief which the court thinks fit to grant under s.996 (R***e London School of Electronics Ltd*** above, 222B-C).

H) Evidence and Findings of Fact

47. There is no dispute that Mr Yanpolsky and Mr Macmillan, as "Founding Members" would manage the Company, which had been incorporated on 25 May 2019, and be employed by it whilst holding an equal number of issued shares. Nor is it in dispute that the aim was for the Company to develop the Product of which Mr Yanpolsky was the architect. It was his knowledge, expertise and experience which was relied upon and used to identify the contents of the software programmes which would need to be coded by platform developers in the Ukraine. This was to be the principal asset of the Company which would generate turnover and ultimately lead to a sale of the Company when its "valuation reaches "£XXX millions", as the document entitled "Founders Agreement Notes" of 15 May 2019 envisaged.

48. That document also refers to Mr Dow and there is no dispute that he became the investment shareholder. From at latest 11 July 2019, Mr Yanpolkski and Mr Macmillan with 10,000 ordinary shares each were persons with significant control individually holding more than 25% but less than 50% of the issued share capital. Mr Dow held 1166 ordinary shares.

49. Although Mr Yanpolsky's claim of unfair prejudice by the deferment of his 8.611 Shares in February 2020 relies in part upon this "Founders' Note" document, it cannot assist him other than perhaps by providing some background information. That is because the question of "hiding" Mr Yanpolsky as a shareholder of the Company following his conviction (assuming for these purposes that the question arose) cannot possibly have arisen in May 2019. Nor is there any evidence that anyone proposed that any part of the content of those Notes would apply for the purpose of the Hidden Shareholder Agreement (which definition (as above), it is to be remembered, includes a contractual agreement, any representation and/or understanding that Mr Yanpolsky relies upon). It is unnecessary, therefore, to address the additional submission that the "Founders' Note" was superseded by the Shareholders' Agreement and the Original Articles, although that was the case.

50. The terms of the Shareholders' Agreement and the Original Articles need only be referred to when relevant to the context but it is to be noted that it is not in dispute that the former prevails in the event of conflict. It is also to be noted that Mr Yanpolsky and Mr Macmillan are identified as the Company's "Founders" in the Shareholders' Agreement. Mr Yanpolsky and Mr Macmillan were both appointed directors. The Articles require there to be two directors, absent an ordinary resolution to permit one, and for board meetings to have a quorum of at least two. Each member with a shareholding of at least 10% can appoint a director. The Articles set out several "Reserved Matters" which would always require Mr Dow's consent as the "Investor". Mr Yanpolsky entered an "executive service agreement" dated 2 July 2019 for his employment as the Company's "Chief Technical Officer".

51. Mr Yanpolsky had previously worked for GPS as their Chief Technology Officer between July 2014 and December 2016. He had disclosed to Mr Macmillan in or about March 2017 that he was under investigation for allegedly hacking their computers. Those allegations led to police investigation and he was charged on 7 September 2017 with one count under the ***Computer Misuse Act 1990***. There is no dispute that these events were disclosed in the context of him expressing his innocence.

52. There are allegations from Mr Macmillan that there was by no means "full disclosure" and that Mr Yanpolsky lied by professing his innocence (as he still does). The evidence is insufficient to enable any finding to me made regarding disclosure. As to the lie, whilst it is correct that he was found guilty on the balance of probability by a jury, I cannot on the evidence before me conclude whether Mr Yanpolsky held a genuine belief of his innocence. Neither allegation takes this matter further in any event.

53. Mr Yanpolsky was convicted on 16 December 2019 and sentenced on 22 January 2020 for a period of imprisonment of three and half years. Plainly this caused a hiatus for the Company, as well as Mr Yanpolsky. He resigned as a director as required by article 25 of the Original Articles but stating he did so to be able to concentrate upon his appeal. The issue of whether he pursued his appeal has been raised but I do not consider it takes this matter further.

54. Turning to the documents to which it is necessary to refer to consider whether there was a Hidden Shareholder Agreement or representation/understanding as alleged:

    a) By email sent to Mrs Yanpolsky on 24 January 2020, Mr Macmillan (in summary) addressed the importance at that stage of not mentioning Mr Yanpolsky's imprisonment to third parties but of merely stating that he had left the Company for personal reasons. He was thinking about appointing a replacement CTO quickly to distract people from asking about Mr Yanpolsky, whom he described as *"irreplaceable"*. In the meantime it was a relief that *"Janine … sounds like she will be able to carry on doing some work"* for the Company. He was anticipating needing to change the Company's website and to alter Mr Yanpolsky's *"LinkedIn profile"*.

    b) On the same day, he sent an email to Mr Yanpolsky via the prison service. Having explained that he would meet Janine to discuss her working for the Company, he added: *"Of course, we also need you, as I want to kick off with the other USA card processor … [but] I do need to remove your name (and probably mine) from the [Company's] website … Can you give me some guidance … it would be good to change your Linkedin page …"* (which steps appear to have been carried out without objection by 25 January with Mr Macmillan removing his name as well).

    c) In an email to Mrs Yanpolsky sent 27 January 2020, who would be seeing her husband the next day, Mr Macmillan included notes for Mr Yanpolsky. Support was expressed generally, and Mr Macmillan thought a new CTO would not be required immediately *"because we can cope with Janine, Iryna, Bohdan and Kostya But there will be an expectation from prospects and investors that there is a technical lead they can meet … a replacement [will mean people] focus less on the departure … [but] it could be someone providing 2 days per week …*

What is Vlad's view?". He also asked for Mr Yanpolsky's *"plan for production server to connect to Tribe"* and how he could set it up.

d) Mr Macmillan also sent further updates for Mr Yanpolsky by email sent 30 January. Mrs Yanpolsky reported back from her visit by email sent 30 January including the fact that her husband could now make regular phone calls to answer all questions arising concerning the ongoing business. She added that "designs, diagrams for [the Company]" could now be sent by post. In a response Mr Macmillan mentioned that he spoke to Mr Yanpolsky by telephone the same day.

e) A minute of a meeting of one director, Mr Macmillan, attended by Mr Dow, held on 9 February 2020 records that Mr Macmillan complied with the requirements of ***section 177 of the Companies Act 2006*** and the Original Articles concerning his interests and that it was resolved that 8,611 of Mr Yanpolsky's shares should become deferred shares pursuant to their automatic conversion under Article 15 by reason of his decision to terminate Mr Yanpolsky's employment.

f) Article 15 provides:

"Departing Founders"

Unless the Board (acting with Investor Consent) determine that this Article 15.1 shall not apply, if at any time during the Relevant Period a Founder ceases to be an Employee, the Leaver's percentage of the Founder Shares relating to such Founder shall automatically convert into Deferred Shares (on the basis of one Deferred Share for each Ordinary Share held) on the Effective Termination Date (rounded down to the nearest whole share). "

g) Article 7 of the Original Articles conferred power upon the Company at any time at its option to purchase or redeem a whole class of deferred shares for £1.00 and without the prior agreement of the holder.

h) By letter dated 9 February 2020 the Company notified Mr Yanpolsky that his service agreement dated 2 July 2019 was terminated and the termination was effective from the date of his conviction. It also informed him of the automatic deferment of his shares under Article 15. A stock transfer form was enclosed for the deferred shares together with a power of attorney to enable Mr Macmillan and Mr Dow to deal with his shares "in any transaction in the future". He was asked to sign and return them.

i) By email sent 10 February 2020, Mr Macmillan forewarned Mrs Yanpolsky that he had posted the 9 February termination letter. This was relied upon in opening and during cross-examination as evidence that the termination and deferment occurred in the context of the Hidden Shareholder Agreement. Reference was made in particular to the following passages with the words particularly emphasised by or on behalf of Mr Yanpolsky underlined:

j) "I have sent:

> *A letter confirming that Vlad's employment ceased as of the date of conviction. This is just so we can explain, if asked, by any investor or customer that Vlad no longer works for BOX.*
>
> *The letter also explains that some of the shares held by Vlad will be converted into deferred shares. This means he will come off Companies House Person with Significant Control (PSC) list and also shows we have taken action to any investor.*
>
> *There is also a Power of Attorney deed and Stock Transfer Form relating to the shares. This is just so, if needed, we can change ownership of shares.*
>
> *From what Vlad said, we wouldn't be able to get these last two signed until he has his new solicitor."*

k) The change of class from ordinary to deferred status was registered at Companies House on 20 March 2020, attributing the date of "assignment" as 17 December 2019.

55. It is apparent from those facts that the deferment of the 8,611 Shares was not caused by Mr Yanpolsky's conviction and imprisonment. At least, it was not the direct cause. The Shareholders' Agreement and the Original Articles contained no provision for a deferment for that reason. What happened was that Mr Yanpolsky's resignation as a director left Mr Macmillan as the sole director of the Company. Whilst the Original Articles required two directors and provided that no meetings could be held without a quorum of two, he resolved at a board meeting on that Mr Yanpolsky's employment should terminate pursuant to Article 15. The validity of the resolution has not been challenged and rightly so since Mr Yanpolsky accepted the termination by letter at the time. It was the termination of his employment that invoked the "automatic" deferment of his 8.611 Shares by the application of Article 15. There was no decision by Mr Macmillan with the consent of Mr Dow that the Article did not apply. Indeed, the contrary was decided.

56. Mr Yanpolsky has suggested that he remained an employee but he received the notice of termination sent pursuant to a board resolution to that effect. Insofar as he relies upon the Company employing him or retaining him as a consultant, he must establish an agreement to that effect which was made or took effect after the termination of his service contract.

57. It was put to Mr Yanpolsky that his case of a Hidden Shareholder Agreement requires him to allege a sham and amounts to him saying that he and Mr Macmillan falsely represented the deferment of the 8,611 Shares when filing notice of that change at Company's House. That, however, cannot be his case. The facts are that his employment was terminated and his 8,611 Shares became deferred shares. The Companies House filing was required. Mr Yanpolsky' case is (or must be) that there was a separate, private agreement with Mr Macmillan (he has excluded Mr Dow) concerning his deferred shares or that he can rely upon representations made by him to Mr Macmillan to assert an estoppel or binding understanding.

58. However, there is nothing in the documentation (including the correspondence above-mentioned) that can possibly lead to the conclusion that there was a Hidden Shareholder

Agreement that (somehow) might mean that he was entitled to recover the deferred shares in due course (whatever that may mean). The documentation including correspondence does not identify an offer, acceptance, intention to enter legal relations, a representation to be relied upon or reliance. It follows that the terms of any agreement or representation/understanding cannot be factually identified without oral evidence, whether that also relies on the documentation to add credence to the evidence of recollection or not.

59. In reaching that finding of fact, I have considered (amongst the other contemporaneous documents) the email sent by Mr Dow to Mr Macmillan on 31 January 2020. The words *"dismiss him as an employee for now"* are ambiguous as to whether and, if so, when he might be offered new employment. The reference to him potentially getting his shares back because they will *"mainly go to an employee benefit trust"* does not express the intention that he will be restored as an employee.

60. Equivalent points can be made in respect of the email to Mrs Yanpolsky from Mr Macmillan sent 10 February 2020. The statement that the employment ceased *"just so we can explain, if asked, by any investor or customer that [he] no longer works for the [Company]"* does not alter the fact of termination. It may suggest that there is some other agreement concerning his return to employment but that cannot be concluded from those words alone. Oral evidence is required. In addition, the reference to the Power of Attorney and the Stock Transfer Form to be signed by Mr Yanpolsky being required *"just so, if needed, we can change ownership of [the deferred] shares"* does not evidence any agreement, representation or understanding that the shares will be restored to ordinary share class or not be transferred.

61. In all those circumstances it was incumbent upon Mr Yanpolsky (insofar as he can) to set out such oral evidence. He accepted in cross-examination, and it is plainly the case, that the only passage within his witness statement relied upon to do this is the following:

> *"While in my first days in a custody, with no access to any advice, support or help, Mr Macmillan asked to give him a power of attorney and permission to defer my shares to make my 'person with significant control' status not visible at Companies House web-site. This request was argued that my name among the people with significant interest can damage BOX marketing. In separate conversations to my wife he asked for the same as he worried that "GPS can make claims against BOX". Mr Macmillan assured my wife and me that this is required for time being and my share in the company and my BOX employment are safe."*

62. There are problems with this passage insofar as *"permission to defer"* was not required but in any event it does not provide the evidence required to establish the Hidden Shareholder Agreement. It raises, however, the possibility that the evidence of the relevant conversations can be found within Mrs Yanpolsky's statement. Yet the only possible paragraphs to refer to, however, are these:

> *"On the following day I met Mr Macmillan at Garson's Farm, Esher coffee shop where we discussed the impact of my husband's sentencing to BOX business. I knew that the development of BOX depended on my husband's innovative ideas and that the company may fail as at that time the development of the platform was not fully completed.*

> *On 30 January 2020 I had another meeting with Mr Macmillan which followed by a series of email where Mr Macmillan asked my assistance to remove my husband's links to BOX as he worried that GPS could make claims against the company. He assured that my husbands BOX shares will not be affected."*

63. Plainly, that evidence does not identify or establish on the balance of probability the Hidden Shareholder Agreement. The last sentence is obviously incorrect when, as a fact, the 8,611 Shares were deferred, as Mr Yanpolsky was informed. However, as far as the sentence is relied upon as evidence of a Hidden Shareholder Agreement, it too fails in the manner explained in respect of Mr Yanpolsky's evidence to establish any form of agreement or representation/understanding to be relied upon. Their respective evidence under cross-examination did not alter that position.

64. It is not enough just to say it was agreed or represented that the shares would be *"safe"* or that the deferment was *"for [the] time being"*. That simply leaves open the following questions: what was the gist of the words used, when, where and in what circumstances? What obligation did *"keep safe"* create when the Articles deferred shares which remained legally and beneficially owned by Mr Yanpolsky? If it was meant to create an obligation to restore the shares to ordinary shares (although this is not stated) when and in what circumstances would this obligation need to be fulfilled? As one simple example to spell this out, there is no statement in the following or similar terms: that as a result of an appropriately particularised discussion it was agreed with Mr Macmillan or he represented or it was understood that Mr Yanpolsky would continue to work in prison for the Company without payment but on terms that his 8611 Shares would be returned to ordinary share class on his release.

65. The conclusion has to be that as a matter of fact, there is no evidence of offer, acceptance, legal relations, a representation or understanding (clear, unequivocal or otherwise) that can be relied to support the case of the Petition concerning the existence of the Hidden Shareholder Agreement whether the case is that the deferment was unfairly prejudicial or the breach of an agreement with Mr Macmillan. Indeed, the nature of that agreement or representation lacks clarity even within the pleaded case.

66. As a sidenote, I mention that had the evidence asserted a private, personal contract or representation/understanding, there would be a serious issue whether ***section 994's*** jurisdiction was invoked. However, this has not been raised and cannot be addressed simply because the agreement/representation/understanding cannot be identified as fact.

67. Although there was no Hidden Shareholder Agreement in place, the documentary evidence sustains (without evidencing the Hidden Shareholder Agreement) Mr Yanpolsky's case that he carried on work for the Company both whilst in Wandsworth and Ford prisons. Even as of 31 March 2020 Mr Macmillan emailed to inform Mr Dow:

> *"We have now set up a process where we can conference call him in with the developers. We've had two calls already and will probably move to a daily call, not as good as we were with Vlad doing code reviews, but still very useful".*

68. As of 25 May 2020 Mr Dow stated in his email to Mr Macmillan (but with none of the content evidencing the Hidden Shareholder Agreement") *that "obviously [Mr Yanpolsky's] input is useful"* and the two of them were discussing whether he could be

a consultant on the basis that he should not be an employee *"just yet"* due to the potential adverse effects of his conviction. This arose in response to an email from Mr Macmillan concerning Mr Yanpolsky working for the Company whilst in Ford prison. He wrote this:

> *"There is only one very small risk, that it becomes know[n] we are employing a convicted hacker. Overall, I think this [knowledge] is a small risk and the benefit of having Vlad working on updates to the platform outweighs it."*

69. There are many other significant documents, as identified by Mr McGuinness during his submissions, to evidence the fact that substantial and significant work was requested and provided. It is not possible to value that work or to identify precisely what was done but it is sufficiently clear from emails received from Mr Macmillan through the prison service, from the other documentation also relied upon by Mr McGuinness, and from Mr Yanpolsky's oral evidence (which I accept in this context on the balance of probability notwithstanding all the reasons for caution previously given and prefer over Mr Macmillan's oral evidence) that it involved the continuing design of the Product and consequential dealings with the coders to ensure that they provided an operating software system in accordance with the requirements of the Company based upon Mr Yanpolsky's designs. I am, satisfied from the oral evidence and evidence as a whole that there were numerous telephone calls between him and Mr Macmillan and with those involved in the design/coding of the platform for the Company during his time in prison.

70. In the light of the evidence as a whole, and even allowing for the fact that the work required would have reduced to the extent that it was undertaken by a new Chief Technical Officer appointed in December 2020, I am satisfied on the balance of probability, and conclude, that Mr Macmillan's evidence seeking to undermine Mr Yanpolsky as someone who carried out substantial work for the Company did him no credit and is to be rejected. Although my findings cannot be precise concerning the work done, on the balance of probability I prefer (albeit in less absolute and, therefore, in more general terms) the following description appearing in Mr Yanpolsky's witness statement:

> *"For the whole duration of my imprisonment I ultimately and directly managed the company's employees, guided them on design and product functionality tasks, closely monitored their performance and assisted Mr Macmillan with variety of business development and company management decisions."*

71. This leads to the contention by or on behalf of Mr Yanpolsky that he continued to be an employee or worked as a consultant for the Company. However, his employment had been terminated, there is no evidence of any agreement of a new employment contract and no evidence of a consultancy agreement. He was not paid, and no such contract(s) can be implied. I am satisfied Mr Yanpolsky provided expert advice but he did not do so professionally in the sense that he was being retained as a consultant to do so.

72. Mr Macmillan attributed his work to Mr Yanpolsky volunteering to assist potentially in the context of guilt for having let the Company down and potentially to keep himself busy. He also surmised that Mr Yanpolsky may have considered it worthwhile because he remained a shareholder. In my judgment Mr Yanpolsky saw himself as someone

who remained invaluable to and needed by the Company. Although there was no Hidden Shareholder Agreement, he probably envisaged his release would result in him returning to the Company and, therefore, to the Product he continued to work on. The fact that Mr Macmillan was willing to offer him a position if he had been allowed out under licence on early release (to be referred to further below) may have added fuel to that belief but there has been no suggestion that any agreement or representation/understanding arose from this. That is, of course, not surprising since the prison authorities refused such a release.

73. Subject to events in September 2020, to be considered below, I accept, therefore, that it probably would have been natural for Mr Yanpolsky during his imprisonment to anticipate, whether realistically or not, that he would return to the Company on his release on 21 May 2021. The Product was his design, he had continued to work for the Company whilst in prison, there had been an attempt to obtain his release on licence for that purpose, he had served his time and was still maintaining his innocence. He may well have envisaged returning as a shareholder with significant control.

74. In fact, however, he had no right to ask, and the Company had no obligation to accept, that this should be the scenario. His evidence does not identify any such binding arrangement to take effect upon his release. His resignation, the termination of his employment and the deferment of the 8,611 Shares had occurred. For the whole period of his imprisonment, there is no evidence of an offer, terms, and acceptance or of the representation being made, relied and acted upon. Nor of words spoken or written upon which the understanding was based.

75. Mr Macmillan's evidence during cross-examination was that he had had a discussion with Mr Yanpolsky in September 2020 when he was asked what role Mr Yanpolsky would have when released. Mr Macmillan's recollection was that he said that he must succeed in his appeal to be able to return to his employment. Mr Yanpolsky does not accept this. Mr Macmillan's recollection is to be contrasted with the position he set out within his email letter to the prison authorities sent 29 October 2020 in which he asked for Mr Yanpolsky's early release on licence to the one presented to Mr Yanpolsky on his release. In the letter Mr Macmillan wrote (my underlining for emphasis but noting there is no equivalent representation to Mr Yanpolsky in evidence):

> *"I am keen to help Mr. Yanpolsky with preparing for life after prison by offering him either part time or full time employment under ROTL. It would also greatly help the business I am running now as well as preparing for Mr. Yanpolsky to be part of the business when he is released next year ..... If Mr. Yanpolsky was allowed to work under ROTL with my company we would ensure compliance with Covid restrictions and monitoring of computer activity."*

76. Mr Macmillan in cross-examination sought to explain this letter as one written to encourage release. If that suggests misstatement to the prison authorities, as it appeared to do, it is certainly not to his credit. I do not, however, conclude this was his intention. It is true that this letter was written in a different context to the discussion the month before but it would be very surprising if Mr Macmillan was willing to make representations to assist to obtain Mr Yanpolsky's release without stating that the Company would not employ him unless and until an appeal was successful if that had been what he previously told Mr Yanpolsky. Of course, he might have changed his mind, although that was not his evidence. In those circumstances I reject his recollection

of the discussion in September 2020. That does not, however, leave any positive evidence from which to find support for Mr Yanpolsky's alleged Hidden Shareholder Agreement.

77. Mr Yanpolsky remained in prison until 21 May 2021. At the meeting between Mr Yanpolsky and Mr Macmillan on 22 May 2021, Mr Yanpolsky appears to have forgotten about the deferment of his 8,611 Shares and his evidence (which appears credible concerning his state of mind at the time) was that he now found himself in a scenario wholly different to the one he probably anticipated. Whatever his state of mind, however, it is a fact that Mr Macmillan would not give an offer of employment and would not agree to his 8,611 Shares being converted back into ordinary shares. Nor was there any legal obligation to do so. Accordingly, Mr Yanpolsky was "shut out" as a person whose only connection was a minority shareholder.

78. At this time, although obviously produced later, the Company's balance sheet within its *"Statement of Financial Position"* as at 31 May 2021 records a deficit of shareholder funds of £85,793 (noting as a detail that creditors of £115,138 included *"amounts owed to participating interests"* of £94,980, and also that the accounts are prepared on a going concern basis because "the director will continue to support the Company"). Absent a dramatic upturn in income to increase current assets, further financing would be required. Whilst there was a share premium account of £240,045, it would not be an available source of capital since its cancellation would not be possible whilst creditors were unpaid. However, the picture is nowhere near as bleak as this suggests because the Product, the platform on which everyone had been working, was not yet ascribed a current value (being valued at cost subject to depreciation, there having been no revaluation). If the tangible assets were worth significantly more than the balance sheet value of £1,735, there would be the potential for investment, borrowing or a sale of assets to the benefit of the shareholders.

79. As a result of what Mr Yanpolsky considered a "volte face" by Mr Macmillan, he wrote a detailed email of complaint sent on 7 June 2021. It refers to assurances when he was asked to hand over his work to the new CTO that his shares would be *"safe"* and that his *"employment will be available"* on his release. Also, to phone calls when he was repeatedly assured that *"all previous agreements are [in] place"*. However, none of this is expressly addressed in his statement and none of the particulars required to present a claim of contractual agreement or binding representation/understanding are evidenced.

80. Mr Macmillan's contrasting approach is probably best set out in the following parts of his response by email sent 9 July 2021 to what has been described as Mr Yanpolsk's letter before claim sent in email form on 22 June 2021:

> *"Regarding the content of your email, I can say the reputation of BOX Processing is important to the Directors, employees and investors of BOX Processing and we will not tolerate any form of criminal activity. If you believe you have evidence of this I would encourage you to contact the relevant authorities. We would be happy to respond to any requests for information from them.*
>
> *In terms of your involvement with BOX Processing, our Articles and Shareholders Agreement, which you signed, make it clear that conviction of a*

> *criminal offence will require immediate resignation/dismissal. This also means that any shares not yet vested will not be attributable to the individual involved. This is common practice for protecting investors.*
>
> *I would like point out that whilst your conviction and sentence has a drastic impact on your life and family, it has also impacted BOX Processing as a company. The association with yourself is having a negative impact on the company's ability to engage customers, work with partners and secure investment. Updating your LinkedIn profile so you are listed as current BOX Processing employee creates problems for the company and is inaccurate."*

81. Whilst that is not an entirely accurate analysis of what had occurred, it not only sets out "the other side of the coin" to Mr Yanpolsky's view of events but also accurately evidences the fact that Mr Yanpolsky was now adrift.

82. In his witness statement Mr Macmillan refers to the Company discovering hacking by Mr Yanpolsky at the end of June 2021. This was not pursued, at my suggestion because of timing issues for the trial and because it was not relied upon for the purposes of the subsequent actions involving Mr Yanpolsky's remaining ordinary shares.

83. The facts can move on to the beginning of 2022. Mr Macmillan in his evidence describes the Company's financial position as *"precarious"* with losses of around £30,000 a month. There was, as yet, only one client and Mr Dow is described as being *"increasingly concerned"* that he may lose his investment and not be repaid his loans. Mr Macmillan says he was told by GPS *"that they could not continue to work with the Company on partnership opportunities whilst the Petitioner was a shareholder ... Mr Dow ... would not continue to provide such loans to the Company if the Company could not work with GPSL"*. This is supported by the unchallenged witness statement of Mr France.

84. An email from Mr Macmillan to Mr Yanpolsky sent on 24 January 2022, which he says was sent *"to address the problem with [GPS]"*, includes the following offer:

> *"You may not appreciate it, but we are finding it very difficult to attract customers, partners and investors while you are still a shareholder and the association this creates with your conviction. I suggest therefore that we buy out your shareholding. That enables you to recognise some cash for your input and for the company to move on.*
>
> *I propose that we pay you £10K for your shareholding and in a year's time a further £5K provided you have ceased to claim you are associated with BOX (e.g. Linked In profile, etc).*
>
> *Obviously this is not the outcome we had all hoped for when we set up BOX but unfortunately your conviction has had a very detrimental effect on our ability to attract investment, partners and clients."*

85. Mr Yanpolsky was under no legal obligation to accept the offer or, indeed, to respond. He did not and Mr Macmillan and Mr Dow sought a "fair value" of his shares from the Company's accountants. They also decided *"to amend the Articles to enable the*

Petitioner to be classified as a Bad Leaver and to allow the remaining ordinary shares to be converted into deferred shares".

86. The Amended Articles were drafted and sent to Mr Yanpolsky for him to vote by email on 7 February 2022. Seven days later, Mr Macmillan emailed Mr Rowan Brewer ("Mr Brewer") of Paymentology Limited ("Paymentology") whom he had known for many years and for which company he had worked between June 2018 and the spring of 2019, and referring to a conversation "just now" wrote:

> *"As mentioned, we appreciate there are concerns regarding the ex-employee of BOX, Vlad Yanpolsky. I hope we will be in a position soon to work together, without the concern over reputations caused by Vlad's past."*
>
> The response was: *"Yes, it would be tough for us to proceed on a project or discussion with that issue hanging over us".*

87. This opening of a dialogue with Paymentology Limited (although as can be seen from Mr Brewer's evidence, the date it opened appears to have been earlier as referred to below) is not mentioned in the subsequent email to Mr Yanpolsky sent on 24 February 2022. It starts:

> *"... the position of BOX is precarious. We are finding it very difficult to attract customers, partners and investors while you are still a shareholder and the association this creates with your conviction. To resolve the situation, I am still keen that we buy out your shareholding. That enables you to recognise some cash for your input and for the company to move on ...*
>
> *As I am sure you are aware the company has updated its Articles of Association to allow for an alternate way forward. The new Articles allow either of us to force a sale at fair value or for shares held by a Bad Leaver to be converted to Deferred Shares, which can then be transferred to another party. If this latter action was taken with your shares, you would not receive any value from the transfer".*

88. This email contained a further offer to buy his remaining ordinary shares in the Company for £11,000, or £7.91 per share based upon but exceeding the accountant's valuation. An additional £5,000 was offered if Mr Yanpolsky agreed to cease representing himself as an employee of the Company. There was no response to the offer. Again, there was no requirement to accept or to respond to it. It was a commercial offer, albeit that Mr Yanpolsky was warned of the adverse consequences resulting from amended articles. In fact, it appears from a further email sent to him on 28 February 2022 that the resolution to adopt the articles had not been validly passed. He was asked again to vote and did not do so. It is not in issue, however, that the Amended Articles were adopted by Mr Macmillan and Mr Dow.

89. The Amended Articles include the following changes (my underlining for emphasis):

> *2. Definitions "Bad Leaver" means an Employee who ceases to be an Employee on account of fraud, gross misconduct or upon a criminal conviction resulting in imprisonment.*

> *7. Deferred Shares*
>
> *7.1 Subject to the Act, any Deferred Shares may be purchased or redeemed by the Company at any time at its option for £1 for all the Deferred Shares registered in the name of any holders(s) without obtaining the sanction of the holder(s) 7.2(a) [right to execute transfer] 1363 . . .*
>
> *15. Departing Founders 15.1 Unless the Board (acting with Investor Consent) determine that this Article 15.1 shall not apply, if at any time during the Relevant Period a Founder ceases to be an Employee, the Leaver's Percentage of the Founder Shares relating to such Founder shall automatically convert into Deferred Shares (on the basis of one Deferred Share for each Ordinary Share held) on the Effective Termination Date or on such other date as the Board may determine in their absolute discretion (rounded down to the nearest whole share).*

90. During cross-examination Mr Macmillan accepted (although this is obvious) that the amendment was intended to apply to Mr Yanpolsky and his remaining 1,389 Shares. Whilst it would continue to have effect in the future for all shareholders (subject to re-amendment), in practice it was only conmsidered relevant to Mr Yanpolsky and its purpose was to remove him as a shareholder for the benefit of the Company. Mr Macmillan accepted this in cross-examination, and I find it to be a fact. Mr Macmillan's explanation for this was that the removal was necessary to enable the Company to achieve necessary future financing and turnover and, in particular, to have the opportunity to enter partnership or another contractual arrangement with GPS.

91. On 7 March 2022 Mr Macmillan and Mr Dow passed a resolution (signed as directors) *"in accordance with article 15 ... [as] adopted on 24 February 2022"* to convert Mr Yanpolsky's 1,389 ordinary shares to deferred shares of nominal value. Mr Yanpolsky was informed of this by an email sent the same day which also repeated that the shares would be transferred to an employee benefit trust for the benefit of employees *"in due course"*. The explanations given for the resolution were the failure to accept the *"fair"* offer and the assertion that *"if [he] remained as a shareholder it would risk the solvency of the Company for the shareholders as a whole"*.

92. On 24 March 2022, Mr Macmillan and Mr Dow incorporated Box EBT and became its officers and equal shareholders according to Companies House filings. However, it appears the shares were held on trust for the Company because their above-mentioned written resolution records the incorporation of Box EBT as a wholly owned subsidiary of the Company to act as trustee of the Company's employee benefit trusts

93. It was also resolved that the Company, applying Article 7 of the Amended Articles, approved the transfer of the 1,389 deferred shares from Mr Yanpolsky (applying the stock transfer form to be executed by Mr Macmillan) to Box EBT to be held under that trust. Mr Macmillan and Mr Dow as directors of Box EBT on 29 March acknowledged the transfer and the trust.

94. On 29 March 2022 Mr Macmillan sent an email to Mr Dow recording that Mr Brewer would talk about investment once Mr Yanpolsky had been removed as a shareholder.

95. A *"kudocs share transfer summary"* records that the remaining 10,000 deferred shares were transferred by the Company, acting by Mr Macmillan, to Box EBT on 30 March 2022. The transfer details were filed at Companies House the same day.

96. By 29 April 2022 Mr Macmillan was able to inform Mr Dow that Mr Brewer was discussing the following:

> *"Paymentology [to] invest in BOX the £1.5m at £6m pre-money valuation - BOX [to] use investment money to grow business ... Paymentology get the rights to buy remaining 80% of BOX for £6m with SaltPay shares SaltPay shares only realised on SaltPay IPO ...".*

97. Unsurprisingly, Mr Macmillan expressed his enthusiasm for that concept in the email. He sets out a variety of thoughts which need not be repeated except to note that he thinks the proposal is serious, and concludes with the following *"other thoughts"* without suggesting that this valuation takes him by surprise:

> *"This is a bit like a phased acquisition, try before you buy where the price is £6m today - - - I'm wondering if there is a better deal for us, a more straight forward acquisition? Paymentology need to find £1.5m to invest in BOX, so I guess they wouldn't want to find a lot of cash for acquisition But they could offer say £6m with £2m in cash and £4m in Saltpay or Paymentology shares, the shares might vest depending on targets."*

98. In the light of the earlier offers for Mr Yanpolsky's shares, which bear no relation to the concept of a *"£6m pre-money valuation"*, one might have expected Mr Macmillan to detail within his evidence both when and how that valuation first arose. His witness statement makes no express reference to it. He says that a discussion with Mr Brewer took place in February 2022 *"regarding Paymentology being a potential investor ... and, eventually, to Paymentology acquiring the Company"* which occurred after the end of March 2022. He says nothing more until stating that *"acquisition discussions continued with Paymentology and its parent company, SaltPay Ltd through to August 2022 ... [when,] on 5 August 2022, [he] received an indicative offer for acquisition"*. He also makes no reference to the earlier discussions that started in 2021 as recollected by Mr Brewer in his witness statement as follows (my underlining for emphasis):

> *"I am able to recall that <u>in discussions with Robert Macmillan in 2021</u> and 2022, I mentioned the possibility that Paymentology or Teya, would be interested in looking at potential partnerships or acquisitions".*

99. The omissions are surprising. Mr Macmillan during cross-examination maintained that GPS was the main driver for him and the Company when addressing what to do with Mr Yanpolsky as a shareholder because they were more engaged than Paymentology. In the light of the positive content of the 29 April email and the value of the investment/acquisition being discussed, it may be that trading arrangements with GPS were more advanced, but it is difficult to accept his evidence that he was not influenced by the Paymentology possibilities which appear to have arisen at least towards the end of 2021 and (even on the limited evidence provided) included potential acquisition.

100. There is a lack of evidence addressing these facts but two points are, in any event, plain. The first is that the Paymentology valuation concerning investment and possible

purchase must take into consideration the market not the balance sheet valuation of the Company's fixed asset, the Product. Second, on the balance of probability, it can't be realistic to think that Mr Macmillan would not have appreciated that the the Product had significant value until Paymentology discussed their investment in Box leading to the 29 April 2022 email.

101. This second point of "appreciation" is borne out by notes at the end of the 28 May 2022 email referred to below which record that it was Mr Macmillan (not Mr Brewer) who on 1 April 2022 proposed funding of *"£1.5m at £6m pre-money"*, The note also suggests that this led to the proposal recorded in the 29 April 2022 email having been put to Mr Macmillan that day. That conclusion is endorsed by an email from Mr Dow in response to the 29 April email in which his view of the proposal to invest £1.5 million at £6 million pre-money valuation was that it *"Seems reasonable"*. He was not taken by surprise and did not express any form of astonishment that might have been expected had he been contrasting it with the valuation relied upon for the offers to purchase Mr Yanpolsky's remaining shares. Mr Dow was also concerned to raise the issue of the repayment of his loans.

102. The following from Mr Brewer's witness statement is also to be noted concerning the attitude adopted towards Mr Yanpolsky:

> *"Mr Macmillan told me that GPS would not work with Box, because Box had a connection with Mr Yanpolsky. I too knew about Mr Yanpolsky's criminal conviction for hacking into GPS's systems. So I explained that we would not work with Box either if Mr Yanpolsky was one of Box's shareholders or involved in any way with Box. 9. In addition, Mr Yanpolsky had previously made a civil claim against Paymentology in the Kingston County Court under case number F4QZ1A7G. 10. Therefore, Teya and Paymentology would not work with Box if it was connected in any way with Mr Yanpolsky. Teya [formerly callled SaltPay] and Paymentology would be interested in acquiring the assets of Box, or the shares in a new legal entity to include the Box assets, but not if it was in any way associated with Mr Yanpolsky."*

103. In an email from Mr Macmillan sent to Mr Dow on 27 May 2022, setting out details of a more advanced proposal being negotiated with Mr Brewer, he wrote that: *"On the downside, SaltPay consider valuations have crashed and £6m pre-money is not realistic (especially given limited revenue)"*. A further email the next day records that £3 million pre-money was the new figure and that Mr Macmillan thought a counteroffer should be put to Saltpay. That included:

> *"Investment: £1.4m Pre-money Valuation: £4m SaltPay post-money shareholding: 26% Cap Table after investment: Rob: 49.38% Colin: 19.76% SaltPay: 25.93% Share Options: 4.94% ...*
>
> *Optional purchase of oustanding BOX shares - SaltPay have the option to purchase remaining BOX shares in 12 months for min price of £4m ... 25% in cash and 75% in Saltpay shares ...".*

104. Negotiations continued and by 26 June 2022 the transaction became the purchase of assets either directly by Paymentology or by a new company to which the assets had

been assigned. The final offer received on or about 6 August was described by Mr Macmillan to Mr Dow as not *"great, but ... it could be worse"*.

105. By September 2022 Ms Wakefield of Edmund Carr, Accountants, became involved and gave tax advice. She describes the position as follows in her statement:

> *"I was advised at that time by Mr Macmillan that an offer had been made to acquire the business of Box Processing Limited, but that the buyer did not want to acquire the shares of Box Processing Limited because of the company's association with the Claimant, Mr Vladimir Yanpolsky, who was a previous director of the company.*
>
> *I was advised by Mr Macmillan that the Claimant was serving a prison sentence for computer hacking and that the buyer was not prepared to buy a company that had connections with a convicted criminal as this would not be good for their business. Because of this, the sale of the business had to be structured in a way which allowed the assets of Box Processing to be sold to the third party rather than shares."*

106. The outcome (as simplified) was that a new company, Bookham Services Limited ("Bookham") was formed on 25 October 2022 and through share exchanges became the Company's parent. This occurred after the Company had purchased and cancelled Mr Yanpolsky's 10,000 (7 November 2022) and 1,389 deferred shares. On 14 November 2022, the Company's assets and liabilities were transferred and assigned to it for no consideration. The Company was a dormant subsidiary until 16 November 2022 when its shares were transferred to Fetcham, which had been formed on 7 November 2022 for the purpose of enabling Bookham to become a company no longer connected to the Company. Bookham's shares could then be sold at a consideration representing the value of what had been the Company's business (including its liabilities).

107. The purchase agreement for the sale of Bookham's shares between Mr Macmillan (10,000 shares), Mr Dow (4,001 shares) and Salt Pay is dated 7 December 2022. The consideration received by Mr Macmillan and Mr Dow can be summarised as follows: £250,000 cash; £550,000 to repay outstanding loans from shareholders; and £2,000,000 in SaltPay shares (in total £2,800,000, the transfer of those shares being deemed reduction in that sum of the purchase price for the Bookham shares). The shares and cash were to be apportioned: Mr Macmillan 832 shares and £177,500; and Mr Dow 340 shares and £72,500 cash. Apparently, there are restrictions upon the sale of the shares which are currently described by or on behalf of Mr Macmillan and Mr Dow as illiquid assets. In addition, Mr Macmillan was offered and accepted a service contract with Bookham.

108. The intention of Mr Macmillan and Mr Dow was that the Company would be struck off. This was prevented by this litigation and that has led to issues, but they need not be addressed. They take this matter no further.

I) Decision – First Issue - s.994

Ground 1: As a result of the Hidden Shareholder Agreement, "he retains and retained full equity" in the 8,611 and the 1,389 Shares and their deferment and/or expropriation was unfair and prejudicial to his interests as a member and shareholder.

109. The findings of fact, which need not be repeated, mean this ground fails. There was no Hidden Shareholder Agreement (as defined to include representation and/or understanding). The termination of Mr Yanpolsky's employment and the automatic deferment of his 8,611 Shares pursuant to Article 15 of the Original Articles occurred. That is a fact. It was not an exercise of "pure presentation". To advance the case of a Hidden Shareholder Agreement, Mr Yanpolsky had to present written and/or oral evidence establishing on the balance of probability that such an agreement was concluded or representation made and relied upon or understanding reached. The evidence does not do this. The evidence does not establish on the balance of probability that the work he carried out in prison, which the findings accept, was carried out pursuant to an agreement, representation or understanding that he *"retained his full equity in the Company"* and/or that his deferred shares would revert to ordinary shares upon the discharge of his sentence and/or release from prison.

110. It cannot be successfully argued that he continued to be an employee of the Company by reason of the substantial work carried out for the Company whilst in prison whether by reference to Article 2(c) of the Original Articles or otherwise. His employment was terminated. The decision to terminate has not been challenged and no-one suggests that the letter of termination he received was other than precisely that. There is no evidence to establish on the balance of probability a new agreement to employ him or to retain him as a consultant. The evidence fails to establish on the balance of probability that he carried out his work pursuant to a representation or understanding of similar affect.

111. The deferment of the 8,611 Shares complied with the binding terms of the Articles. There is no evidence to establish on the balance of probability an *"explicit term of the spoken variation that the shares of the Petitioner would be returned to him as ordinary shares or treated as ordinary shares as between the Petitioner and First Respondent, upon the discharge of his criminal sentence and release from prison"*.

Ground 2: Adoption of the Amended Articles was unfair and prejudicial to his interests as a member and shareholder and was a breach of the Hidden Shareholder Agreement.

112. This ground must fail insofar as it alleges breach of the Hidden Shareholder Agreement but the remaining allegation raises the issue of the inter-relationship between the following two principles:

a) That the majority shall not exercise their powers under a company's articles of association to oppress or otherwise to be unjust to the minority; and

b) The principle that the majority are and should be able to act in their own interests when exercising their powers in accordance with a company's constitution.

113. The first principle is an inherent restraint that can be analysed either as an implied contractual term or as an equity of the minority shareholders. The second principle reflects the fact that the articles of association are the constitution, the rules, of the company which represent the contract between the shareholders. If the rules permit the majority vote, the minority should accept it.

114. Those two principles were addressed by the then Chancellor in ***Re Charterhouse Capital Ltd*** (above) at [90] as follows:

> *"(1) The limitations on the exercise of the power to amend a company's articles arise because, as in the case of all powers, the manner of their exercise is constrained by the purpose of the power and because the framers of the power of a majority to bind a minority will not, in the absence of clear words, have intended the power to be completely without limitation. These principles may be characterised as principles of law and equity or as implied terms: Allen (above) at 671; Assenagon (above) at 278–280.*
>
> *(2) A power to amend will be validly exercised if it is exercised in good faith in the interests of the company: Sidebottom (above) at 163 (3) It is for the shareholders, and not the court, to say whether an alteration of the articles is for the benefit of the company but it will not be for the benefit of the company if no reasonable person would consider it to be such: Shuttleworth (above) at 18–19, 23–24, 26–27; Peters' American Delicacy Co (above) at 488".*

115. The issue of inter-relationship arises for the Petition in the context of a fundamental distinction between the first and second deferments of Mr Yanpolsky's Shares. In the case of the 8,611 shares, deferment occurred pursuant to the Original Articles which he had accepted as binding when he became a member of the Company. The 1,389 shares, however, were deferred pursuant to the Amended Articles. As is apparent from the findings of fact and will be expanded upon below, this occurred when the amendment was adverse to his interests but of benefit to the majority who voted. However, the shareholders had power given to them by the Original Articles to amend by special resolution, and therefore by majority. Absent the case of unfair prejudice, there is no challenge to the validity of the resolution once it is established that there was no Hidden Shareholder Agreement.

116. The law concerning the inter-relationship needs to be explored in more detail. However, in a nutshell, it depends upon whether the resolution passed is a resolution in which the Company has an interest. If it is, the majority can exercise their power even if it is beneficial to them and oppressive or even unjust to the minority provided, they do so in good faith and the decision is for the benefit of the company concerned. If it is not in the interests of the company concerned, however, they must not exercise a power to oppress or otherwise to be unjust to the minority. The issue of good faith and benefit to the company concerned do not arise because it is only the shareholders who hold an interest in the outcome. That principle can be found in the decision of the Court of Appeal in ***Re Charterhouse Capital Ltd*** (above) which now requires analysis to address its application to the Petition.

117. The headnote explains the case as follows:

> *"This was an appeal from an order of Asplin J ([2014] EWHC 1410 (Ch)) dismissing a petition pursuant to s.994 of the Companies Act 2006 claiming that the affairs of a company had been conducted in a manner unfairly prejudicial to the petitioner as a member of the company where, following an alteration of the company's articles of association, the issues included the propriety of the compulsory acquisition of the petitioner's shares in the company at what he claimed was a gross undervalue."*

118. At first glance this may appear to reflect the facts of this case but it is convenient here (albeit that it does not affect the legal principles being considered) to note the potential distinctions which can be drawn from the third holding:

> *"The amendments to the articles were valid. The judge found that there was no evidence of bad faith or improper motive and there could be no possible challenge to that finding. The amendments to the articles were in substance, as the judge had found, a "tidying up exercise", extending the protective condition in the articles and the exit provision in the shareholders' agreement that the non-purchaser shareholders holding a majority of the remaining shares must agree to the proposed sale. The amended drag provision also provided a mechanism by which, if any shareholder failed to transfer their shares to the buyer pursuant to a relevant sale, the buyer could request the directors to authorise some person to execute and deliver on behalf of the shareholder any necessary transfer in favour of the buyer. The changes made the articles clearer and more consistent, facilitated the transfer and registration of shares compulsorily acquired and were for the benefit of the company even if they also benefited the shareholders as such."*

119. As a matter of fact, the resolution to adopt the Amended Articles cannot be described as a "tidying up" exercise. It produced an extension of the contract between the shareholders which applied retrospectively to conduct which the members had previously not agreed to include as a sanction resulting in share deferment. It also extended the sanction to all of the ordinary shares not just to a proportion calculated in accordance with the Original Articles.

120. However, returning to law, the key point is that the Chancellor distinguished between decisions solely for the benefit of shareholders in which the company concerned had no interest from decisions which were or were also in the interests of the company. As to the former, a decision made in good faith in the interests of the company will not be invalidated despite it adversely affecting the minority of shareholders. This is explained by the Chancellor as follows:

> *"(5) The mere fact that the amendment adversely affects, and even if it is intended adversely to affect, one or more minority shareholders and benefit others does not, of itself, invalidate the amendment if the amendment is made in good faith in the interests of the company: Sidebottom at 161, 163–167, 170-173; Shuttleworth; Citco (above) at 210, 213; Peters' American Delicacy Co at 480, 486.".*

121. The Chancellor also explained the test as to whether the alteration of the articles was in the interests of the company as being whether the shareholders acting in good faith were of the view that it was for the benefit of the company provided this was not a resolution

to amend which no reasonable person could consider was for the benefit of the company. The Petition does not make such an allegation.

122. The Chancellor then addressed the position if the company concerned has no interest. The principle that the majority shall not exercise their powers under a company's articles of association to oppress the minority will apply irrespective of issues of good faith and improper motive addressing the interests of the company. The Chancellor explained it as follows within paragraph [90] of the judgment agreed to by the other two Court of Appeal judges (underlining for emphasis):

> *"(6) A power to amend will also be validly exercised, even though the amendment is not for the benefit of the company because it relates to a matter in which the company as an entity has no interest but rather is only for the benefit of shareholders as such or some of them, provided that the amendment does not amount to oppression of the minority or is otherwise unjust or is outside the scope of the power: Peters' American Delicacy Co at 481, 504, 513, 515; Assenagon."*.

123. That sixth principle is addressed further by the Chancellor at paragraphs [92-96] during which he emphasised:

> *"In the case of an amendment in which the company as an entity has no interest (which, as it happens, is not the present case) I would prefer to express the test as one which depends on the type of vitiating factors [oppression, appropriation of an unjust or reprehensible nature, and a purpose outside the scope of the power] described by Latham CJ and Dixon J in Peters' American Delicacy Co* [(1939) 61 C.L.R. 457] *rather than in terms of the benefit to the "corporators as a general body" or a "hypothetical member" as in Evershed MR's judgment in Greenhalgh [Greenhalgh v Arderne Cinemas Ltd [1951] Ch. 286]. That is the reason why I have expressed [90(6)] as I have."*

124. The Court of Appeal therefore drew the clear distinction between cases where the decision of the majority concerns matter(s) in the interests of the company and ones where it does not. Applying the facts in ***Re Charterhouse Capital Ltd*** (above), the Court of Appeal was satisfied that the *"tidying up exercise"*, as described, was in the interests of the company. The purpose was legitimate, in that it prevented a minority blocking a sale of the whole company. That was a scenario anticipated by the original articles which must have been intended to apply to such a situation. The amendment applied to all shareholders, the minority were protected sufficiently for the minority to have confidence that any resulting purchase of their shares would be on terms and at a price which were fair and proper. The amendments by making the articles *"clearer and more consistent and facilitating the transfer and registration of shares compulsorily acquired—were for the benefit of the company even if they also benefited the shareholders as such"*.

125. Therefore, on the facts of that case, the amendment was in the interests of the company and, as a result the principle that an amendment adversely affecting the minority will still be valid if made in the good faith in the interests of the company applied. The arguments to the contrary were largely rejected as being challenges to facts the trial judge was entitled to reach. However, they included a submission that in any event there was unfair prejudice (even when applying the sixth principle above) because the

enforced sale would be at a price significantly below real value for reasons expanded upon in the judgment of the Chancellor. Many of the arguments to support the submission failed as attempts to re-try the case on appeal. However, the Chancellor also said this:

> *"121. Aside from the issue of the remuneration model, I do not propose to address each of Mr Chivers' submissions on the valuation issue because the general answer to all of them is that each of the founders agreed in cl.7.2 of the shareholders' agreement that, if the founder majority agreed to pursue an exit, he would be bound to sell his shares "provided that the terms on which he is required to sell his shares are no less favourable to him than those being offered to any other shareholder". In other words, Mr Arbuthnott, as one of the founders, agreed that he would be bound by the price with which the founder majority was content .....*
>
> *126. The factual setting for the shareholders agreement was that the founders were, as the judge found, a group of sophisticated financial professionals with an intimate knowledge of the private-equity business. They had sufficient trust in each other to go into business together. It is perfectly natural that, in such circumstances, they would be willing to rely on the honest judgment of the founder majority as to what were fair and reasonable terms for a sale in the context of cl.7.2. In the light of the factual background to the shareholders' agreement, I consider that cl.7.2 contained an implied term that the founder majority would not agree to pursue an exit except on terms which they honestly considered to be fair and reasonable."*

126. It was unnecessary in context for the Chancellor to have to spell out the relevance of a fair and reasonable price when there was such a provision, and the resolution "only" required "good faith" because it was a decision in which the company had an interest. However, the importance of such a requirement is readily apparent and, indeed, it was of similar importance to Evershed MR in ***Greenhalgh v Arderne Cinemas Ltd*** (above) as referred to by the Chancellor, paragraph [93] of ***Re Charterhouse Capital Ltd*** (above).

127. Applying the principles of law established by the Court of Appeal to this case, the following conclusions are to be drawn:

a) The Petition does not allege that Mr Macmillan and Mr Dow when passing the resolution to adopt the Amended Articles acted in bad faith. Nor can it now be alleged as decided within the judgment delivered orlly on the first day of trial in respect of Mr Beaumont's informal application arising out of Mr MacGuinness's reliance upon ***Re Charterhouse Capital Ltd*** in his skeleton argument.

b) This second ground can only succeed if the vitiating factor(s) relied upon, oppression of the minority and/or unjustness, applies to a resolution in which the Company did not have an interest.

c) The submissions of law of Mr Beaumont (above) require expansion to add the sixth principle of the Chancellor (above), which in this context means that if the resolution was not in the interests of the Company and only in the interests of

the shareholders, the power to amend will not have been properly exercised if the amendment amounts to oppression of the minority or is otherwise unjust.

128. The Petition accepts that the amendment applied to the 1,389 Shares. There is a potential argument of construction that the amended Article 15 only applies from the date of its commencement (i.e. that it is prospective only) with the result that Mr Yanpolsky could not cease to be an "Employee" because he was not one at or after that date. This argument has not been advanced, but it draws attention to the point that this amendment is relied upon to effect past actions which were not at the time the subject of the sanction now introduced. It was not a sanction that Mr Yanpolsky had "signed up to" when becoming a member.

129. For the purpose of oppression, Mr Yanpolsky relies upon the fact that Mr Macmillan and Mr Dow intended the amendment to apply to him and to have the immediate effect of automatically deferring his remaining 1,389 Shares. The resolution was to his detriment and to the benefit of the majority who passed it. His detriment being that his shares became effectively worthless, and their transfer could be compelled. The benefit for the majority was that Mr Macmillan and Mr Dow became the sole members with voting rights and at their choosing could become the sole members should the deferred shares be bought for £1.00. This was a valuable outcome to them even based upon the share valuation they had already placed on Mr Yanpolsky's shares in their two offers to purchase. It was of real value based upon a valuation of the Company's fixed asset which led to the price they received for their Bookham shares in due course.

130. One counter to this, although understandably it did not appear to be maintained in submissions, was that offers to purchase had previously been made at a fair price and refused. This faces two fundamental problems. First, these were commercial offers to achieve a contractual result and there was no obligation upon Mr Yanpolsky to accept them or even to respond.

131. It is, of course, correct that in ***O'Neil v Phillips*** (above) Lord Hoffmann explained that an offer to purchase at a fair value was only relevant to costs (see 1106 B-H) but went on to opine (see 1106-7 H-E) that exclusion by a majority shareholder wishing to end the association may not be unfair if it is combined with a reasonable offer to purchase the shares normally without a minority discount. However, that does not mean that if a reasonable offer is made and rejected, the majority can then exclude unfairly and prejudicially without a reasonable offer being made at the time of exclusion.

132. Second, the offer was far from fair. First, it did not meet the requirements set out by Lord Hoffmann (see 1107 D-H). Second, I accept the evidence of Mr Isaacs with reference to his report to that effect. His opinion was unequivocal during cross-examination. That is not surprising. The valuation failed to address the true commercial value of the Company's fixed asset.

133. The real counter was that the resolution to adopt was in the interests of the Company in the context of the effect of Mr Yanpolsky's criminal conviction upon the Company. That being so, the resolution to adopt can only be challenged if bad faith is alleged, and it is not. If it had been, they would have relied upon the evidence concerning the facts that the Company was in financial difficulty and could not progress through trade or investment or even sale without Mr Yanpolsky's removal as a shareholder because his criminal conviction tainted the Company's goodwill.

134. I accept that an amendment extending the automatic deferment provisions to criminal convictions might be in the interests of a company depending on the facts and all the circumstances. If so, that would leave the test of good faith. That does not, however, give carte blanche to the majority to pass a resolution in a form which includes terms that result in oppression of the minority or is otherwise unjust if those terms are only relevant to the interests of the shareholders not the company.

135. Article 15 and the associated articles of the Original Articles could have been amended in the interests of the Company to provide, as they did, for deferment by reason of conviction. This amendment also provided, however, that the deferment would result in the shares having a nominal value and being the subject of compulsory transfer for nominal value. That part of the amendment was not a matter of interest to the Company. The price to be paid to Mr Yanpolsky and the financial gain for Mr Macmillan and Mr Dow were matters only of interest to the shareholders.

136. In those circumstances the issue is whether those provisions as to value and transfer were oppressive and/or unjust to the minority. The retrospective nature and the obvious benefit gained by Mr Macmillan and Mr Dow as the majority shareholders shine out as a paradigm example of a resolution that by its inclusion of the provisions as to value and transfer in the interests of the majority shareholders alone breached the inherent restraint of the principle that the majority shall not exercise their powers under the articles of a company to oppress the minority.

137. It is clear that the amendment could and should have provided that the deferred shares would have and could be transferred at a fair and reasonable price. If support for this is needed, reference back can be made to the emphasis of the Chancellor and of Evershed MR (see above) upon the importance of ensuring that the majority *"would not agree to pursue an exit except on terms which they honestly considered to be fair and reasonable."* That quotation from the Chancellor's judgment in ***Re Charterhouse Capital Ltd*** (above) is apposite. It reflects the fundamental principle that the majority should not exercise their powers conferred by the articles of association to oppress or otherwise to be unjust to the minority.

138. I conclude, therefore, that the resolution to adopt the amendment for Article 15 of the Original Articles to the extent that it applied retrospectively to Mr Yanpolsky and would enable Mr Macmillan and Mr Dow to expropriate his 1,389 Shares for £1.00 was not in the interests of the Company and was an unfair and prejudicial act.

139. When reaching that conclusion, I have considered whether this has been properly pleaded. Although there should have been express wording to the effect that the above-mentioned implied term or equity have been breached and impinged, the Amended Petition makes plain that the case is founded on unfairly prejudicial conduct caused by the amendment of the articles to the obvious detriment of Mr Yanpolsky. The Amended Defence shows this was appreciated and there is nothing unfair in the context of the litigation to prevent that conclusion being reached.

140. That means it is unnecessary and, indeed, it is irrelevant to address the concerns raised within the findings of fact concerning Mr Macmillan's and Mr Dow's knowledge of the real value of the Company whether because of their knowledge of the Product alone or as a result of acquisition discussions with Mr Brewer of Paymentology which he had *"with Robert Macmillan in 2021 and 2022 ... [when he] mentioned the possibility that*

Paymentology or Teya, would be interested in looking at potential partnerships or acquisitions". Also it is unnecessary to dwell on the fact that neither offer to purchase Mr Yanpolsky's 1,389 Shares referred to those discussions nor to the need for any valuation to consider them or for Mr Yanpolsky to be aware of them give him a fair opportunity to assess the value of the offers.

141. I accept Ground 2 has been proved on the balance of probability.

Ground 3: The subsequent, purported passing on 7 March 2022 of a special resolution to convert his 1,389 ordinary shares to deferred shares was invalid. The required 75% majority was not achieved when Mr Yanpolsky retained his equity in the 8,611 ordinary shares pursuant to the Hidden Shareholder Agreement together with his 1,389 ordinary shares. As a result, but even if legally valid, the voting for and implementation of the resolution was unfair and prejudicial to his interests as a shareholder.

142. This ground insofar as it relies upon invalidity fails because of the decision that there was no Hidden Shareholder Agreement. The ground that the resolution was not in his interests as a shareholder repeats the issue of oppression addressed in "Ground 2". To address it further would effectively be tautologous. The outcome is the same.

Ground 4: The transfer of the Company's business (assets and liabilities) to "newco" and the later sale of "newco's shares" owned solely by Mr Macmillan and Mr Dow was unfairly prejudicial to his interests as a member and shareholder.

143. The transfer of the Company's business stems from the Amended Articles deferring his 1,389 Shares. It is a matter to consider when applying the remedy of ***s.996 of the Companies Act 2006***.

J) Decision – Second Issue - Remedy, s.996

144. Addressing Mr Beaumont's submissions of law, the starting point is to consider whether Mr Yanpolsky's conduct concerning his criminal conviction and the alleged placing of the business in jeopardy should lead to the conclusions that the adoption of the Amended Articles was not unfair or that he has brought the prejudice upon himself or that the court should decide not to grant relief.

145. In my judgment it would be wrong for me to reach that conclusion when the true mischief was not the adoption of an article extending Article 15 to criminal convictions but the adoption of such an article without ensuring that any subsequent compulsory transfer would be at a fair and reasonable price. That should have been the approach taken by Mr Macmillan and by Mr Dow and the court should not in effect reach a different conclusion in practice by leaving Mr Yampolsky without a fair and reasonable price. Whilst it is obviously true that none of this would have occurred but for Mr

Yanpolsky's conviction, the shareholders had signed up to the Original Articles which left him with the 1,386 Shares. It was only the decision to amend Article 15 in the form adopted which resulted in his 1,386 Shares becoming deferred and subject to compulsory transfer for £1.00.

146. In those circumstances the remedy should restore him to the position he would have been in had the Amended Articles provided within article 15 for his shares to be transferred if compulsorily transferred for a fair and reasonable price. I do not consider it appropriate to decide that Mr Yanpolsky's conduct should otherwise affect that relief because it achieves restoration to what should have been the position.

147. The parties agreed a single joint expert and neither side applied (as permitted by directions) for a split trial. Mr Isaacs was instructed to provide opinion as to the market value of the 1,389 Shares (assuming total issued share capital of 15,390 ordinary shares) in February 2022, March 2022, December 2022 and as at the date of his report on the alternative bases that a minority discount does and does not apply. His conclusions were based upon accounts for the Company for the three years ended 31 May 2022 and the forecasts provided. His calculations on the basis of the Company's discounted cash flows are:

		Discount rate		Valuation
	Paragraph	50%	70%	(midpoint)
	reference	£'000	£'000	£'000
February 2020	5.9.1	4,148	2,433	3,291
February 2022	6.6.1	3,803	1,413	2,608
March 2022	7.3	4,025	1,573	2,799

148. He took into consideration his opinion that:

> *"The valuations in the table above are broadly consistent with:*
>
> *i) the implied valuation of £1.4million when Mr Dow originally acquired his shares in the Company in 2019, at which time I would expect its value to have been less than the figures in the table above because of the Company's infancy; and*
>
> *ii) the figure of roughly £3million which SaltPay paid to acquire the business and assets, albeit that a significant element of that value was in illiquid non-voting shares."*

149. He also opined:

> *"the values set out in the table … above could only have been achieved if a significant element of the consideration was deferred over an extended period of time and was contingent on future performance. I consider it highly unlikely that these values could have been realised from a cash purchaser, not least*

> *because at each of the valuation dates the Company had generated little revenue and its product was relatively untested in the market.*
>
> *In other words, the extent to which the value of the shares could have been realised would have been significantly lower if a purchaser was required to pay an upfront sum in cash."* ("the Deferred Consideration Issue")

150. The Petitioner sought to argue for a valuation higher than £2.8 million based on the anticipation that this would be established by cross-examination of Mr Isaacs. There is no suggestion in closing that this anticipation was realised, it was not pursued and that is a realistic approach. As a result it is unnecessary to address the arguments raised in cross-examination which were rejected by Mr Isaacs.

151. Mr Beaumont in his skeleton argument objected to the use of forecasts on the basis that they are *"highly speculative"*. He also described the premise of growth of revenue as *"imaginative"*. These are arguments without the support of expert opinion. They are also made in the face of my assessment of Mr Isaacs and the failure to make inroads when seeking to challenge his opinion during cross-examination. In addition, they are at odds with the features of consistency in particular with the sale to SaltPay. Based on closing submissions, I do not understand this conclusion to be in issue and, therefore, need not develop it further.

152. This brings into play the further argument on behalf of Mr Macmillan and Mr Dow that the SaltPay transaction was only available because Mr Yanpolsky ceased to be a shareholder. One of the ways Mr Beaumont puts it is: *"It must not be forgotten that a hypothetical sale of the Company in such a scenario would have been with P, a criminal hacker, still in situ. If so, the company would not have been capable of being sold to Salt Pay at all, as the evidence shows."* In addition, Mr Beaumont in his skeleton argument submitted that *"the forecasts were predicated on all of the founders and directors being and remaining men of good character. They did not reflect the criminal conviction of one of them for computer hacking, nor the reaction to that event of a very limited, niche marketplace for gaining new custom"*.

153. I do not accept that approach. It is a fact that Articles 7 and 15 of the Amended Articles were activated not only by deferment but by the compulsory transfer of Mr Yanpolsky's shares. He only received (in principle perhaps) £1.00 for that transfer when he should have received a fair and reasonable price. A fair and reasonable value will be based upon the value of the shares in the context of the value of the Company assuming a hypothetical willing seller and buyer. In this case the buyer, who would be Mr Macmillan and Mr Dow, would be negotiating their purchase price on the bases of the value of the Product, the current and future income to be received, and the current and future net profit (i.e. including consideration of debt) as those future factors affect the value of the shares being sold. They would be adding to their shares in the circumstance of Mr Yanpolsky no longer being a shareholder in the future. Those negotiations are clearly hypothetical but that is why the opinion of the expert is to be relied upon to provide a valuation at the relevant date.

154. That valuation is based on the Company going forward without Mr Yanpolsky as a shareholder. Therefore, in the context of the hypothetical purchasers adding to their shareholdings in circumstances of the Company's goodwill not being affected by the continuing membership of Mr Yanpolsky. There is no expert opinion to the effect that

Mr Yanpolsky's past membership would continue to taint the value. That is unsurprising and accords with the evidence that the reason for his removal was to achieve a growth in the customer basis and/or investment and/or sale. There is no suggestion that the "clean break" intended would not be effective and, indeed, it was.

155. Mr Beaumont's skeleton argument contends instead that the rationale of Mr Isaacs's report is (wrongly) that Mr Yanpolsky should not have been dismissed and the dismissal was prejudicial. It is not. The rationale is that Mr Yanpolsky should have been entitled under the Amended Articles to receive a fair and reasonable price following the compulsory transfer of the 1,389 Shares. It is not the case, as the skeleton argument proposes, that correction of the prejudicial outcome requires Mr Yanpolsky to be treated as a continuing shareholder. Whilst there is still a discretion for the court to reduce the valuation taking into consideration conduct, for the reasons set out above I do not consider that appropriate.

156. That rationale leads to the conclusion that the date of valuation should be as near as practical to the date Mr Yanpolsky's 1,389 Shares were transferred. Mr Isaacs's nearest valuation is for March 2022 which ties in with their classification as deferred shares on 7 March 2022 and the resolution to transfer them to Box EBT on 24 March 2022.

157. There is fall back argument that Mr Yanpolsky had in any event to transfer his shares upon cessation of his employment pursuant to clause 20 of his service contract. For that to have effect, there was first to be a board resolution that terminated the contract under clause 17. In this case (in summary) on the ground that his conduct resulting in and including his conviction has in the opinion of the board brought into serious disrepute or has prejudiced or may prejudice the business or affairs of the Company. Further or alternatively that he has been convicted of a criminal offence that in the reasonable opinion of the board materially affected his ability to perform his duties. It is then provided in clause 20 that "any qualifying or nominee shares [he held] in connection with [this employment]" are to be transferred *"to the Company or such other person as the Company may direct"*.

158. The term *"qualifying or nominee shares"* has not been defined and there is no reference in the contract to Mr Yanpolsky being entitled at any time to receive shares as an employee. This is a provision that has not been argued further but the 1,389 Shares were not provided in connection with his employment but as "Founder" shares. This would explain why the Original Articles had to be amended, why the Company relied upon Article 15 of the Amended Articles of Association, why clause 20 does not apply and why it is not relied upon for the purpose of submitting that the Petition should be dismissed (as summarised in paragraph 3 of the skeleton argument, although noting paragraph 28).

159. Mr Isaacs' pro rata midpoint valuation of a 9.03% shareholding without a minority discount as of March 2022 is £253,000. I accept this evidence subject to three matters.

160. The first is Mr Isaacs's response number 15 to the questions asked of him on behalf of Mr Macmillan and Mr Dow:

> *"15. The "target return rate" is intended to reflect risk. Professor Damodaran's 2009 report, refers to a target risk rate of 50%-70% across start-ups. In 1998, the data group that FinTech would have fallen into, has the highest failure rate.*

This reflects more recent estimates of failure rates for Fintech. In addition to the failure rate above, the business:
• had a founder in prison and key potential clients that would not work with us because
of that;
• missed all revenue and growth targets by substantial margins;
• was being kept alive by drip-fed monthly cash;
• the existing investor's last investment in Feb 2021 took the "capitalised value" of the company from £1.4M to £923K.
Given the high failure rates for SAAS and Fintech businesses, surely the "Target rate" for this SAAS/Fintech would be the upper 70 per cent, rather than a very generic "catch-all" midpoint?"

Reply:

I agree, albeit that my valuation specifically excludes consideration of the first of these bullet points."

161. That question and response do not address the question of valuation in the context of the relationship and discussions between Mr Macmillan and Paymentology which started, as stated by Mr Brewer, in 2021 or the fact that these discussions were not disclosed to Mr Yanpolsky when offering to purchase his shares. There may be an issue not only as to the application or to the extent of the application of this part of his opinion (in particular) in the light of Mr Macmillan and Mr Dow being the purchasers and having an open channel with a potential investor/purchaser and/or customer as set out in the findings of fact. Neither matter has been considered in submissions but the findings of fact concerning the dealings between Mr Macmillan and Paymentology ("the Paymentology Issue") may have potential relevance to this target rate reduction.

162. The second matter is whether there should be a minority discount ("the Minority Discount Issue"). Mr Isaacs, applying guidance of the Association of Chartered Certified Accountants, opined that, if so, the discount should be 67.5% reducing the £253,000 valuation (assuming this should be used) to £82,000.

163. No submissions were made on the law or its application to the circumstances of this case. Helped enormously by "Hollington Shareholders' Rights" and with specific reference to the judgment of the court by Birss LJ in ***Re International Automotive Engineering Projects Ltd, Dodson v Shields*** [2023] EWCA Civ 1391 it is clear that I should approach the issue on the following bases:

a) The discretion is a wide one with the purpose being to value the successful Petitioner's shares "to put right and cure for the future the unfair prejudice … suffered" by providing a fair and equitable remedy (see the words of Oliver LJ in ***O'Neill v Phillips*** [1988] B.C.C. 405 as endorsed by Birss LJ at [115 and 119]).

b) Each case will depend upon its own circumstances not whether it is or is not a quasi-partnership case, although the existence of a quasi-partnership is likely to be a relevant circumstance. *"In many cases no discount will be an appropriate remedy for unfairness irrespective of whether or not the relationship was a*

quasi-partnership, but in other cases may be appropriate." (see Birss LJ at [116]).

c) Reasons why it may be fair not to apply a minority discount may include a decision that the majority shareholders should not be unjustly enriched as a result (see Birss LJ at [116]).

164. However, returning to the theme of litigation being an adversarial process, I must pause here. It is not right for a Judge to identify the relevant law and circumstances to be considered, identify and debate with himself the respective merits of each side's case within the framework of that law and those circumstances, and then to reach a decision from that process without the input of the parties through their counsels' submissions. For example, it is not unreasonable to anticipate that submissions will bear in mind the approach reached by Fancourt J., obviously on different facts, in ***Re Edwardian*** (above at 637-651). To take any other course would be to open the way for an appeal.

165. The third matter is the Deferred Consideration Issue. This too was not addressed in submissions. Its outcome is dependent upon knowing the value which would otherwise be paid.

166. I also note that the Paymentology Issue may be entwined with the Minority Discount Issue and/or the Deferred Consideration Issue whether for its own or their purposes. The parties should have the opportunity for submissions to be made. I stress, however, that the Paymentology Issue is raised on entirely neutral terms for the parties to consider and, for example, should they so choose, accept or submit that the Paymentology Issue is irrelevant.

167. In reaching that decision, I understand that the parties will not want to incur further costs but the answer to that is to settle now they have the decision subject to a final valuation addressing the three issues. My decision, therefore, and absent settlement, is to adjourn the issue of relief to a further hearing with directions to be agreed between counsel to enable submissions on the Paymentology Issue, the Minority Discount Issue and the Deferred Consideration Issue.

K) Conclusion

168. In summary I have found the requirements of ***s.994*** have been met but only in respect of the 1,389 Shares. The resulting remedy cannot be resolved without submissions upon the Paymentology Issue (potentially), the Minority Discount Issue and the Deferred Consideration Issue. A further hearing is required for that purpose but can be avoided by settlement, which is very much encouraged.

169. If not, for the purpose of the order to be made upon handing down, to be drafted by counsel on the basis of the paragraph above, I suggest the Petition is adjourned on terms that the time for appeal/permission to appeal concerning the decisions reached is extended in the usual terms until further order at or following the further hearing. If required there should be provision for lodging dates to avoid with time estimates for the adjourned hearing. Order Accordingly