Neutral Citation Number: [2023] EWHC 1800 (Ch)

Case No: CR-2020-002648

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF MITT WEARABLES LIMITED (CRN.11026507)
AND IN THE MATTER OF THE COMPANIES ACT 2006

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

Date: 19 July 2023

Before :

ICC JUDGE PRENTIS

- -

Between :

BENJAMIN KARL LAKEY	**Petitioner**
- and -	
1. NATHAN LEVI ASHLEY JORDAN MACABUAG **2. NICHOLAS EVERARD MELLOR** **3. ~~HUGH SEYMOUR WOLLEY~~ (discontinued)** **4. MITT WEARABLES LIMITED** **5. KOALAA LIMITED**	**Respondents**

- -

Stephen Hackett (instructed by Candey Limited) for the Petitioner
Matthew Parfitt (instructed by Advocate with Mayer Brown International LLP) for the First Respondent
Simon Goldstone (instructed on a direct access basis) for the Second Respondent
William Clerk (instructed by Laytons LLP) for the Fifth Respondent

Hearing dates: 16-19, 22-24, 26 May 2023

JUDGMENT

ICC JUDGE PRENTIS

Introduction and overview

1. During the conversations before Nathan Macabuag invited Benjamin Lakey to join him as a co-founder of Mitt Wearables Limited ("Mitt"), Mr Macabuag told him a story. In its condensed form, given in cross-examination, it was of Jesus "riding on a donkey and everyone is sort of like applauding because they're happy that Jesus is coming back. So this donkey is walking into town, it's full of a crowd of people, and this donkey is thinking 'Yeah, wow, all these people for me, wow'. And the moral of the story is, obviously: don't be an ass: it's not you; it's what you're carrying; it's the idea".

2. Mitt had been incorporated to develop and sell the idea, a new type of medical prosthesis, known as "the Mitt", which would be far cheaper than existing alternatives, and was perceived as offering the possibility of being fitted without clinics, and hence of being sold direct to users. The idea was Mr Macabuag's, developed during his studies in mechanical engineering at Imperial College, London ("Imperial"), during which he "fell in love" with the story and character of Alex Lewis, who had lost all limbs to septicaemia and was now offering himself to students not only as an inspiration, but as a human test model. Mr Macabuag was enthused by the possibility of using his own talents to be useful to Mr Lewis and others. He was not the only one working on the idea: three others were with him at Imperial, and Mitt was incorporated on 23 October 2017 by himself and one of those, Joshua Chidwick. Mr Chidwick left amicably to pursue other matters, and on 15 March 2018 transferred his shares to Mr Macabuag and ceased to act as a director.

3. The next day Mr Macabuag and Mr Lakey met for the first time. Mr Lakey is Canadian, with a degree in mechanical engineering from the University of Alberta. From there he had joined a company in Canada as a project co-ordinator and manager in the fields of mining and construction, before moving to Imperial to study for an MRes in "medical device design and entrepreneurship", focussing on clinical research and commercial exploitation in prosthetics; the only such course in the UK. "I was taught how to start and grow a company in a heavily regulated and clinical environment". At the time of meeting Mr Macabuag, Mr Lakey was setting up a clinical evaluation of control software for his project on myoelectric control for prostheses. The idea resonated with him: his sister was to undergo a below-knee amputation later in 2018.

4. By May 2018 Mr Macabuag and Mr Lakey were working together on Mitt, and from July 2018 were sharing desk space at Imperial's "Advanced Hackspace". Mr Lakey was appointed a director of Mitt from 26 June 2018, an office he held until 20 December that year, and was re-appointed on 21 March 2019; the hiatus was owing to his immigration status. He also came to be a shareholder under a 20 August 2018 Founders Agreement; and an employee under a 12 September 2018 Employment Agreement.

5. In Autumn 2018 two important events in the development of Mitt occurred. Through the Hackspace Mr Macabuag and then Mr Lakey met Nicholas Mellor, who agreed to become a formal adviser. Mitt also won the People's Choice award in the 2018 Royal Academy of Engineering ("RAE") Launchpad Awards, sponsored by the Gammon family and intended to assist student engineers with money and connections. They were thereby introduced to David Gammon, who by co-incidence was a friendly acquaintance of Mr Mellor's.

6. These were important because Mitt was never going to get anywhere without significant investment which would permit the product's further development and trialling, leading, as was hoped, to its being marketed for the benefit of all.

7. Mitt signed off an agreed summary term sheet with its new investors on 21 March 2019. On 2 April 2019 its Articles were amended, and it and they entered into a Subscription and Shareholders' Agreement (the "SSA") drafted by Taylor Vinters. Mr Mellor was appointed as a non-executive director on 5 April 2019. His wife, Amanda, was one of the investors; the others were Jeffrey Berman, William Hobhouse, Chris Pinnington and Rockspring Nominees Limited, which was the vehicle for Mr Gammon and Huw Jones. £300,000 was raised. A second funding round was anticipated to commence in January 2020, with closure in April 2020. Mitt was not expected to be financially self-sufficient before then.

8. Shortly after the first funding round the relationship between Mr Macabuag and Mr Lakey commenced its decline to a position of unworkability. The ins and outs were covered in trial and will be recorded below, although they have become largely immaterial. By the end of September 2019 Mitt was taking advice from Taylor Vinters as to the removal of Mr Lakey, as director and employee; and on 8 October he was suspended on allegations of misconduct. After correspondence between Taylor Vinters and Withers, whom Mr Lakey had instructed, on 22 October Sophia Berry, a barrister of Littleton Chambers, was instructed by Mitt to investigate the

allegations. She produced her report on 16 December, finding some of the allegations made out and determining that Mr Lakey had committed "serious breaches of duties or obligations that he owes to the Company" in their respect, and as to a post-suspension accessing by him of Mitt's Google Drive. Mr Lakey had already rejected the terms of a settlement letter handed to him on 8 October, and those of a letter of 14 October; and he rejected those in another letter of 17 December. On 19 December his employment and directorship were terminated by letter. However, Mitt accepting that the latter was irregularly carried through, his directorship was restored until termination by shareholder resolution on 28 August 2020. This unfair prejudice petition under section 994 *Companies Act 2006* ("CA06") had already been presented, on 2 June.

9. It is the position of Mitt, and of Mr Macabuag and Mr Mellor as respondents to the petition, that the effect of Mr Lakey's removal as employee was that under the Articles he was to be characterised as a Bad Leaver, and as such his shares were automatically converted into Deferred Shares carrying no dividend rights and a total value of a penny.

10. On 3 March 2020 Mr Macabuag incorporated the fifth respondent to the petition, Koalaa Limited, of which he has been sole director throughout. During April and May 2020 the investors in Mitt received proportionate allotments of shares in Koalaa; and on 6 May 2020 Mitt and Koalaa entered a "Licence of intellectual property and asset purchase agreement" (the "Licence"), whereby Koalaa obtained Mitt's fixed assets, being office equipment, tools and stock, and access to its business records; licensed its IP; and became the TUPE-transferor of Mitt's employees. Mitt's remaining asset of value is its right to the fee payable under the Licence.

Mr Lakey's case

11. Mr Lakey's case has been pleaded at extraordinary length. The parties' statements of case in all exceed 400 pages, even allowing for the duplication consequent on Mr Macabuag's and Mr Mellor's becoming separately represented. They contain more factual details than the witness statements. Mr Lakey has a mind for detail, which may have infused his petition, by trial in re-amended form, his painstaking reply, and the Part 18 requests and information.

12. In his written evidence, Mr Lakey says this:

"On 8 October 2019 I was suspended from Mitt following false allegations that I had committed misconduct. I believe that these accusations were orchestrated to remove me from Mitt and strip me of my valuable shareholding, following which Mitt's business, its opportunities and corporate property were diverted to Koalaa… a company that was set up as a mirror image of Mitt, but in which I have no shareholding".

13. The summary of his case given in the petition is that it "is to be inferred" that his suspension "as a result of allegations that he had committed misconduct", and "the Respondents' subsequent conduct", were "in furtherance of a pre-meditated and deliberate scheme to which the Respondents were party". The scheme was to "exclude the Petitioner from Mitt and strip him of his valuable shareholding unlawfully and unfairly, and thereafter to appropriate the business, opportunities and other corporate property of Mitt and/ or which should have been applied for Mitt's benefit to a new vehicle, Koalaa, unlawfully and via serious breaches of Mr Macabuag and Mr Mellor's fiduciary duties".

14. There was a clear initial difficulty with this, in that Koalaa was only incorporated latterly. By re-amendment it was said that it "acceded to the scheme upon its incorporation". Such contention fails to explain what the appropriation part of the scheme was said to be before that point; likewise the later averral by re-amendment that its incorporation was "in furtherance of the scheme/ conspiracy".

15. Mr Lakey was doubtless shocked by his removal. The scheme was his explanation to himself. In his submissions to Miss Berry he presented an early iteration:

"I believe Nicholas had a plan from the beginning of his tenure as the company chairman to remove me from the company so Nicholas could proceed with his agenda of adding one of his contacts as an executive in the business, and to release my shares back into the company for the next investment round, so that Nicholas' wife's ownership of the company does not get diluted".

In cross-examination he adjusted the start date of the plan to "quite early on" in Mr Mellor's involvement; and identified the contact as Ewan Phillips, a contact of Mr Mellor's and Mr Gammon's; albeit that Mr Phillips was only to join Mitt in January 2020, many months after the plan's apparent genesis. Mr Phillips was Mitt's interim chief commercial officer until March 2020, but not a director. He joined Koalaa as CEO, but again not as a director; and negotiated the Licence on its behalf.

16. The petition proceeds to give elements of the scheme and Mr Lakey's other claims.

16.1 The allegations made against him were "demonstrably false": Mr Lakey "had not committed any misconduct", yet was dismissed as employee and purportedly removed as director on 19 December 2019 "following a deeply flawed investigation into his conduct", which came to "seriously and obviously incorrect conclusions", and is said to have been a "sham".

16.2 His "valuable ordinary shares" were redesignated to "substantially worthless deferred shares as a result of a shareholders' ordinary resolution proposed by Mr Macabuag and Mr Mellor as directors".

16.3 His removal as a director was "unlawful, ultra vires, and a nullity" as the power invoked related only to his contract as employee.

16.4 As he was wrongly removed, the provisions of the Articles and SSA which re-designated his shares were inapplicable.

16.5 He was deprived of his rights as director until his removal on 28 August 2020; Mr Lakey ought to have been able to vote his shares on that resolution; and had he done so it would not have passed, as he and Mr Macabuag would have held equal shares; and as Mr Macabuag was the only voting shareholder "it is to be inferred that no other shareholder of Mitt was willing to vote their shares in support of the resolution".

16.6 As there was no misconduct, and the investigation was flawed, he ought not to have been dismissed as an employee either.

16.7 Before, as a result of, and following Mr Lakey's exclusion, Mr Macabuag and Mr Mellor "committed a number of breaches of their contractual, fiduciary and other duties to Mitt and/ or in the case of Mr Macabuag under the [SSA]", which have "caused serious harm to Mitt's business and imperilled its future prospects". Those include "the apparent wholesale misappropriation and/ or unauthorised transfer of Mitt's business (save for its intellectual property), together with the diversion of fundraising and other business opportunities properly belonging to Mitt to Koalaa, an entity in which neither [Mr Lakey] nor Mitt has any interest but Mr Macabuag does". Those misappropriations or transfers are said to be "in an apparent attempt to, in effect, avoid the consequence of this litigation for Mitt and/ or defeat any remedy or enforcement action against it".

16.8 Mitt is said to have been a quasi-partnership company in which Mr Lakey "had a legitimate expectation of participation in management and to receive the information necessary for him to do so".

16.9 By re-amendment, as Mr Macabuag is its sole director, Koalaa is said to have his knowledge attributed to it; it has furthered the scheme by its receipt of Mitt's business, property and opportunities; and is a knowing recipient of the same.

17. Among the summation of the unfair prejudice claim at the petition's end, and in its premises, is that "the affairs of Mitt have been conducted by [Mr Macabuag and Mr Mellor] so as to irrevocably destroy the relationship of mutual trust and confidence" between Mr Macabuag, Mr Lakey and the investors in Mitt, or alternatively between Mr Macabuag and Mr Lakey.

18. Also in all the premises pleaded in the previous paragraphs of the petition it is said that:

"the actions of Mr Macabuag and/ or Mr Mellor have not been prompted by any proper business considerations or any solicitude for the welfare of Mitt, but have been at all times designed to benefit their sectional interests as shareholders and/ or prospective shareholders and/ or those involved with Mitt's business, and/ or constituted breaches of duty, to the detriment of the Petitioner and Mitt".

19. That extravagant case, settled by junior and, in re-amended form, leading counsel, no doubt reflected Mr Lakey's instructions.

20. In the hands of Mr Hackett, who was not that junior counsel, and whose adept and considered approach is to be commended, the case had by closing undergone substantial renovation.

21. As this is a point which speaks to Mr Lakey's character and reliability as a witness, it ought to be traced through in some detail.

22. Mr Hackett's skeleton drew out elements of the scheme rather than parade the scheme itself.

22.1 "Mr Macabuag ultimately turned on Mr Lakey and worked in secret with Mr Mellor to exclude him from the business. This exclusion was achieved by Messrs. Macabuag and Mellor in a matter of days by suspending Mr Lakey on transparently confected disciplinary allegations".

22.2 By the end of September 2019 it was "eminently obvious… that Messrs Mellor and Gammon were interested in removing Mr Lakey because of the commercial strategy that he wished to pursue".

22.3 By the beginning of October, the "fact of Mr Lakey leaving Mitt was… evidently being treated as a foregone conclusion". That was despite advice from Taylor Vinters on 1 October and on 27 October that Mr Lakey could not be removed as director without an amendment to the Articles and SSA. The 1 October advice was also that the process was two-staged: investigation followed by a possible disciplinary process, which in the event was not engaged.

22.4 The investigation was "conspicuously flawed both procedurally and substantively. The (foregone) conclusions of that investigation were used, without legal rationale, to purportedly terminate Mr Lakey's employment, directorship, and entitlement to ordinary shares".

22.5 The transfer to Koalaa was "so as to allow the business formerly run by Mitt to be run by Koalaa. This was done to protect the investors' further investments in the business from an adverse judgment in litigation brought by Mr Lakey (i.e. this litigation)".

23. The skeleton accepted that Mr Lakey could never again work with Mr Macabuag or Mr Mellor "and that (even through no fault of his own) his involvement in the business that he co-founded and worked hard on, is over. However, Mr Lakey cannot accept being deprived of the value of his shares…". In the certificate provided to the Court under its initial directions, Mr Lakey professed belief that his shares were worth £1.5m, a figure apparently derived from the proposed second funding round valuation of £5m, and his holding a 30% stake.

24. In opening there was no mention of scheme or sham.

25. At its highest, Mr Hackett said it was the "foregone conclusion" of Mr Macabuag and Mr Mellor that once the disciplinary process started Mr Lakey was never returning. He referred to the Taylor Vinters' advice of 1 October, adding to his skeleton an acknowledgment that a fair dismissal process was not a requirement of employment law. He described the instructions to Miss Berry, including the chronology, as "extremely partial and tendentious"; to her operating within a "relatively brief" time and budget; and to Mr Lakey's being deprived of access to Mitt's computer systems. These, then, were treated as confined points, rather than as evidencing a scheme.

26. As to Koalaa, Mr Hackett said that the consideration payable under the Licence was both "commercially illogical" and "self-evidently inadequate".

27. His opening summary of the issues for trial was as follows.

27.1 Was Mr Lakey an employee?

27.2 If so, were Mr Macabuag and Mr Mellor entitled to rely on Miss Berry's conclusions to dismiss Mr Lakey? This involved sub-issues, (a) were the parameters of the investigation flawed; (b) were her conclusions wrong (as to which he noted that the Respondents would say they could still rely on them; but that Mr Lakey maintained his case that they were "conspicuously wrong"); (c) were they sufficient to justify termination?

27.3 As it was agreed that the December 2019 removal process was inoperative, so he remained a director, could the Leaver provisions within the Articles apply at all?

27.4 Was any unfair prejudice affected by any right to remove Mr Lakey as employee on 30 days' notice?

27.5 Was he removed as director on 28 August 2020, and if so, was that fair?

27.6 Was the transfer of assets to Koalaa to thwart Mr Lakey?

27.7 If there was unfair prejudice, what would be the remedy?

28. Before closing, Mr Hackett circulated a note describing Mr Lakey's final case.

28.1 The Leaver provisions could not be engaged until Mr Lakey was removed as employee and director. That occurred, if at all, on 28 August 2020, by when he would have held more shares under re-vesting provisions. Mr Lakey contends that, as above, there was no valid vote as he was not allowed to vote; and had he, no resolution would have been passed. More fundamentally he contends that he could not be removed as director (a) on the true interpretation of the Articles and SSA; or (b) because Mitt was a quasi-partnership such that he could not through the Leaver provisions be deprived of any shares "other than for good reason"; he was therefore wrongly excluded from management from his suspension ("in that it was not done for any legitimate disciplinary reason") until 28 August 2020 or, presumably, now. (Mr Hackett puts in issue under this head whether Mr Lakey

was an employee at all. It makes no difference to the outcome, but it is not a contention open to Mr Lakey whose petition, if not his reply, avers the efficacy of the Employment Agreement).

28.2 If the Leaver provisions were engaged against him as employee, that was only properly if he was dismissed "fairly as a result of his own misconduct". That did not occur because of the "serious procedural failings" in (a) the investigation's constitution and conduct, including "tendentious instructions and insufficient time and budget resources", and (b) the use made of it to dismiss Mr Lakey when Miss Berry had made no such recommendation, the Taylor Vinters advice was for a two-stage process, and Mr Lakey had been told in his suspension letter he could challenge it; and because Miss Berry's conclusions were "seriously and obviously incorrect".

28.3 The transfer of assets to Koalaa was "carried out to thwart any attempt by Mr Lakey to obtain a remedy against Mitt in respect of unfair prejudice he has suffered".

28.4 As against Mr Mellor, "Mr Lakey does not maintain that Mr Mellor acted dishonestly, or that he deliberately constituted disciplinary investigations that he believed to be sham". Instead, he says that "Mr Mellor's actions were influenced by a belief that, irrespective of the fairness or otherwise of Mr Lakey's treatment, Mr Lakey's entitlement in respect of the Shares could not at law exceed the entitlement of a Good Leaver. Under that (Mr Lakey says incorrect) belief, Mr Mellor caused Mitt to ignore Taylor Vinters' repeated advice to follow a fair process in terminating Mr Lakey's involvement with the business, or even to mediate with Mr Lakey".

28.5 Koalaa was now no longer said to have "perpetrated any unfair prejudice" against Mr Lakey, and no allegations as to the transfer being at an undervalue were pursued (a realistic position, not least as there was no expert evidence). Its role was now limited to being an appropriate party against which to make a share purchase order, it having received Mitt's assets, the primary suggestion being on a joint and several basis with Mr Macabuag and Mr Mellor.

29. The scheme was not put in cross-examination and is gone. Whatever comfort Mr Lakey may have derived from seeing his theory pleaded out by counsel, on a bird's eye view it was always much less likely than the alternative of a catastrophic falling

out, an admitted desire to remove Mr Lakey, his suspension on grounds which were at least believed to be proper, the following of an understanding of legal advice, his removal on the basis of the investigation's findings with the understood consequence to his shares, his challenges to that removal, Mitt's therefore becoming an unviable vehicle for the future investment necessary for its business, and the consequent transfer of its staff and assets into an investable vehicle.

30. More, it seems to me that, with a step back and a deep breath, on any analysis the alleged scheme was always so flawed that its chances of being an accurate account were in practice non-existent.

30.1 Hugh Wolley, a consultant manager at Mitt, was originally said to be a party to it, perhaps because it was he who met Mr Lakey on 8 October 2019 to hand him the suspension letter and settlement letter which Mr Lakey says bore Mr Wolley's signature; perhaps also because Mr Lakey has maintained a (hopeless) position that Mr Wolley can never have been duly authorised as Mr Lakey was not given notice of the board meeting which decided to suspend him for misconduct. Whatever, the discontinuance of the petition as against Mr Wolley, at the petition's first hearing on 18 December 2020, caused no alteration to the petition and the pleading of the substance of the scheme beyond a striking through of Mr Wolley's name as a participant. Making all allowances for the scheme's necessarily being a matter of inference from Mr Lakey's viewpoint, by itself that is an indication of the uncertainties concerning even the parties to it; and of the ease with which Mr Lakey was inclined to view others' actions negatively, and willing to make serious allegations against them without any proper grounding.

30.2 The only participants in the scheme were then said to be Mr Macabuag and Mr Mellor. No investor was said to be a part of it, even though its purpose was the removal and transfer of Mitt's business for their benefit.

30.3 That is especially extraordinary given that (a) Mr Lakey was complaining about what he perceived as Mr Gammon's over-involvement in the management of the business; and (b) the investors were, as will be set out later, a group of unusual experience, as well as a group whose investment, while financially motivated, carried with it the additional desire to support the Mitt product. They were not parties to the scheme; were they really people who would stand by, silent?

30.4 Mr Mellor was not himself a shareholder at all. Mr Lakey suggested that his motivation was non-dilution of his wife's shareholding, and indeed its increase through the recharacterisation of his shares. But, in an illustration of the calibre of the investors, at the time of her investment Mrs Mellor was the company secretary at Standard Chartered plc, having in February 2019 left her position as company secretary and head of governance at Marks & Spencer plc.

30.5 These investors had put in, between them, £300,000. There was nothing to suggest that for any of them their individual investment was of any financial significance; nor anything to suggest that Mitt had some hidden value which might be scurried away.

30.6 Not only, then, does the scheme simply ignore the investors, but in a clash of theories, and as already recorded at paragraph 17 above, one plea in the petition is that Mr Macabuag and Mr Mellor have conducted Mitt's affairs "so as to irrevocably destroy the relationship of mutual trust and confidence" between Mr Macabuag and Mr Lakey and the investors.

30.7 It also takes no obvious account of who Mr Mellor was. Again, more details will be given below, but he was and is a man of great business distinction who until October 2019, from when he was due a nominal monthly payment, was working for Mitt for free, as an extension of his gratuitous work as Hacker-in-Residence at the Hackspace.

30.8 Other plain difficulties arise from the fact of there being a disciplinary process, throughout which, and whether Mr Macabuag and Mr Mellor fully understood it or not, they took advice from well-respected solicitors at all stages.

30.9 The investigation was carried through by an independent barrister from a specialist chambers.

30.10 While the process was described as a sham, no allegations of impropriety have been made against either Taylor Vinters or Miss Berry. As Mr Hackett acknowledged in his skeleton, "there is no suggestion Miss Berry acted in bad faith". So, apparently, a part of the scheme was an instigation of a genuine process. While Mr Lakey's complaints may lie in how that process was used, these are hugely unlikely steps to have taken in promotion of the scheme.

30.11 Koalaa was not originally a party to the petition at all. As we have seen, neither was it incorporated until 6 months after the implementation of the scheme; yet it was to be the illicit recipient of Mitt's business and assets, for the benefit of the investors. No other vehicle, even one to be incorporated in the future, is pleaded.

30.12 Despite Mr Lakey's theories to Miss Berry, in the petition Mr Phillips is not said to be a participant in the scheme, although he negotiated the Licence on behalf of Koalaa. Again, the scheme includes a necessary step which is unimpeachable.

30.13 Mitt's cash was bound to run out by the end of the first third of 2020. It therefore required further investment were it to survive. By the time that investment fell to be decided Mr Lakey and Mr Macabuag had irremediably fallen out, and Mr Lakey was threatening legal action. Particularly given the potency of the idea, it would not be unnatural for investors to wish to ensure their investment was as safe as could be, through a new vehicle. Being proper investors, the other stage of the process would be to ensure that Mitt, in which they retained their interest, received full value for what it was transferring. Thus, something had to be done with Mitt; and the Licence and arrangements pursuant to it were not on their face suspicious, but perfectly in accord with propriety. So, absent an allegation against Mr Phillips, the scheme as pleaded would have to fail.

31. I therefore consider that Mr Hackett was entirely correct not to pursue the scheme at trial; and that neither Mr Macabuag nor Mr Mellor ought ever to have been subject to it.

32. As to the case now presented, the allegations as to failure of process within the investigation do not form part of the re-amended petition. Erroneously, they are pleaded in the reply only. However, neither Mr Parfitt for Mr Macabuag nor Mr Goldstone for Mr Mellor invited Mr Hackett to make an application for a re-re-amendment.

33. Mr Goldstone did, though, raise the question of what Mr Lakey's remaining case was, and where it was to be found. The latter is answered in general terms by the above. As to the former, Mr Hackett explained that Mr Lakey could have achieved more than being a Good Leaver through relief consequent on a finding of unfair prejudice, or

through negotiation; so Mr Mellor's alleged belief that his best return was as a Good Leaver was unwarranted; yet it was that belief which led him to cause Mitt to ignore Taylor Vinters' advice. Had I considered this material to the outcome, we would have investigated further the fairness of pursuing this case, which has not been subject to any complete or direct pleading.

34. As it is, this trial is by the order of Deputy ICC Judge Lambert of 14 February 2022 to address liability, being "all issues arising on the pleadings" except for the valuation of Mr Macabuag's and Mr Lakey's shares in Mitt, and the valuation of what was passed to Koalaa. Although it is now academic, the parties agreed that the direction as to Koalaa was not intended to exclude from this trial liability in its regard to the extent that that liability required proof of the value of the transfer.

The law

35. This is not controversial, and a detailed examination is not required.

36. By section 994(1)

"*A member of a company may apply to the court by petition for an order under this Part on the ground (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself)…*".

By section 996(1)

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

Section 996(2) then gives examples of relief.

37. So there must be prejudice to a member which is unfair.

38. While prejudice will often be financial, it need not be; but it must be of some substance. As Hoffmann LJ said in *Re Saul D Harrison & Sons plc* [1994] BCC 475, 489 "*trivial or technical infringements of the articles were not intended to give rise to petitions under s.459*". In a similar vein, there will be no prejudice in a procedural failing where, had the procedure been carried through properly, the same result would have inured: *Re OS3 Distribution Ltd* [2017] EWHC 2621 (Ch).

39. In *O'Neill v Phillips* [1999] 1 WLR 1092 Lord Hoffmann said that "*a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted*". Those terms will be found in articles of association, and may be found in a shareholders' agreement or other collateral arrangement.

40. Here there are the Articles and the SSA. Mr Lakey also relies on there being a quasi-partnership relationship between himself and Mr Macabuag, which survived the first funding round. In *Re Edwardian Group Ltd* [2018] EWHC 1715 (Ch) Fancourt J reviewed the classic authority of *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 with its elements indicative of such a relationship. At [127] he observed that "*it is salutary to remind oneself that the initial question on such a petition must be whether the conduct of which complaint is made was in accordance with the articles of association. It if was, then the allegation of some inconsistent obligation or right needs to be carefully scrutinised*". By the same token, it must be set against the parties' other formal documents including, there, a comprehensive shareholders' agreement: the unfair prejudice regime is concerned with the vindication of rights, not their avoidance: that includes considerations of quasi-partnership. Fancourt J also remarked in that case on the unlikelihood of a quasi-partnership subsisting between some only of the members.

41. Quasi-partnership is an often unhelpful shorthand for extra-documentary rights. The real question is what those rights are: their terms, their status, between whom they exist. The petition also refers to Mr Lakey's "legitimate expectation" as to participation in management and access to documents for that purpose; indeed, his legitimate expectation is admitted. That phrase was retired by *O'Neill v Phillips*, but I shall treat it as though it were a pleading of an equitable right.

42. An issue on our facts is the scope of the Leaver provisions and in particular the recharacterisation of Mr Lakey's shares. Other cases, on their own facts, have been cited.

43. In *In re a company (No.004377 of 1986)* [1987] 1 WLR 102 the articles contained a provision for a deemed transfer notice within 14 days of a member ceasing to be an employee or director; and provided that there was cessation as employee "*if he ceases to be such for any reason whatsoever… but excluding… ceasing to be employed by wrongful dismissal or by notice from the company in cases where there has been no breach of contract by the employee*". The respondents claimed the articles were

exhaustive: the petitioner had ceased to be a director on his removal, so a transfer notice was deemed served. The petitioner said that there must be "*an implied term that an employee director who had been wrongfully dismissed was not obliged to give a transfer notice when he ceased to be a director*". "*I do not regard the implication of such a term as seriously arguable*", found Hoffmann, J in acceding to the application to strike out the petition: the article "*works perfectly well as it stands*"; it was contemplated as well that without the proviso for wrongful dismissal, it still might have been a reasonable provision "*irrespective of the rights and wrongs of his removal as a director or dismissal as an employee*".

44. In *Holt v Faulks* [2001] BCC 50, under a shareholders' agreement, if a director's employment ceased "*for whatever reason*", he was bound to transfer his shares in accordance with the articles; and the articles contained a similar obligation where there was cessation as a director "*for any reason whatever*", and repeated that phrase in respect of a member employed by the company. Kim Lewison QC, sitting as a deputy High Court Judge, agreed with the Hoffmann J decision above: "*In my judgment the words 'for whatever reason' cover both lawful and unlawful termination of the employment of an executive director*".

45. As to process, I have had cited in *Re F & C Alternative Investments (Holdings Ltd v Barthelemy (No 2)* [2012] Ch 613, where Sales J said at [1103] that an unfair prejudice case based on the conduct of an internal disciplinary tribunal would rarely be made out where that tribunal or person acted in accordance with what they believed in good faith to be their duty, citing *Hawkes v Cuddy No 2* at [54]; as while there may be prejudice, it would not be unfairly prejudicial if the relevant action were taken in the genuine belief that it was in the company's interests. That outcome would seem to me to depend on the precise complaint in the petition.

46. The same case has been cited for the proper parties to a petition. At [1096] Sales J stated that a person might be responsible for unfair prejudice where they are "*so connected to the unfairly prejudicial conduct in question that it would be just, in the context of the statutory regime contained in sections 994 to 1006, to grant a remedy against that defendant in relation to that conduct. The standard of justice to be applied reflects the requirements of fair commercial dealing inherent in the statutory regime. This is to state the test at a high level of abstraction. In practice, everything will depend upon the facts of a particular case and the court's assessment whether what was done involved unfairness in which the relevant defendant was sufficiently implicated to warrant relief being granted against him*".

47. Before turning to employment law, by section 168(1) *Companies Act 2006* "*A company may by ordinary resolution at a meeting remove a director before the expiration of his period of office, notwithstanding anything in any agreement between it and him*". The director has a right to protest removal under section 169. The section 168 right may be overridden by an agreement between the shareholders to which the company is not party.

48. In *Harvey on Industrial Relations and Employment Law* (looseleaf) it is stated at E409 that at common law "*dismissal may be effected without good cause*"; but if the dismissal is in breach of contract, then an action may lie. Thus, without more, there is no implied term that dismissal will be fair, or in good faith, or having given an employee the opportunity to state his case.

49. The qualitative test for what constitutes gross misconduct was investigated by Sir Donald Rattee in *Re Twenty Twenty Productions Ltd*, 14 February 2003. He drew the principles from Lord Jauncey in *Neary v Dean of Westminster* [1999] IRLR 288, himself quoting from a number of authorities: Lord Evershed MR "*whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service*"; Sellers LJ "*whether that conduct was of such a type that it was inconsistent, in a grave way- incompatible- with the employment in which he had been engaged*"; Sachs LJ "*a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them*"; Glidewell LJ whether the conduct "*constituted a breach of the implied obligation of trust and confidence of sufficient gravity to justify*" the removal. On his facts, the judge found that the conduct "*was such as to undermine the trust and confidence inherent in Mr Woolwich's contract of employment*".

50. To add another quotation from Lord Evershed MR in *Laws v Chronicle London (Indicator Newspapers) Ltd* [1959] 1 WLR 698 at 701: "*one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions;… the disobedience must at least have the quality that it is 'wilful'… a deliberate flouting of the essential contractual conditions*".

51. *Mortimore: Company Directors* (2017) 3rd edition 7.56 states that a "*breach of fiduciary duty will inevitably constitute gross misconduct*". As breaches of fiduciary

duty are a spectrum, that seems to me to go too far. It too, though, builds on the dicta in *Laws* for the following propositions, which I do accept: gross misconduct describes "*any conduct… sufficiently serious to justify termination without notice*", which is a question of fact including "*the character of the company, the role played by the director in the company, and the degree of trust required of the director vis-à-vis the company*"; "*Any director… will normally therefore be held to a higher standard than a mere employee*".

The parties, witnesses and others

Mr Lakey

52. Mr Lakey's general background has already been described. So too has his case and its changing nature.

53. Everybody viewed Mr Macabuag and Mr Lakey as complementary of each other. So did Mr Lakey: "I think we both immediately saw the enormous potential of working together since we had similar ambitions and complementary skill sets". Both were highly intelligent young men. Mr Macabuag was the inventor and front man; Mr Lakey, as Liz Coffey put it "very organised and planful": "Ben felt very much like the CEO, running the behind-the-scenes operations, focusing on the nitty-gritty of running the business…". He was, she said, someone who would meet "issues head on, occasionally with some vigour"; he was "forthright and straightforward", "extremely motivated by the business, not least because he had a personal connection with his own sister having had a below-knee amputation".

54. The other side of these qualities was that Mr Lakey was abrasive and apt to wind up people the wrong way. He is a single-minded man, convinced of his own rightness and unencumbered by self-doubt; and that even in business matters in which he had academic learning but little practical experience, certainly compared with Mr Mellor and the investors. There is a pervading sense in this case, from his answers in cross-examination, which were often evasive, and from his allegations, that he is a man who has built himself a construct from which he is unwilling to look out: he has theorised to himself why he was removed, with little if any regard to the intrusion of the investors and the accompanying agreements, or to Mr Mellor and his gratuitous services, or to the collapse of his relations with Mr Macabuag, or to the process of removal being advised on by professionals.

55. The scheme was a phantasy. Yet until recently Mr Lakey's case has proceeded remorselessly, gliding past the waving warning flags which ought to have been registered. The creation of constructs, and the silo mentality, means that Mr Lakey's evidence needs treating with the greatest circumspection.

Mr Macabuag

56. In contrast to Mr Lakey, Mr Macabuag's is a smiling and engaged personality, captivated by the idea and able to present it in a way long-removed from notions of a laboratory-bound academic. It can well be understood that he was not interested in back-room technicalities, and was pleased to leave them to another. Again, Liz Coffey seems to me accurate in her assessment: Mr Macabuag is "more of a people pleaser… trying to read the room before voicing his opinion"; a man with a "natural aversion to conflict". That desire to seek the middle way (expressed more positively, the golden path) is an attribute which comes strongly through the facts of this case.

57. He was a good witness, listening to the question and considering his answer; willing to be flexible and admitting when wrong. But there were times, particularly when questioned over the plans to remove Mr Lakey, when his niceness, or perception of his own niceness, got in the way: the documents speak to the desire from the end of September to remove Mr Lakey, and as much is admitted in Mr Macabuag's defence; but he insisted that his mind was not yet made up. I think that he, if not the others involved, may have been content to have received back a penitent Mr Lakey; but the immediate reality by the end of September 2019 was that he had to go, for the good of Mitt. So I have some mild caution in approaching Mr Macabuag's evidence.

Mr Mellor

58. More must be said about Mr Mellor and his background.

59. A selection is that he obtained a masters in biochemistry from Oxford; he worked for SmithKline in vaccine product development; Arthur D Little as a management consultant, founding their healthcare practice, and leading projects including the Children's Vaccine Initiative for the World Health Organisation and UNICEF; he then co-founded Merlin "which became one of the world's leading agencies involved in emergency health programmes", and is now part of Save the Children.

60. As his defence says, he has "considerable experience in angel investment and in private equity as a consultant and adviser to institutions" working in healthcare; he

was "the founder of Merlin, Datamark, MiiHealth, and 4DHeritage; adviser to Venture Capital Report; consultant to the World Bank and the European Bank for Reconstruction and Development on "investment projects relating to health". He has "a strong network (largely in Europe and the USA) of investors and humanitarians".

61. Mr Hackett acknowledged Mr Mellor's "very impressive track record" with "decades of experience in commercialising healthcare products". For his part, during his evidence which was straightforward and full, Mr Mellor agreed that he did not have particular experience in retail to consumers, but said he had at Arthur D Little worked regularly with consumer healthcare companies.

62. His involvement with Mitt came about through volunteer work. In September 2018 he was invited to join the Hackspace, which according to its website is intended to "bring together inventive minds from all backgrounds, disciplines, and levels of expertise to collaborate, experiment and innovate. All in the name of making amazing things happen". Mr Mellor was its "Hacker-in-Residence". So he was "expected to provide support and encouragement to the other teams and to provide an informal mentoring role".

63. Having gone beyond his Hacker role to become a formal adviser to Mitt, he became a director in support of the first round investment in April 2019, resigning on 5 January 2023. His role was unremunerated until October 2019, when a £1,000 monthly stipend was approved. He received this for the 3 months to December 2019, and thereafter 5 further payments over the next 20 months. He therefore had no meaningful financial involvement in Mitt, or in Koalaa. Having, as he perceived it, and as I will find, done his best for Mitt throughout, he was understandably upset at having been joined to the petition, the more so given the extraordinary allegations which it chose to make against him.

Amanda Mellor

64. Mrs Mellor is neither a party, nor gave evidence. She is a shareholder in both Mitt and Koalaa, subscribing £50,000 for her 4,114 shares in Mitt.

65. In addition to her significant roles at Standard Chartered and Marks & Spencer, her husband's defence says that she has a "detailed first-hand knowledge of the retail, fashion and consumer market" and "an excellent network of senior and influential commercial contacts", having held 47 board positions. She introduced Mitt to Tony Shiret, a retail analyst at investment bank Whitman Howard; Simon Colbeck, who led

the Innovation and Technology team at M&S; and Krishnan Hundal, a former director of departments at M&S.

66. Mr Mellor said in cross-examination that despite his role in Mitt "it was strictly Amanda's investment"; but that as a family, they all had an interest in Mitt's story.

Andrew Carroll

67. Mr Carroll provided a statement for Mr Lakey which in the event was admitted unchallenged. He now works as operations lead at Syndi, a digital health platform founded by Mr Lakey and another.

68. When in 2018 he met Mr Macabuag at the Hackspace he was working as "Head of Manufacturing Engineering A350", for Airbus Commercial in Broughton, North Wales. He met Mr Lakey, whom Mr Macabuag introduced as a co-founder, and got on with them both, coming to know them well. He introduced them to people who might be helpful and "took on an unofficial role as their adviser"; they had a WhatsApp group, and would communicate often daily.

69. Mr Carroll considered that Mitt needed both of them: Mr Macabuag was "very good at engaging with customers and creating ideas", while Ben "had the drive and… cultivated Mitt and considered all the essential elements required to create and run the business. Nate took the lead on the technical side and Ben the operational side".

70. So when Mr Lakey texted on 8 October to say Mr Macabuag had tried to get him removed, Mr Carroll was "completely shocked" at the step and the method.

Liz Coffey

71. Liz Coffey (as she wished to be known) is a leadership consultant who gave evidence for Mr Lakey. Aside from a merging of memories of meetings with Mr Macabuag and Mr Lakey in August and September 2019, understandable in the absence of notes, her evidence was cogent and she was direct in her opinions.

72. She first met them in February 2019; they "both exuded a very positive, collaborative vibe", and at their request she became another voluntary coach.

73. She was "startled" by the allegations in the letters: from her standpoint she thought the accusations were "simply an excuse to be able to disempower" Mr Lakey, an "unprovoked attack".

William Hobhouse

74. Mr Hobhouse invested £25,000 for 2,057 shares in Mitt. He gave evidence for the respondents, with which no issue can be taken.

75. Until 2002, he was CEO of Tie Rack Retail Limited, then of Whittards of Chelsea; since then he has been chair and a non-executive director of "a range of businesses", who has "invested in a large number of small businesses including start-ups", as well as chairing his family's investment arm, Sarratt Equity.

76. He was introduced to Mitt at an evening event in Imperial. "I thought the idea behind Mitt sounded fantastic and I was interested in investing". According to his statement he invested "somewhere between £20,000 and £30,000" in Mitt. He agreed in cross-examination that he could not remember the precise amount because for him it was not a significant investment.

77. Mr Lakey believes that the introduction to Mr Hobhouse was through a Chloe Jeremy, an intern Mr Lakey had brought in whose father knew Mr Hobhouse. Whatever, Mr Lakey viewed Mr Hobhouse as "a great opportunity for Mitt", given his previous experience.

78. Mr Hobhouse in turn introduced Christopher Pinnington, who subscribed £25,000 for 2,057 shares, and Jeffrey Berman, who invested £100,000 for 8,230 shares. Mr Berman was an observer at Mitt board meetings.

David Gammon

79. Mr Gammon gave forthright evidence for the Respondents. He was not a man to mince his words.

80. Through Rockspring he and Huw Jones subscribed £100,000 for 8,230 shares. Mr Gammon became Rockspring's observer at the board meetings. As such he said he received and reviewed board papers, tried to attend board meetings, and helped when asked.

81. Mr Gammon is an Honorary Fellow of the RAE; a member of Cambridge Angels and of the Access to Finance and Growth Capital Committee of the Scale Up Institute, and on the advisory board of IQ Capital LLP. Mr Mellor described him as "a highly experienced angel investor". They had been at prep school together, then met again

around 2000. They would meet occasionally in the summer, near Aldeburgh, but their wives were closer than they.

82. Before Rockspring, Mr Gammon was an investment banker. Since 2001 Rockspring has provided capital and advice to about 52 early-stage UK technology companies. Mr Gammon sees 200-300 company pitches a year, investing in 2-3. "I'm very particular. Fussy".

83. In winning the People's Choice award in 2018 Mr Gammon and his judges "thought that Nate was an outstanding man and a fantastic presenter with a great business idea". Later that year he found out that Mr Mellor was assisting Mitt as part of Imperial's early-stage advisory business.

84. According to Mr Lakey, Mr Gammon had "impressive credentials", and told them he had some "good connections". "He was very interested in Mitt and had very clear ideas about investment and how we should be running our fundraising strategy. Undoubtedly, we were flattered by his interest", even if from the beginning Mr Lakey found him "pushy and opinionated".

Ewan Phillips

85. Mr Phillips gave evidence for the Respondents. He has never been paid for the work he did as Mitt's interim chief commercial officer from January to March 2020, and is owed £8,799. He too gave evidence which was clear and to the point.

86. He was a chartered accountant at Deloitte, in audit then corporate finance. He moved into MedTech with Deltex companies; and since 2018 has held roles as interim/ part-time CFO/ CEO at "various start-up and early stage MedTech companies, assisting them with developing and implementing growth and funding strategies".

Mitt's incorporation and business to the first funding round

87. When Mr Macabuag and Mr Chidwick founded Mitt, they applied to "every competition we could find" to fund it. By March 2018, when Mr Chidwick left, there was a product for first testing, £30,000 to run "two or three product trials with ten users", and a grant from the Douglas Bader Foundation. Mitt was also building a user-base through charities. "At this stage the business's focus was to understand

what, if anything, a product would look like, what created value to users" said Mr Macabuag.

88. Mr Macabuag was looking for someone to "help me take Mitt forward": it "was just me at the time and I knew I couldn't do it on my own". He was introduced to Mr Lakey, who was "keen to do all the things for Mitt that I didn't want to do (eg contracts, admin, emails, communicating with partners etc) so I could focus on the design of the prosthetics. I thought that sounded great".

89. With their complementary skills Mr Lakey soon became known as chief operating officer. From around May 2018 they were referring to each other as co-founders, although that was never literally true. "It felt like we were in it together" said Mr Lakey. "We would bounce ideas off each other and discuss and plan the direction of the company. At no stage did I regard myself as reporting to Nate. It was very much a relationship of equals. We developed an easy working relationship, and both trusted each other implicitly". They spent "lots of time" together outside work.

90. Mr Macabuag's more sanguine view was that it took Mr Lakey a few months to settle in; but from July 2018 they were sharing desk space at the Hackspace, and Mr Lakey was spending around 75% of his time on Mitt. His thesis was submitted in September 2018.

The Founders Agreement

91. On 20 August 2018 Mr Macabuag and Mr Lakey executed a document entitled "Founders Agreement", which had been in draft form since 29 July. Perhaps curiously, given their respective roles, it was drafted by Mr Macabuag, who could not recall using a template but thought there might have been some web-guidance on layout. Its purpose, he said, was "to document the terms on which Ben is to start working for Mitt". Mr Lakey saw it as being to "formalise the fact we had entered into a business together, to document the direction of the company, to set out how we intended to launch Mitt, and to detail how the shares would be allocated".

92. They are the parties to it, described together as "founders". It is stated to concern share ownership in Mitt. The recitals record that the current sole shareholder is Mr Macabuag; that he agrees to assign a portion of shares to Mr Lakey on completion of milestones identified in schedule A; that their responsibilities are set out in its schedule B; and that they may withdraw funds in accordance with schedule C.

93. The schedule A milestones were first "*None*": Mr Lakey was to receive 5% of the shares immediately. Secondly, with a deadline of 18 September 2018, was "*Provisional patent filed*", when Mr Lakey would receive a further 15%. Thirdly, by which his shareholding would be brought to equality, was "*Fundraising round prepared*", with a deadline of 1 October 2018. Details of what was required for the last were given: financial forecasting; an identified list of investors; a completed investor deck; a calculation of the amount of funding; a company valuation; and an initial term sheet. In practice the two of them treated these requirements fluidly, Mr Lakey not receiving his full 50% shareholding until March 2019 when his new visa permitted it. As Mr Macabuag said, he had no cash to offer Mr Lakey for his work, but he could offer him shares.

94. The last detail under Schedule A is interesting. It read:

"*Either founder can decide to leave the company at any time, if this is within one year of the latest stock transfer form signing, all shares will be returned to the remaining founder for a sum of £0.00*".

95. No reliance was placed on this provision during the removal of Mr Lakey, although it was within the year's period. That may be because Mr Lakey did not decide to leave, or because the Leaver provisions had by then taken over. Whatever, it is an indication of the pre-eminence of the idea: the continuing party was to have control; whatever work the departing party had put in, and it would have been anticipated to be extensive, no value was to be placed on their shares. As a general concept, it was carried into the Leaver provisions.

96. All parties cross-examined on the motivations behind this and all the other relevant agreements. Mr Lakey simply said of this provision that he was not going to leave, so did not really think about it. Mr Macabuag, though, did regard it seriously: "the conversation I was having with Ben was that either one of us in the future, it might be best for Mitt that one of us isn't involved, or both of us aren't involved, and I just wanted to document that somewhere". I accept Mr Macabuag's evidence.

97. The Schedule B "Outline of responsibilities" had Mr Macabuag with the titles CTO and CEO, and Mr Lakey COO. Mr Macabuag's tasks were "*Product design, Customer relations, Future ventures*", Mr Lakey's "*Legal & Logistics, Funding strategy*". Mr Lakey said his actual responsibilities were "quite different", involving

for example dealing with the patent issue and the structure of Mitt's team; but this was only an outline and the demarcations were already clear in their minds.

98. By Schedule C it was noted that there was "£*12,000 available for founders to live on. At a 50/50 split this is £6,000 each*". It then provided for a monthly payment of £500 to Mr Lakey only, until completion of all Schedule A milestones, at which point Mr Macabuag might catch up. Mr Lakey received his £500.

99. That was not going to go far, especially as Mr Lakey was looking to rent a new flat.

The Employment Agreement

100. On 12 September 2018 he and Mitt entered an "Employment Agreement", signed for Mitt by Macabuag. When sending it to Mr Macabuag on that day, Mr Lakey headed his email "Employment contract for rent".

101. As already noted, in his Reply Mr Lakey sought to say that the Employment Agreement was "not treated as being, and was not, in force and binding between the Petitioner and Mitt". That is not a plea which is open to him, his petition averring, and the defences agreeing, its effectiveness. During cross-examination Mr Lakey was actually more nuanced: "I think that's still up for debate, is that [employment] contract valid or not… I honestly haven't got a clear answer on that"; but he believed it was superseded by the Founders Service Agreement given its "blurb". Mr Macabuag also had his doubts: he considered that the only purpose of the document was to be shown to Mr Lakey's prospective landlord, as a demonstration of adequate means; to that end he signed it as he was "really trying" to help Mr Lakey; and at the time he did not understand that Mitt had anything to do under the agreement. Mr Lakey confirmed that in the event he had not needed to use it with the landlord as the flat was let elsewhere. Whatever, there is an agreed position in the petition and the defences, and both sides were relying on the Employment Agreement as an enforceable agreement before Miss Berry. Further, its effectiveness is not determined by its original purpose.

102. The Employment Agreement was drafted by Mr Lakey from a SeedLegals template. Initially he said that while additions could be made, changes could not; but he came to agree that text could probably be edited, it was just that he had not done so.

103. The start date for the employment was given as 30 March 2018. Mr Lakey was to be employed as COO, which was also right, "*reporting only to the Chief Executive*

Officer, Nathan Macabuag, who will be your manager". That obligation was what raised the question of the possibility of alterations. At this point Mr Lakey had received only 5% of the shares in Mitt, so the notion of Mr Macabuag holding additional rights is not absurd; but a hierarchical reporting structure seems opposed to the responsibilities in the Founders Agreement. Nothing turns on this, but it seems best read as a simple reflection of there being no one else to whom Mr Lakey could report.

104. By clause 3 Mr Lakey's salary was specified as being £45,000 per year, to please the landlord. He did not actually receive any salary until after the first funding round, when he was remunerated at £40,000 per year.

105. By clause 10 Mr Lakey was prohibited from using confidential information, except in the proper course of his duties, which was defined as meaning "*all information of a confidential nature including trade secrets and commercially sensitive information (whatever format and wherever located)*".

106. Clause 14 was headed "Notice period and terminating your employment".

"*Either you or Mitt Wearables can terminate your employment by giving 30 days notice in writing.*

We may at our discretion terminate your employment without notice and make a payment of basic salary in lieu of notice.

We will be entitled to dismiss you at any time without notice or payment in lieu of notice if:

(a) you commit a serious breach of your obligations as an employee, including:…

(iii) you are guilty of any gross misconduct affecting the business of Mitt Wearables...

(vi) you behave in any manner which in the opinion of Mitt Wearables… is materially adverse to the interests of Mitt Wearables".

107. Clause 15, headed "Disciplinary and grievance" provided that

"*We reserve the right to suspend you with pay for no longer than is necessary to investigate any allegation of misconduct against you or so long as is otherwise reasonable while any disciplinary procedure against you is outstanding*".

108. Mr Lakey said that as to the 30 days notice "I knew it was for the landlord and didn't think twice about that". However, put to him that clause 14 permitted termination without notice for serious breach, he said "I believe so"; put: "Was it your understanding that if you committed a serious breach of your obligations you could be dismissed?": "Yes", but this agreement was for the landlord.

109. It was following this that both Mr Mellor and Mr Gammon became acquainted with Mitt. Mr Mellor had joined the Hackspace in September 2018. He was initially struck by Mr Macabuag's relationship with Alex Lewis, and got to know him further when he volunteered for outreach at a local school. As Hacker-in-Residence Mr Mellor was expected to give 20% of his time supporting colleagues, and he decided to focus his support on helping Mr Macabuag and Mr Lakey, initially with advice on presentations and introductions to contacts in retail/ healthcare/ charity sectors.

110. Mr Lakey says that Mr Mellor told them he wanted to become an adviser. It seems more likely Mr Macabuag and Mr Lakey invited him, as they did many others. They were receiving his expertise pro bono, and his presence would assist in their bids for first round funding. Mr Mellor says that it was, though, his expectation that if the relationship developed beyond the Hackspace, it would become commercial.

111. Having met them after the competition, in around November 2018 Mr Gammon was also providing advice, including as to the first funding round. "Their post-money valuation was absolutely lunatic. They were looking to raise at a post-money value of around £3.5-£4 million. I told them there's no way that anyone I know nor could I help them with such a ludicrous value". During several meetings in 2018 he told them to be realistic: a reasonable investor value would be about £1.5 million.

112. In cross-examination he expanded on his views. He "believed that neither of them would ever end up running the company as CEO… Because there are good people to get things off the ground and then there are good people to commercialise and run a company, and the two don't always go together. As the company evolves, and they change very quickly, then obviously the situation is very fluid".

113. Also as part of the work towards funding, by November 2018 a draft business plan had been put together. Within it was the idea of selling direct to consumers, which

continued to be debated for months. At the time, Mr Macabuag said, he was keen on the business to consumer model, but that wasn't the vision: Mitt was there "to be useful and provide prosthetic components to people that could benefit from them. It didn't matter how". Looking ahead, unlike Mr Lakey, who remained an avid proponent of the potentialities of such market disruption, he became less keen after the first few post-funding board meetings. Mr Mellor did not consider direct selling to consumers a very good idea, but neither did he expect perfection from novices, so at least initially he let it ride.

The Founders Service Agreement

114. The origins of the 13 December 2018 Founders Service Agreement are mysterious; the more so as by then Mr Macabuag and Mr Lakey had open to them expert advice and were taking positive steps towards the first funding round. Nobody questions that it was binding. The question is its effect. In his reply Mr Lakey suggests that it was a replacement for the Employment Agreement.

115. It is another agreement between Mitt and Mr Lakey, although here Mr Lakey has signed for both parties. Again, it was produced by Mr Lakey from a SeedLegals template. It would appear from the footer reference that there was an initial draft, or perhaps the template was downloaded, on 1 September 2018. Mr Macabuag, having no memory of the date, hypothesised from that that it may have been signed around then. That is possible, but Mr Lakey's memory of the date was certain, and he was its creator. Mr Macabuag did say "It was suggested by Ben. I didn't have much of a view other than Ben thought it was necessary, so I agreed". He also confirmed that for his part he had entered neither an employment agreement nor a founders service agreement with Mitt.

116. Consistent with its at least being in contemplation at the same time that the Employment Agreement was being considered, it operates within a different sphere. There is no mention of "employment", but instead "service". Just as the Employment Agreement took effect from 30 March 2018, this agreement took effect "*from the date of Ben Lakey's first service to Mitt Wearables*". Whereas the Employment Agreement provides a figure for salary, there is no mention of remuneration in this agreement.

117. All of that points to this being an agreement which covers Mr Lakey's service as a director of Mitt, as opposed to his employment by it.

118. That is reinforced by clause 9, headed "Disciplinary and grievance procedures". If Mr Lakey wished "*to seek redress for any grievance relating to your appointment you are entitled to raise the matter in writing with any other member of the Board…*": so this is addressed to him in his capacity as director.

119. Also of importance is what is later in the clause: were the grievance Mitt's, then "*There are no special disciplinary rules which apply to you and any disciplinary matters affecting you will be dealt with by a member of the Board*": not, it will be seen, the board as a whole.

120. The role and obligations of Mr Lakey under the Founders Service Agreement are expressed with reference to him as founder. Under clause 1, headed "Role", we have "*You are a founder of Mitt Wearables. You acknowledge that your full efforts will be required to promote and develop Mitt Wearables's business*". This is not therefore an agreement directed at Mr Lakey's role as a (notional) founder member; and clause 1.3 refers to his role giving him "*autonomous decision-taking powers about your working hours*".

121. Clause 2 was "Warranties, responsibilities and duties". Clause 2.3 "*While you are a founder of Mitt Wearables you will (a) comply with the Articles of Association of Mitt Wearables as amended from time to time by statute or court order…; (b) comply with the terms of any subscription and shareholders' agreements which may be entered into by Mitt Wearables from time to time*". I would observe that these provisions indicate that Mr Lakey's December date for the agreement is correct: by then, active steps were being taken towards the first funding round which would inevitably result in amended articles, a subscription agreement, and a shareholders' agreement.

122. Clause 4 covered confidential information, defined in the same terms as in the Employment Agreement; and by clause 4.2 there was an identically-worded restriction on its use.

123. Clause 6 was headed "Notice period and terminating your service". By clause 6.1:

> "*We will be entitled to end your service to Mitt Wearables at any time without notice or payment in lieu of notice if:*
>
> *(a) you commit a serious breach of your obligations as a founder, including:*
>
> *(i) you are guilty of any gross misconduct affecting the business of Mitt Wearables…*

> *(iii) you behave in any manner which in the opinion of Mitt Wearables… is materially adverse to the interests of Mitt Wearables*".

Referring to founder rather than employee, those are identical to clause 14 of the Employment Agreement.

124. Mr Lakey said in cross-examination that at the time of the first funding round he had expected Taylor Vinters to produce a director's service agreement as well, but none ever came. That is understandable, but nobody suggests that this Founders Service Agreement became ineffective on the introduction of formal investors.

Preparations for the first funding round

125. In January 2019 Mr Gammon emailed Mitt a term sheet which included a proposal that Mr Mellor be appointed director and non-executive chairman. Mr Lakey says he was "very hesitant" because of Mr Mellor's background in selling to charities, when "Mitt's business model was based on selling the prostheses to individuals and organisations".

126. On 13 January 2019 Mr Mellor had expressed the view to Mr Gammon that

> "I would like to help them if I can, and Amanda and I could possibly be investors. However I don't think their current plan is realistic nor do they seem to have the capacity to execute a plan. However they are [an] exceptional and complementary team on the start of what could be a very exciting and significant journey".

127. The next day Mr Gammon replied:

> "I agree that their plan is not realistic, but then no one I have met fresh out of university ever does have one. My tactic is to infiltrate and mould from the inside".

128. He expanded on this in cross-examination.

> "I treat every business plan as a statement of intent and nothing else. It's usually nonsense… and I certainly don't believe them… I've never seen a business plan actually fulfilled… And having been in this business, I have a lot of experience… I look at the people. I look at other things… I am interested in the product, and… in the market it is trying to aim towards, the way it's going to do it, the way it's going to build a team, the way they are going to evolve as individuals".

129. Mr Gammon was also keen to encourage Mr Mellor's involvement.

"I would very much welcome seeing you with Mitt. I am 100% sure that you can add a lot to them although I do not think it either wise or fair for you to do so without economic recompense".

130. As Mr Mellor agreed, in hindsight Mr Gammon was right, if by that he meant that otherwise there would be such an amount of work that he would have the sense of being imposed on: Mr Mellor did develop that sense, especially with regard to Mr Lakey placing demands on him which exceeded the time he thought fair. As it happens, in his evidence Mr Gammon explained that that was not what he had meant: instead, it was simply "if you work for free all the time and don't get any income you can't pay your expenses".

131. Mr Mellor was not engaged in the pitches for funding; Mr Gammon assisted with that, and indeed with the procurement of Mrs Mellor's investment.

132. Mr Mellor became more deeply involved "solely in order to guide and assist Mr Lakey and Mr Macabuag, who were young and inexperienced but appeared to have talent and a vision, in their desire to establish a business which he believed could make a meaningful difference to the lives of limb-different children". There were "no formal management structures or preferential reporting", and he set out to treat them "equally and impartially". But he came to perceive Mr Macabuag as the key to long-term success, while Mr Lakey as flawed: unable to react when his assumptions were challenged, and ultimately creating "business jeopardy" in his strategies, thereby "putting into danger the safe adoption of a soft prosthetic by the very people who might have benefitted" from it.

133. The first funding round and its investors had been put in place by February 2019. The delay until April was because Mr Macabuag wished Mr Lakey to receive his shares under the Founders Agreement, but they were waiting for Mr Lakey's tier 4 visa to expire, to be succeeded by a tier 1 exceptional talent visa, to allow it. The fundraising had been more successful than anticipated, the original £250,000 round being increased to £300,000: £100,000 from Rockspring and Mr Berman, £50,000 from Mrs Mellor, and £25,000 from Mr Hobhouse and Mr Pinnington. On the post-money valuation of £1.65m Mr Lakey calculated that he was already a millionaire, "in Canadian dollars". The investors were also on hand, he said, to give advice as and when.

134. Notwithstanding the experienced reservations of Mr Gammon and Mr Mellor, there was also, said Mr Gammon, "a large level of excitement about what Nate was doing with the aid of a solid administrator in the form of Ben. They complemented each other perfectly. We thought the two would be absolutely magical".

135. Once the funding round was in place, Mr Mellor was asked formally to become the chair. Mr Gammon was naturally "very supportive": "Nicholas is an important man in this world". He wanted someone he "knew and trusted" with "directly relevant experience of medtech, of life sciences, who could guide two people who had just been students, had never run a business and have no understanding of how things work". As he said "when you come out of university you don't have much idea about business, and it's something you have to learn over time".

136. Mr Macabuag was also delighted. Mr Mellor was "very well connected"; "I think he's brilliant… he has been there and seen it all but isn't cynical, instead he is wildly optimistic about life". Mr Lakey was not: Mr Macabuag could not remember why, but it was presumably associated with his belief that Mr Mellor lacked experience in selling direct to consumers, and was inherently doubtful about it; it may also have been because there was to be someone in place who would at times be telling him what to do, and disagreeing with him.

137. Mr Mellor was aware that his role retained aspects of mentorship. The founders were young and inexperienced and would require guidance on corporate governance including such details as timely briefing papers and agendas. He thought they also needed to be discerning in how they briefed and treated the long list of people willing to provide free advice. And they needed to recruit and build a team.

138. In January 2019 a summary term sheet was circulating, being the proposed terms of investment. From the outset one of terms was a "Good Leaver/ Bad Leaver". Its first iteration was this, in clause 2.7:

> "*A Bad leaver is a Founder* [Mr Macabuag or Mr Lakey] *who ceases to be an Employee* [undefined] *at any time by reason of dismissal by the Company for cause or by way of voluntary resignation (not the result of constructive dismissal) unless the Board determines that the Founder should be a Good leaver.*
>
> *A Good leaver is a Founder who ceases to be an Employee who is not a Bad leaver.*

In the case of a Bad leaver all their ordinary founder shares shall be automatically converted into Deferred Shares".

139. Deferred Shares are undefined, and any consequence of being a Good leaver not stated, but the intent of conversion into a different class is plain; so too that this is intended to be comprehensive: if a Founder is not a Bad leaver, they are a Good leaver.

140. Mr Lakey took advice on the draft term sheet from a friend, Alex Coussey, a lawyer at Tesla. Under this section Mr Lakey wrote "Tough on bad leavers but we can agree, does this mean no vesting periods? Bad leaver sells their shares at fair or nominal value?". This is an admirably detailed reading, picking up the point on the unstated effect of being a Bad leaver. His other concern, as to vesting periods, must relate to ongoing negotiations over the founders' shares.

141. Mr Lakey identified Mr Coussey's comments as being those in blue on the document; but from their wording it looks as if they are his recording of Mr Coussey's comments during their discussion, which has included the negotiations over vesting periods. There is an abrupt start to them, immediately after the "fair or nominal value?".

"most heavily negotiated, and he suggests we change this.

No time limit attached to this. A point in time where we have put in enough sweat to where we have earned our shares.

Push back on resignation piece

There isn't an expressed statement, what are the consequences of being a good leaver

Bad Leaver is a founder who ceases to be an employee within 3 years of completion of the company

Voluntary leaver covers resignation- allowed 50% of vested shares and will lose the rest- Or this could be worked into good leaver

Vesting period- say 3 years, from close of investment or company incorp. if leave in 18 months as good leaver you would get 50%, if voluntarily 50% of 50% after 18 months.

Good leaver keeps all the shares after 3 years".

142. Mr Macabuag confirmed that he too had studied the terms, but it was Mr Lakey who was responsible for responding to them, which he did to Taylor Vinters, taking into account Mr Coussey's remarks.

143. The summary term sheet was agreed in its final form by the investors on 13 and 14 March and by Mitt, Mr Macabuag and Mr Lakey on 21 March. Despite the careful negotiations, in which Taylor Vinters had provided advice to the non-investor parties, the offer within it was expressly not legally-binding, although the clauses addressing fees, confidentiality and jurisdiction, were. What it did, though, was contain the terms of the offer, open until close of business on 31 March 2019 but extendable by agreement, which was in the event accepted. The parties were agreed that it was therefore a document relevant to the consideration of the ensuing Articles and SSA.

144. The investment was to be of £300,000 for A ordinary penny shares. Clause 3 was described as "Conditions of Investment". Clause 3.1 gave "*Milestones to be achieved with funds raised*". There were 4 of these: "*Design, field test and manufacture late beta version of Mitt sleeve with 4 tools to launch in UK market. File appropriate patents and trade marks. Build and test appropriate distribution and sales channel for UK launch. Provision Key Hirings: marketing & community manager, design engineer, part-time FD*". Clause 3 ascribed the use of the investment: £55,000 on legals, including IP and insurance; £20,000 on marketing; £35,000 on R&D; £20,000 operating costs, including software; £150,000 on salaries including the founders; with a £20,000 contingency.

145. Clause 4 "Board structure" gave Rockspring a director or observer, so long as it held at least 5% of the shares; any other investor the same right with at least 10% of the shares; and the founders a right to "*two directors or observers*" while they held at least 20% of shares. The initial board on completion was intended to be Mr Mellor as non-executive chairman, Mr Macabuag, Mr Lakey, Mr Gammon and Mr Berman as observers, plus one other non-executive "*to be confirmed*". Clause 5.5 obliged a minimum of 8 board meetings a year.

146. Clause 2.7 was agreed in these terms, which included provision for vesting and the effect of being a Good Leaver, if not definitions of Employee or Deferred Shares. It also added a category of Voluntary Leaver.

"*The Founders shall be subject to straight-line monthly vesting of all ordinary founder shares. Such vesting shall start from the date of completion of the investment*

and end 3 years later. The Good Leaver/ Bad Leaver provisions shall only apply during this vesting period after which all shares shall be vested and no claw-back will be applicable.

A Bad leaver [capitalisation is irregular] *is a Founder who ceases to be an Employee within the vesting period by reason of dismissal by the Company for cause unless the Board determines that the Founder should be a Good leaver.*

In the case of a Bad leaver all their ordinary founder shares (both vested and unvested) shall be automatically converted into Deferred Shares.

A Voluntary Leaver is a Founder who ceases to be an Employee by way of voluntary resignation (which is not the result of constructive dismissal) unless the Board determines that the Founder should be a Good leaver.

In the case of a Voluntary Leaver, 50% of any vested shares shall be retained by the Founder and the remaining 50% of the vested shares as well as 100% of unvested shares shall be automatically converted into Deferred Shares.

A Good leaver is a Founder who ceases to be an Employee who is not a Bad Leaver or a Voluntary Leaver.

In the case of a Good Leaver, all the vested shares shall be retained by the Founder and the remaining unvested shares shall be automatically converted into Deferred Shares".

147. Again, the wording and concepts are different, but what is described is a complete code upon departure, with the Good leaver sweep up.

148. Mr Lakey confirmed that he was fully aware of the consequences of leaving within 3 years of funding. He also understood that "I couldn't be dismissed unless there was gross misconduct". He therefore read into the term sheet phrase "dismissal by the Company for cause" the phrase "gross misconduct" which is used in the Employment Agreement and the Founders Service Agreement; in which in my view he is right.

149. By way of completion of the documents and structure for the first funding round, on 2 April 2019 Mitt approved new Articles and the SSA; and on 5 April Mr Mellor was appointed a director.

150. Nobody has found the Articles or SSA clear.

The Articles

151. We must begin with the Articles.

152. These created Ordinary Shares, A Ordinary Shares and Deferred Shares, each class having a value of 1,000 to the penny. Under Article 3, Deferred Shares had a priority right under a capital reduction, sale or other return of money on shares, save for a dividend distribution; but that right was as a class to receive a total of £1, which might be paid to any one of them. They were not transferable, save under drag along provisions in Article 9; they had no right to vote at a members' meeting; and they were always liable to be redeemed, for a penny to any holder, at the Company's behest. A Ordinaries, which were issued to the investors, carried mildly preferential rights on sale in that their holders would receive the greater either of the original subscription price, or of the amount which would be payable to them and to the Ordinaries were there to be a distribution. The Ordinary Shares were held by Mr Macabuag and Mr Lakey, who were termed "Founders", or "Founder" if one of them. They were also termed "Employee", as the definition of that was "*each Founder and each person who is or is to become or has been a director and/ or an employee of or a consultant to the Company or any of its subsidiaries*". They were also an "Employee Member" for so long as they held Shares, being other than Deferred Shares.

153. By Article 5.2, absent consent from an Investor Majority, "*no Founder shall transfer any Shares in the three years following Completion*", which was defined in accordance with the SSA; there is a disjunct there, as there is no such definition in the SSA, although it itself uses the word, and defines First Completion and Second Completion: a notional two funding rounds, which in fact comprise the first funding round (a device seemingly to even up the number of A Ordinaries in issue). But it seems that Completion, in the Articles and SSA, must be intended to refer to completion of the first funding round, so 2 April 2019, because, for example, by clause 3.12 the "members of the Board immediately following Completion shall be the Founders and Nicholas Mellor". Thus, there was a 3-year lock-in period.

154. Article 5 went on to provide for the transfer of shares, including, if it came to it, for determination of the fair value per Share, ultimately, again if necessary, by the Auditors acting as experts, at a fair open market value, not discounted for being a minority holding.

155. Article 7 is headed "Employee Leaving Events"; it is also the derivation for the Deferred Shares and the re-vesting provisions.

156. By Article 7.1

> "*If any Employee shall Leave for any other reason whatsoever than as set out in Articles 7.2 and 7.3, (such Employee to be referred to as a "Good Leaver") such Employee's Unvested Shares shall, subject to Article 7.4, automatically convert into Deferred Shares at the conversion rate of one Deferred Share for each Unvested Share on the Effective Termination Date (rounded down to the nearest whole Share)*".

157. Article 7.4 gave the Board the discretionary ability, with Investor Majority Consent, to waive the application of Articles 7.1, and 7.2 and 7.3 as well.

158. The Effective Termination Date was "*the date on which the Employee's employment or consultancy terminates*".

159. Unvested Shares meant the Good Leaver's Percentage or the Voluntary Leaver's Percentage of Shares. The former was what was left over after taking the Employee's Shares, treating them as vesting in equal amounts monthly over 36 months from 2 April 2019, and permitting such vesting for each full month worked in that period until the Effective Termination Date. The latter was half of that.

160. "Leave" meant:

> "*in respect of an Employee Member, the Employee ceasing to be a director, employee or consultant of the Company or any of its subsidiaries or be seconded to provide services to the Company or to any of its subsidiaries without remaining or becoming a director, employee, consultant of the Company or any other subsidiary (as the case may be) or being seconded to provide services to the Company or to any other subsidiary for any reason whatsoever, including his dying or becoming a patient within the meaning of the Mental Health Act 1982*".

161. There are two groups of cessation: the "*ceasing to be a director…*" and the "*ceasing to… be seconded*". The large ambiguity is whether the "*without remaining or becoming…*" qualifies just the cessation of secondment, or both.

162. Leaving is also the trigger under Articles 7.2 and 7.3.

163. By Article 7.2:

"*If any Employee Leaves because he voluntarily resigns (other than as a result of his constructive dismissal) within three years of the Relevant Date* [2 April 2019], *(such Employee to be referred to as a "Voluntary Leaver") such Employee's Unvested Shares shall, subject to Article 7.4, automatically convert into Deferred Shares at the conversion rate of one Deferred Share for each Unvested Share on the Effective Termination Date (rounded down to the nearest whole Share)*".

164. A Voluntary Leaver would thereby retain half of the Shares which would vest had they been a Good Leaver. That accords with the summary term sheet.

165. By Article 7.3

"*Subject to Article 7.4, if any Employee*

7.3.1 Leaves within 3 years of the Relevant Date; and

7.3.2 Leaves in circumstances where he:

(i) commits any serious breach of his contract of employment, consultancy agreement or service contract (as appropriate) or is guilty of any gross misconduct or any wilful neglect in the discharge of his duties and results in termination of such agreement or contract by the Company…

[there follow other scenarios covering fraud, dishonesty, criminal offences and bankruptcy]...

then all of his Relevant Shares shall automatically convert into Deferred Shares at the conversion rate of one Deferred Share for each Relevant Share from the Effective Termination Date".

166. Again that accords with the summary term sheet.

167. So too does the overall scheme of shutting off all other possibilities through the definition of Good Leaver: "*If any Employee shall Leave for any other reason whatsoever other than*…". Further, as above, "Leave" is itself expressed not in terms of desire, but fact: "*ceasing to be*"; and is also comprehensive: "*for any reason whatsoever*".

168. It follows in my view that provided there has been a cessation of that role, there is a Leaving. These are comprehensive articles, as were those in *004377 of 1986* and *Holt v Faulks*.

169. It may be noted that the Articles, a foundational document applicable to all, differ from the particular Employment Agreement and Founders Service Agreement between Mitt and Mr Lakey, which each provided for dismissal for serious breach including gross misconduct rather than giving it as an alternative. In practice a breach of the Articles would almost certainly be a breach of the Agreements (or the relevant Agreement), and vice versa. Built in as well is clause 14 of the Employment Agreement's 30 day no-fault notice on each side.

170. I come back to the ambiguity in "Leave". On any reading the proviso applies to an Employee ceasing to be seconded. It may be said that given the serious effect of being deemed a Leaver, through the deprivation of shares, it cannot have been intended that should occur where the party had, for example, left as employee but remained a director of the company or of a subsidiary (were there any). Further, one might have left voluntarily as an employee, for good reason, but remain a director. It can also be borne in mind that Mr Macabuag and Mr Lakey had each dedicated themselves to Mitt for a year beforehand, their reward up to then being in their shares only.

171. Those are all strong points. I take on board Mr Mellor's statement that "I had a different way of looking at it. Every month they were actually increasing their shareholding from a very low level… the whole point of those clauses is to earn out their stake in the business", but, in terms of construction, for anything other than a Good Leaver this was a deprivation.

172. There is a partial answer in the Article 7.4 ability for the Board to waive the effect of Article 7.1-7.3: partial only, because that is a discretionary power which may not be effected.

173. The clearest answer is in the Bad Leaver provisions. Article 7.3.2(i) contemplates the Leaving in a number of separate situations: "*any serious breach of his contract of employment, consultancy agreement or service contract*" and then the further alternatives of "*any gross misconduct or any wilful neglect in the discharge of his duties*", in any event resulting "*in termination of such agreement or contract by the Company*". A proviso disapplying his Leaving in such a scenario cannot be read in. Additionally, there is no Article 7.4 equivalent for non-Leaving, which if the proviso applies would leave Mitt stuck with a shareholder even where they had committed a serious breach; and again the reality is that a serious breach of a contract of employment would be a serious breach of a service agreement, and vice versa.

174. So I consider that the Leaver provisions apply even should that person remain as a director, employee, consultant or secondee of the Company or a subsidiary.

175. Article 11 is headed "Directors and Observers".

176. By Article 11.1:

"*The directors shall be not less than two or more than seven in number*".

177. By Article 11.2:

"*for so long as the Founders… together hold more than 20% of the Shares, the Founders shall be entitled to nominate two persons to act as directors… and the other holders of Shares shall not vote their Shares so as to remove that director from office. The Founders, acting jointly, shall be entitled to remove one or both of their nominated director(s) so appointed at any time by notice in writing to the Company… and appoint another person(s) to act in their place (each a 'Founder Director' and where two are appointed, the 'Founder Directors')*".

178. "Founder Director" is also defined as "*any director appointed by a Founder pursuant to… Article 11.2*".

179. It is tolerably clear that as the right to appoint rests in the Founders if they together hold the requisite percentage, and as the right to appoint or remove is joint, the ability to appoint two directors is one exercisable on behalf of both, not each. There being no other embedded right for the appointment of Mr Macabuag or Mr Lakey as director, if they wished to be appointed then that would be as one of those two. Their alternative would be to appoint one or two observers on their behalf under Article 11.8; but as it states, "*The aggregate number of Founder Directors and observers appointed by the Founders… shall at no time exceed two*". Insofar as an appointment of a director is made by Mr Macabuag and Mr Lakey, that director, whether being one of them or another, will be a Founder Director.

180. What of the inability of the other holders of Shares to vote to remove a Founder Director? For three alternative reasons that restriction is ineffective to prevent removal. First, from the shareholders' stance, it is contrary to section 168. Secondly, from Mitt's stance, there are rights of removal under the Founders Service Agreement, or whatever other agreement it might have with a director. A third reason can also be posited: the Article cannot have been intended to be effective where the director in question was in serious breach of his duties.

181. Articles 11.3 and 11.4 gave Rockspring and the Angel Investors a right to nominate one director or observer each, if holding respectively 5% and 10% of the Shares; again, as in the summary term sheet. As with the Founders, other holders of Shares were not able to vote their Shares so as to remove those directors.

182. Article 11.5 permitted the directors to appoint further directors up to the maximum, to fill a vacancy or otherwise

183. Article 11.6 allowed the director to appoint one of themselves, or another willing person, to be chairman; although that person could not be a Rockspring or Angel Director.

184. Article 14.1 prescribed a quorum for the transaction of business by directors of three; but reduced to two where, as here, Rockspring had not appointed a director. The Chairman or a Founder Director also had to be present as part of the quorum. The Chairman had no casting vote: Article 14.3.

The SSA

185. The parties to the SSA of 2 April 2019 were Mitt, Mr Macabuag and Mr Lakey, and the investors. It recorded the subscription monies received and the A Ordinaries to be allotted and issued to each; that Mr Mellor would be appointed a non-executive director, and that "*The members of the Board immediately following Completion shall be the Founders and Nicholas Mellor*".

186. Clause 3, headed "Director and observer rights" was in materially identical terms to Article 11. Clause 3.2 reflected Article 11.2, including the inability of other holders of Shares to vote on them to remove a Founder Director; and likewise for the Rockspring and Angel Investors' appointments.

187. Although Mitt is a party to the SSA, it seems to me possible to read these clauses as operating only between the shareholders. As such, the first objection to the restriction when in the Articles would fall away: shareholders may unanimously agree between themselves to disapply section 168. However, the modes of removal under another agreement, and on removal for cause, would remain.

188. Another provision in the SSA potentially relevant to this is clause 5, headed "Undertakings"

"*Each of the Founders shall exercise all voting rights and powers of control available to him in relation to the Company… to procure that, save with Investor Majority Consent, the Company shall not effect or propose any of the matters referred to in Schedule 4*".

Schedule 4, headed "Consent matters", has at paragraph 7:

"*The Company shall not appoint or dismiss any directors… or make any substantial change to the Board*".

189. Investor Majority Consent is the consent of "more than 50% in nominal value of the total A Ordinary Shares held by the Investors from time to time". The Founders' voting rights and powers of control include those as directors. The obligation on them is therefore, for example, to obtain Investor Majority Consent before, say, a proposal that the Company dismiss a director. This is a personal obligation. What it does not do is oblige them to act in accordance with Investor Majority Consent (although they would be obliged to act at the direction of a special resolution: Model Article 4). Clause 5 does not assist.

190. However, there is an indication in clause 6.1.3 that the third mode may be apposite. This clause is headed "Restrictive Covenants". They are operative, materially, against the Founders for a period of "*6 months after ceasing to be a director, employee or consultant of or to the Company*", and then this:

"*save that where that Founder is dismissed by the Company and that dismissal is not for Cause, then the relevant period… shall be 3 months after ceasing to be a director, employee or consultant of or to the Company*".

191. So what is contemplated is a dismissal of Mr Macabuag or Mr Lakey by Mitt not for "Cause", a word which, while capitalised, is not defined. It can therefore be said that a power of dismissal within Mitt is considered to exist, whether for "Cause" or not, which power might be that under section 168, although it might also arise under an agreement between Mitt and the Founder concerned.

192. As it seems to me, there can be no compelling reason, not even the recharacterisation of shares, for Mitt's shareholders not to have the implied right to vote to remove a director who had been guilty of serious misconduct. A director in that position who continued to hold office would benefit neither Mitt, nor his appointor; and any appointor would not be prejudiced by the removal as they would be entitled to

appoint another. That the right is given to Mitt anyway under the particular contract constituted by the Founders Service Agreement supports rather than detracts from the proposition: the director in question may or may not have a formal contract. Moreover, no party, not even Mr Lakey, has sought to suggest otherwise.

193. Other aspects to be drawn from the SSA are clause 5.3.1, which, supported by an undertaking from Mitt and the Founders to the Investors to ensure as much (without other agreement of the Investor Directors), sets at least 8 board meetings a year, at not more than 6-weekly intervals; and "*no business shall be conducted at a meeting unless an agenda and all supporting papers are circulated to all of the Board (and Observers if appointed) at least 48 hours before the meeting, specifying the business to be dealt with*". Doubtless were the papers delayed or not produced, the directors could proceed if they chose.

194. Another undertaking was to procure that "*a copy of the minutes of each Board meeting shall be provided to each of the Investor Directors (or if appointed the relevant Observer, or if any investor has not appointed an Investor Director or Observer, then to such Investor) within 14 days of such Board meeting being held*": clause 5.3.7.

195. Clause 15 was headed "Confidentiality and non-disclosure". Clause 15.1:

> "… *each of the Shareholders [which included the Founders] agrees to keep all information which relates to the business activities of the Company and this Agreement confidential. No such party shall reveal any such confidential information to any third party save in connection with the performance of his obligations hereunder or otherwise for the purposes of the Business", which was defined as "the design, production and sale of prostheses*".
>
> Clause 15.2 permitted disclosure of confidential information to professional advisers.

196. Two other clauses can be noted.

197. By clause 14.2 "*Nothing contained in this Agreement shall be deemed to constitute a partnership between the parties*".

198. By clause 15.4 "*This Agreement and the Articles constitute the entire agreement between the parties and supersede any previous agreements, understandings and arrangements between them and representations by them, whether oral or written, which relate to the subject matter of this Agreement…*".

Quasi-partnership/ legitimate expectation

199. It remains Mr Lakey's case that Mitt was a quasi-partnership such that he could not through the Leaver provisions be deprived of any shares "other than for good reason"; or that he had a "legitimate expectation" that he could continue to participate in its management, and be given access to its information for him to do so, subject to the same proviso.

200. The legitimate expectation is admitted by Mr Macabuag and Mr Mellor in their defences, though as Mr Parfitt noted, Mr Lakey in his witness statement is silent as to how he says it arose. Mr Parfitt explained the admission as being derived from, and therefore constrained by, the agreements and Articles just described. I agree they would legitimise such an expectation. The concept, then, adds nothing to Mr Lakey's argument.

201. The notion that, were there a quasi-partnership, it survived the first funding round and its formal documentation to impose additional obligations between Mr Macabuag and Mr Lakey, or between them and the Investors, is without substance. It is contrary to clause 14.2 of the SSA, and its clause 15.4. Even without those clauses, the effect of the first funding round was a seismic shift in Mitt's development: professional outside investors intruded, with rights to board representation and an independent chair; and Mr Macabuag and Mr Lakey had their shareholding become subject to reverse vesting. Mitt was no longer their company, and they had no basis to seek to overlay rights onto the constitutional documents. Those documents, as we have seen, gave detailed consideration to the circumstances in which there might be removal, and how it might be effected, and were themselves a complete code.

202. On the actual position before the first funding round it is unnecessary to speculate beyond saying that it is apparent that Mr Macabuag and Mr Lakey had confidence each in the other. Mr Mellor, giving an outsider's view, agreed that pre-investment Mr Macabuag and Mr Lakey might have considered themselves as running the business in partnership; but "it all changes when you bring in outside investors": their responsibilities were to the wider stakeholders, whom he identified as shareholders, customers and employees.

From the first funding round, to removal

203. The summary term sheet contained prescribed milestones and the allocation of funds to achieve them, as already set out. With the aim of manufacturing a late beta (trial) version of the product, and having in place a tested UK sales and distribution channel, they were of reduced intent compared to those recommended by Mr Gammon to Mr Macabuag and Mr Lakey on 6 December 2018: "A clear set of milestones… that would then trigger the next round"; a product "legal to sell with all regulatory hurdles done", with a "tested and proven" production run and "evidence of early demand with order system from web up and running"; and a "first iteration of supply chain". "If you don't achieve the milestones then I recommend another small round- say £250k at £2.5m or thereabouts". "Assuming milestones are hit then the next round, latest 1Q20, would look to raise £1m off circa £5m".

204. These targets soon shifted. Mr Mellor remembers that key performance indicators were agreed at the first board meeting after the fundraise, on 8 April 2019, but they were never routinely used. They were intended to lead to a finished product by the end of 2019, although there came a point when Mr Gammon told them not to worry how long it took so long as they ensured they had the most comfortable upper-arm sleeve on the market. By August the target was a late-stage beta product by March 2020. Mr Macabuag too recalls an agreed objective for 2019 of beta-trialling with around 100 users, enabling a move from proof of concept to a sellable product.

205. Mr Lakey saw Mitt's business as having "progressed rapidly" after the first funding round, but it is not clear what that means at this development stage. It is agreed that there was "considerable positive press coverage", and grants from the Wellcome Trust, Academy Medical Sciences, and Innovate UK Global Challenges Research Fund. Mr Lakey also injected £30,000 of the £50,000 gained by his 2019 Royal Academy of Engineering Fellowship. There is a dispute as to this, which nobody wished resolved, Mr Lakey's case being that the £30,000 "should be treated as a director's loan from the Petitioner to Mitt repayable on demand" (not that that appears directly in the petition's claimed relief, and it would make Mitt's financial position more precarious still), Mr Macabuag being of the view that actually the entire £50,000 was always for Mitt's use, which is why while Mr Lakey was the lead applicant he was the co-applicant.

206. As to the staffing milestones in the summary term sheet, by October 2019 there were around 8 other members of staff and 5 consultants. Numbers are a little vague as most of the staff were, in Mr Macabuag's phrase, "recent university leavers on their first jobs, with no relevant industry experience"; but this was a marked increase. Mr

Macabuag also said that there were 10 users of the product in October 2019, although this increased to 100 by July 2020, when the product was, under the Licence, out of Mitt's hands.

207. In Summer 2019 the current version of the product received a CE mark, said Mr Lakey, confirming conformation with European "health, safety and environmental protection standards".

208. By August 2019, in Mr Macabuag's words, "we still had no plan to find users, no agreement about what we would give them, what it would cost, how to handle logistics, and no sign in sight of these operational decisions being made". In contrast, Mr Lakey considered that every milestone was on track until September 2019, when Mr Macabuag kept changing his mind about the pricing of the beta product, causing a risk to manufacturing and sales targets. Even at the date of his removal, the petition avers that Mitt "had met, or was on course to meet, all of its performance targets for 2019", meaning by "performance targets" "directional milestones". There is a rose tint to this, the reply stating that Mitt had only fallen behind on internal deadlines for product development; and that was because of Mr Macabuag's "failure to make adequate progress", but insisting that by 8 October 2019 product development was "substantially back on track".

209. On the evidence, by October 2019 there remained significant basic issues.

210. There was the product itself, on which Mr Macabuag and his team were continually tinkering: it remained in the research and development stage.

211. There was the business model. As Mr Mellor said, Mr Lakey was "wedded to the idea that the company could disrupt the prosthetics market by selling directly to consumers" a view which Mr Mellor thought needed testing, and the ethics of which required consideration anyway. Mr Lakey was "intransigent", Mr Macabuag "circumspect". There is no evidence that Mitt ever got to the stage of grappling with the obvious and significant ethical issues of direct sale.

212. Then there were the trials. Mr Mellor criticised the failure of the executive leadership to agree on how these should be run. All but Mr Lakey wanted the beta products provided free or for a nominal service charge. The observers were also concerned about the decisions to build prototypes in China.

213. This was all against a background of finite funds. A cash runway prepared in May 2019, shortly after the first funding round, showed negative cash by July 2020, on the assumptions which then pertained, which included no more grant money. As at 1 October 2019 the runway looked admirably accurate: there was £197,776 in bank against a predicted £196,877.

214. There was also considerable discontent from Mr Lakey with Mr Mellor. As with the other elements, more details will be covered below, but while frequently turning to Mr Mellor for (free) advice, Mr Lakey developed a growing antipathy to him, convincing himself that he was an impediment to the success of Mitt. Almost certainly that derived from Mr Mellor's providing experienced advice which differed from Mr Lakey's views, which were enthusiastic but derived from short business experience coupled with a university course. Mr Lakey was not to see that: he was a man convinced of his own correctness; one who would hawk around for advice from others until he found someone who agreed.

215. The unreasonableness and disproportion of the allegations shows Mr Lakey's obsessive and irrational side; not just those of the scheme and the sham, but smaller matters.

216. So the petition pleads that Mr Mellor "repeatedly attempted to involve his personal acquaintances with Mitt as either paid advisers or executives… in ways which would have been unnecessary and/ or counterproductive for Mitt at that stage and which were opposed by the Petitioner", "notably" Simon Colbeck, Krishan Hundal and Adam Westerfield (in fact, Waterfield); this case is enlarged in the reply to a plea that those he introduced as potential recruits "sought large salaries or shares", and Mr Mellor wanted them to have an executive role.

217. Even from Mr Lakey's own pleaded case it can be gathered that none of this came to anything; and there is anyway nothing inherently wrong in someone seeking a salary or shares for work, or in recommending someone for an executive role. Indeed, there is no allegation that Mr Mellor was doing anything other than fulfilling his role with Mitt. As Mr Mellor puts it, and denying that he was pushing for anyone to be paid, he was trying to recruit "appropriate experienced business professionals to share their relevant expertise with Mitt's Board": given that Mitt was a "fledgling start-up" run by "business novices" in their 20s, the "assistance of seasoned successful networked business people was likely to assist its prospects of becoming a commercial success".

218. There is also a bizarre group of complaints which include both that Mr Mellor "persistently failed to make himself available to discuss the affairs of Mitt" with Mr Macabuag and Mr Lakey, including as to the signing-off of board minutes; and that he "took an excessive and disruptive interest in draft Board minutes, on occasion attempting to alter them for his own purposes", while also calling too many board meetings, Mr Lakey viewing the minimum of 8 in the SSA as being "In retrospect… more than was sensible, but Nicholas ended up calling board meetings even more frequently". There is no need to record the minutiae of the minutes point, although aspects will be dealt with below as there are also allegations against Mr Lakey concerning minutes. There is no evidence that Mr Mellor was doing anything other than his duty to seek to agree minutes with the other directors who attended the board meetings; nor in, as may be thought wise given the nascent state of Mitt, calling additional board meetings.

219. Perhaps the most serious of the significant basic issues which beset Mitt was that after the first funding round the previously close relationship between Mr Macabuag and Mr Lakey fell apart; and the opposites which had made them such complements for each other became aspects of irreconcilability.

220. The deterioration was recorded by everyone.

221. Mr Carroll said that in Summer 2019 he noticed that the relationship was not as strong as he had thought, from comments each made showing frustration with the other. He tried to help them with "their leadership of the business and their relationship". There was "a lot of emotion on both sides"; "some friction as to how mass-produced the products would be". Mr Macabuag was happy to take things slowly but Mr Lakey wanted them faster, hoping to achieve a larger scale so a cheaper price. "Over time, I began to get the feeling that Nate didn't want to fully share Mitt with Ben", which accords with the sense from Mr Macabuag's cross-examination that when it came to it he always regarded himself as the main man within Mitt (the product was, after all, his creation; and he was the front man for it). However, both "voiced their desire to make changes for their relationship to work"; and in a session together, Mr Lakey proposed being more patient and demonstrating more empathy, Mr Macabuag with being more organised, with more structure in the day, and "to understand when to be serious".

222. Liz Coffey had noticed cracks in the relationship by August 2019. She had a weekend meeting with them, lasting 5-6 hours. Each was also asking to speak to her

separately. She recalled Mr Macabuag telling her of concerns about Mr Lakey's "attitude in addressing the board and how he could be perceived as abrupt or abrasive".

223. Mr Gammon had had contact from Mr Macabuag within a few months of the investment, regarding his relationship with Mr Lakey. His issues were "quite shocking, so soon after we made the investment"; at his request, in July Mr Gammon phoned the two about their relationship and lines of demarcation. "Ben was absolutely intransigent. Nate wanted the middle of the road and tried to make things harmonised". There was then a "crescendo" at the board meeting on 12 August.

224. Mr Mellor described Mitt becoming progressively dysfunctional as the Macabuag: Lakey relationship deteriorated. Mr Mellor tried to encourage them to build strong relationships with experienced advisers, Hugh Wolley, a finance director, and Bryan Roberts, with a background in sports technology, design and retailing, hired at commercial rates negotiated by Mr Macabuag and Mr Lakey. He also kept the investors aware of his concerns over the founders' relationship: for much of the summer they could not be in the office at the same time.

225. One thing on which Mr Macabuag and Mr Lakey agree is that the deterioration was after the first funding round. Mr Lakey found that Mr Macabuag's attitude to him "began to sour and by early Summer 2019 it was apparent that a serious gulf had opened up".

226. Mr Macabuag thought that Mr Lakey was not performing. "Mitt was not making any operational progress", which led to "stress and frustration for him that was directed at me". By August it was an "abusive relationship", as he told Mr Mellor on 5 August. Mr Lakey "never seemed to switch off", would message at all hours, any day; a mention of work/ life balance was met by a statement that he was not working enough. In Mr Macabuag's view he also became aggressive and angry when stressed.

227. Mr Lakey had his own doubts about Mr Macabuag, who from July "started to push back against the various deadlines", and they had "various disagreements" about management. Mr Lakey thought Mr Macabuag "had started to become slow to make decisions which was impacting upon the commercial progress… We needed to hit milestones to start generating sales in advance of January 2020 when the second funding round would open"; but Mr Macabuag was cautious about adverse feedback,

so was "continually tinkering with the prototype and this ended up with the design and manufacturing deadlines being missed".

228. For Mr Lakey these frustrations found an outlet in his beginning to press for the removal of Mr Mellor. That first seems to have been vented to Mr Macabuag after the 11 June board meeting, at which Mr Lakey had presented on the business-to-consumer model and there had been further discussion of necessary milestones before the second fundraising round. Mr Mellor, Mr Gammon and Mr Berman had joined in questioning Mr Lakey. Three days later there was a meeting between Mr Macabuag, Mr Lakey and Mr Mellor, after which Mr Lakey had to write in contrite terms:

"Thanks for taking so much time to meet with us Nicholas. I sincerely apologise to both you and Nate if my tone of voice at some points came across as rude and disrespectful. I don't mean to be but emotions have been getting the best of me in these conversations that I feel maybe too passionately about".

He ended: "Thanks again for meeting today guys- and sorry about raising my voice or talking over you at times".

229. On 15 June Mr Macabuag and Mr Lakey met for a discussion. Mr Lakey said he felt Mr Macabuag did not value him enough. At the time, Mr Macabuag says, he actually respected Mr Lakey's opinion more than his own.

230. All this worried Mr Macabuag. His perception was that nearly every day there was "an explosive, draining argument", as Mr Lakey would be infuriated if Mr Macabuag did not agree to a tiny detail; there was no focus, but instead "a chaotic, disjointed and stressful atmosphere with no personal boundaries"; and the "constant miniature cuts began to pile up".

231. He and Mr Lakey agree that on 20 June he told Mr Lakey to "go and find another company to work for" if he was going to think only of himself.

232. On 18 July was another board meeting, after which Mr Lakey again pressed Mr Macabuag on removing Mr Mellor. The minutes for this were never agreed, but it seems from the draft that there was, as may be expected, further discussion of the beta trial, but falling well short of Mr Lakey's memory that there was agreement to sell the beta products in batches; and Mr Lakey's proposing to charge for it again did not receive an enthusiastic reception. The unagreed minutes record the board wanted to see a decision on whether trial products should be charged by monthly subscription

"£5?", or "upfront nominal fee" "£25?" "to cover admin and delivery. There is great reluctance to sell at full price". Mr Macabuag recalls that that pricing proposal was consequent on rejecting the product-charging model. Present were the directors, both observers, Mr Wolley and Mr Roberts.

233. Mr Macabuag says he never agreed to the proposal to remove Mr Mellor; and Mr Gammon said that Mr Macabuag had never raised it with him. But one may think, given his avoidance of conflict, that Mr Macabuag may not have told Mr Lakey any absolute view; and the issue continued until Mr Lakey's removal.

234. Mr Lakey records that on 25 July Mr Macabuag and Mr Mellor had a call concerning the need for external consultants being involved in the manufacturing process; but how when he tried to join the call, Mr Macabuag said he would tell him about it in the morning. Mr Lakey complains that this is an example of his being excluded from company decisions. The exclusion is not easy to see, when all was to be explained in the morning; and while a director has a right to be involved in strategic decisions, that does not mean that there should be no discussions between directors save with them all present.

235. The extent of the breakdown is shown by the events on 30 July. Mr Lakey and Mr Macabuag were to fly to Egypt on behalf of Mitt; but that morning Mr Macabuag told Mr Lakey he was having mental health difficulties, and his mother was unwell, so he would not be going. His mother's illness was not as serious as that may have indicated: she had asthma. But his own mental health issue was that he "was experiencing severe stress", such that he was unable to get out of bed "owing to the prospect of attending the trip" with Mr Lakey. While Mr Lakey was abroad, he alleges another exclusive telephone call between Mr Macabuag and Mr Mellor, which Mr Macabuag told him had happened, "but was reluctant to discuss the content". The answer was that Mr Mellor wanted to know where Mr Lakey was, which Mr Macabuag told him.

236. On 2 August Mr Lakey emailed Mr Wolley, to ask whether he thought he should email Mr Macabuag, Mr Mellor and Mr Roberts to say that "we've all had lots of side conversations and there seems to be a lot of confusion on what the plans are", and proposing a discussion together. Mr Wolley replied to say that "Nicholas has called me a couple of times- I am about to send an email to him along those lines, ahead of my meeting with him on Tuesday- let me see how it goes. I'll call you on Monday".

Mr Wolley sent that email at 1704. 2 August was a Friday. This perfectly reasonable response is pleaded as another example of non-disclosure of conversations.

237. The next day Mr Macabuag met Liz Coffey at Tate Modern, where he raised the question of a third-party CEO.

238. On Sunday 4 August, Mr Macabuag met Mr Lakey and told him why he could not go with him to Egypt. Mr Lakey again attributed his outbursts to his sense of himself as being undervalued. Mr Macabuag confirmed to him his value, and raised the question of a CEO to guide them. Mr Lakey's response was "if a CEO comes in then where is my place in the company". Mr Macabuag said he did not think Mr Lakey had that experience; Mr Lakey said neither believed the other was necessary, a remark he then withdrew.

239. Later that evening Mr Lakey was compiling the agenda for a meeting the next day with Mr Mellor, and asked Mr Macabuag what he wanted on it. The reply was "Decision making process/ responsibilities. I was gonna run by him the idea of having someone experienced come guide us. Honestly I think it'd be good to talk about a lot of what we said today". Mr Lakey: "By that you mean new advisor or a CEO". Properly, Mr Lakey added it in.

240. It was raised at the meeting with Mr Mellor, which was to try to clear the air. Mr Lakey pointed out his own lack of place if there were a CEO. Mr Macabuag said something needed to change, and his mental health was suffering. There is a disagreement as to whether Mr Macabuag told Mr Lakey "I don't see you as CEO and I never will", or "I don't see you as CEO yet", but either way he was unconvinced as to Mr Lakey's current ability to fill the role. It was after this meeting that Mr Macabuag told Mr Mellor that "working with the Petitioner was like being in an abusive relationship". "At that point", said Mr Mellor, "I thought their partnership was over and they needed to go their separate ways". "So long as Nate stayed with the business, I thought the business could be saved. Ben's role in the business was less crucial. If the business could be saved, he would still benefit as a shareholder". Mr Mellor emphasised in cross-examination that he was not saying that Mr Lakey was wrong and Mr Macabuag right, or vice versa.

241. Mr Mellor invited Mr Macabuag and Mr Lakey to send him proposals for resolution. That evening Mr Macabuag sent him a PowerPoint with thoughts on how the "underlying issues" might be addressed. Mr Lakey sent Mr Mellor a bullet point list

of his "key operational activities" for the next six weeks, the first being "More market research", to be assisted by Julia Polnareva, to enable a decision on pricing strategy, though his view was that the product was "definitely worth paying for".

242. The PowerPoint was a three-page document fronted "leadership issues", with three points on "what's going on" and three "suggestions". "What's going on", box one: "Problem: the working relationship between Ben and myself has become toxic and hostile over the last 4 months. Beginning once the investment was raised and amplifying as we attempted to come to an agreement over a direction for the next 12 months". He notes that Mr Lakey says he does not feel valued, but that is fulfilled only when Mr Macabuag does what he says. The conclusion under this was: "We're trying to help people. But at the moment we're wasting time because of this pointless squabble. After 4 months of compromises, conversations and concessions I can only see a handful of ways left through this".

243. So he suggests open discussions with Mrs Kerr and Liz Coffey, on the basis that each is respected by both; or adjusting the share structure to 60:40 (it is not clear in whose favour) and with the note that "this may leave a resentment that reappears in an even more explosive way down the line"; and finally "Transition Ben out of the company. If we can't grow past it, and we can't restructure the company roles to accommodate… perhaps the only way is to split. I care too much about the people this company is trying to help than to let Mitt die because of stagnating, uncooperative leadership". The bottom line is "Ultimately this is about what is best for the company. I'm willing to do whatever it takes to keep this company alive".

244. From 5 August Mr Mellor was and remained "deeply concerned" about the mental health of each of them; and that was despite their unanticipated reconciliation before the 12 August board meeting.

245. On 6 August he wrote to Mr Berman:

> "I am sad to say the relationship between Ben and Nate has broken down further… It is not just the business at stake here, and the vision to help the greatest number of people possible, but their own personal wellbeing. I am seeing two diminished people no longer working as a team… David and I believe there needs to be a mutually agreed separation of Ben and Nate. The business can be sustained by Nate. It cannot be sustained by Ben. The aim would be to find some way forward that would enable Mitt to come forward with Nate, and where Ben is wound down

(hopefully in a mutually agreed way, rather than terminated)". To which Berman replies "If… the relationship is so badly broken I don't think a realignment of shares is a necessary and/ or lasting solution. So would agree there needs to be a separation- and that Nate is the more backable of the two. As it happens I never have seen this happen before so early in a company's life".

246. Mr Gammon's view was that:

"I was looking at losing all my investment. I'd given time and support to the team. They ignored my advice. Ben was intransigent, uncooperative in board meetings, and if you are given a choice between liquidation, which I did advocate… or continuing the business in some way shape or form… the more backable of the two and therefore the one that can sustain the business is the inventor of the product, and that is Nate. Whereas the person who makes… the business difficult, and has clearly shown, I would say, questionable management expertise is not".

What was pertinent was that "I had just made an investment in the company. Within a few months the two founders had come to what I can only describe as a serious disagreement… I was pretty pissed off… The issue of an interim CEO I think would have saved the company and kept them both in… but given that that was not a possibility, I could see no way forward other than to either close the company or have Nate take the company and run with it".

247. He concluded "when the company is dysfunctional because the two founding members clearly aren't getting on, then something has to be done or the company stops".

248. On 7 August Mr Mellor reported to Mr Gammon and Mr Berman on Mr Macabuag's and Mr Lakey's first counselling session the day before. Mr Macabuag had reported that "Ben exploded" at the suggestion a CEO be brought in. "The best solution I see is that they are able to continue together, but with an experienced CEO (ideally an experienced line manager with knowledge of the sector)… An alternative is that Ben leaves in a managed way… The worst outcome is that the split is hostile".

249. The two met both Mrs Kerr and Liz Coffey over the next two days. The meeting with Liz Coffey on 8 August was successful. In the WhatsApps afterwards Mr Lakey wrote: "In a time of desperation she was what seemed like our best chance. I was really scared yesterday". Mr Macabuag: "Me too man. But I think we have an opportunity to really surprise and impress Nick, David and the rest now".

250. The pleadings may disagree on who organised these coaching sessions, but at that point there remained enough positive animus for them to be successful.

251. On 9 August Mr Mellor was told of the reconciliation, and circulated the news to the investors. "Deary me!" was Mr Berman's response of 12 August. "Well that is good news I suppose… in 20+ years of doing this I have never seen a project work unless the principals had 100% trust and respect… So if one party believes the other is useless, unpleasant or not listening etc etc this project won't work, and they are wasting their time and ours". Mr Mellor: "Absolutely. I couldn't agree more".

252. At the 12 August board meeting, Mr Mellor and Mr Gammon again raised the issue of an interim CEO. This will be addressed further below, in the context of the issue over the ensuing minutes which was an allegation before Miss Berry, but Mr Lakey ultimately accepted that there had been an in principle acceptance of such an appointment, albeit that after the meeting he and Mr Macabuag took steps to alter the CEO title to something less intrusive on Mr Lakey's role. Mr Lakey perceived Mr Macabuag as being "firmly in agreement" with him, but Mr Macabuag says that actually he considered the CEO "a very good idea. I thought it would help us"; he also did not think there had been a formal resolution on the point. The next day he drafted an email to be sent by himself and Mr Lakey to Mr Mellor, which included:

"I still think Ben and I together are leading the ship. But what we do totally agree is finding someone with, as you say, guidance, leadership, and mentoring, willing to get their hands dirty- not necessarily day to day but definitely more than twice a month".

253. On 13 August, after Mr Mellor had circulated his draft minutes of the meeting, he sent a separate message to Mr Gammon.

"I left yesterday's meeting with the same misgivings as I went into the meeting. The personality and leadership issues were not addressed and I suspect the idea for an interim CEO was only grudgingly accepted by Ben… Both Hugh and Bryan have misgivings about Ben, but recognise his strengths if he was working for/ guided by a CEO… I wanted to put a marker down with the minutes that we agreed that an interim CEO would be a good idea. Having it there will provide a lifeline to Nate if things go off the rails again".

254. Mr Gammon replied:

"I would probably leave Nate and Ben for a while to settle down. I think they will either sort it or lose it in the next month and so leaving them for a bit might be best".

255. Mr Macabuag and Mr Lakey raised a variant to the minutes, and they were never agreed.

256. The reconciliation did not resolve Mr Lakey's discontent with Mr Mellor. He was talking about it after the board meeting, but Mr Macabuag told him he did not want change immediately: "one day in the future, when the time was right, the board may change, and Nicholas Mellor may no longer be or even want to be a suitable chairman"; in the meantime "he went above and beyond what a chairman needed to do", and no investor was upset with him. Mr Lakey wanted to meet Mr Berman to discuss it.

257. On 19 August Mr Wolley provided feedback from his weekly call with Mr Lakey, including Mr Lakey's views that "the Board is getting involved way beyond the levels of authority in the subscription agreement… the Board is too involved at day to day level" (yet in the petition Mr Lakey avers that Mr Mellor was not involving himself enough). Mr Gammon responded "I am not sure we are welcome by Ben/ Nate. I am pretty certain it is Ben sowing seeds of doubt to Nate. In these situations I have found the best thing to do is step back. Give them a lot of rope. Give them their head and way".

258. In cross-examination Mr Gammon explained that he was not going to write to Mr Mellor to say "this is a disaster"; but instead, "give them rope and let them hang themselves: that's what I would do, because that's the kind of person I am". "I had a teeny hope that… somehow this could be not as bad as I thought it was… I've seen these kind of situations before, and they kind of escalate and go nowhere, waste a huge amount of time and particularly money… I don't enjoy losing money, and I react badly when I think I'm going to"; but Mr Mellor "had a lot more hope than I did".

259. Mr Mellor was on holiday for two weeks in August. Following his return, on 4 September he contacted Mr Gammon and Mr Berman. He had spoken to Mr Lakey the day before.

"After the upset earlier in the summer they seem to be back on track, with Nate out in China supervising the first production batch, and Ben in London planning the trials that will begin in October. Both Hugh and Bryan feel that things are better. All

credit to Ben and Nate for putting it behind them and they have a clear plan to work to.

"The CEO issue is clearly very contentious and suggestion is to flag it as something raised in the last board meeting but go no further than that… Their plan is very much their original B2C idea with plans for a sales portal… Three charities (Reach, Blesma and Douglas Bader) have agreed to promote Beta Mitt to their membership through articles in their newsletters".

260. On 6 September Mr Hobhouse wrote: "I understand there are issues between Nate and Ben". Mr Mellor thought he had found this out through Mr Berman. Mr Mellor emailed Mr Gammon: "I think the line is that things are back on track but this could be an issue in the future, which in the medium term this could be mitigated by the appointment of a CEO". In his oral evidence Mr Mellor expanded: "I thought, there's a coming storm here".

261. On 11 September Mr Lakey expressed concern to Mr Macabuag that Mr Mellor was trying to exclude Mr Berman, but talking to Mr Gammon.

262. A week later, on 18 September Mr Macabuag and Mr Lakey had another session with Liz Coffey. Mr Lakey was still on about removing Mr Mellor because of his "poor performance, unprofessional conduct and closeness to Mr Gammon". Liz Coffey, from this and her other dealings with Mr Macabuag and Mr Lakey, was "struck by the control that Mr Gammon appeared to wield", that sense deriving in part from his support for the appointment of Mr Mellor as chairman (which was true), and her understanding that "Mr Mellor seemed to do Mr Gammon's bidding even though neither of them considered Mr Mellor had the right experience to be the company's chairman". Other examples of this influence were his insisting that Mitt use Taylor Vinters, and seeking to bring in his son as an adviser. It may be observed that, if this view of Mr Gammon's influence was really Mr Lakey's, the scheme, purportedly between Mr Macabuag and Mr Mellor, is even more preposterous. As it is, none of the acts mentioned go further than might be expected of the lead investor whose concern for the company, and his investment, was genuine.

263. Mr Lakey says that it was agreed at this meeting that he would speak to his mentors at the RAE about the best way to remove Mr Mellor. Liz Coffey, though attributing it to a meeting on 30 September, recalled a discussion on "how they could go about

removing Mr Mellor elegantly". She had not understood from Mr Macabuag that he was opposed to the idea.

264. On 19 September Marjorie Tulloch of the NHS wrote to Mr Macabuag forwarding comments from her manager, Vicky Jarvis, Clinical and Quality Lead- Prosthetics, after a query about trialling the Mitt sleeve. "She obviously has the same concerns as me regarding negativity towards the NHS which comes across strongly on the Mitt website and interviews". She also warned that for the NHS a free trial was standard for a new-to-market product, "as our NHS Trusts will not sanction spend on untested products".

265. Mr Macabuag transmitted these "super interesting" views.

"I think it's a really good point- it's a fine line to tread, but I think we need to start switching our descriptions away from what's wrong with other prostheses to what's good about ours- or more importantly, what people are doing with the Mitts… As ultimately clinicians are the first port of call for people with limb difference so we really really want them onside".

266. This drew Mr Mellor into sending a measured reply to Mr Macabuag and Mr Lakey, "You have to take a 'systems' approach to understanding how healthcare is delivered", while at the same time complaining to Mr Gammon that

"we are charging down the route of a B2C model without a proper understanding of either the ecosystem of innovation in prosthetics or the healthcare systems of which they are a part. It's a strategy more appropriate to an ice hockey team than a start up- and I continue to look for a single team member or adviser with proper health/ prosthetics sector knowledge".

267. Mr Gammon agreed.

"It is a real wake up call for Nate and Ben- or should be. We have been consistent in our advice that we should work with the existing structure and not against it. It is really horrible to think NHS practitioners are already picking up on a negative NHS spin from Mitt. That will get us absolutely nowhere… We need to be working and talking in a positive way about these very people".

268. As Mr Macabuag said, the NHS response was a "huge deal": "The NHS are the sole primary provider of medical products in the UK". While this response brought home the weakness of the proposed business-to-consumer model, it also laid bare the

unlikelihood of being able to charge for the beta test; and was therefore against Mr Lakey's views on both. It can be added that on neither point was Mr Lakey's view irrational: he gave a short list of household names which had become such through market disruption; and he wanted to charge because he wanted to show those who might invest in the second round that it was a product with commercial revenue-making possibility. But as this told him, that was not feasible, and on 1 October Mrs Kerr informed him that nobody, even Nike or Procter and Gamble, charged for testing, because the purpose of testing was to focus on just that.

269. It is unclear why Mr Lakey regarded Mr Berman as likely to be sympathetic, and Mr Berman has been unable to give evidence. But on 23 September he got his meeting with him, accompanied by Mr Macabuag who, having been warned that Mr Lakey wanted to raise the issue of Mr Mellor, was intending to talk out the meeting to prevent it. He almost succeeded, but as it was about to wrap up Mr Lakey asked Mr Berman what he thought of Mr Mellor as chairman, and suggested a change. Mr Berman said Mr Mellor was doing fine, and they should speak to the lead investor, Mr Gammon.

270. On 24 September Mr Berman emailed Mr Gammon and Mr Mellor with his account of the meeting. Before that, on the same day, there had been other emails. Mr Mellor emailed Mr Gammon and Mr Berman with an update from his meeting with Mr Macabuag and Mr Lakey the week before: "they have achieved a lot in the last few weeks… At the same time, old concerns remain"; Mr Macabuag is "very open when I see him one to one… [but] cautious about any discussions which might reopen areas of sensitivity such as questioning the B2C model and who ultimately might become CEO…". Mr Gammon's reply was "My view remains we need to give them breathing space and engage less… They are doing a lot and have made progress for which all due credit". His real thoughts, which he gave the court, were "I've already faced my loss, what I assume to be, because I just don't believe in what they're doing".

271. Mr Berman's email recorded two real issues: strategy, and the board. It did so in explosive terms.

272. For the beta trial "Ben said they were going to make 150 units and sell them for discounted price of £50. I asked why did they decide 50- because it proves the business model that people are willing to pay for the product. I said that was bullshit and it proved nothing and they were simply wrong- they were taken aback with my

directness but at this point I don't have the time to give them beating around the bush. I asked them how many other business models they diligence and on what basis they thought this proved anything- and they- Ben had nothing to say. I said they can do what they want but that it was a terrible idea to discount- if was a Fking trial not an inventory clearance and it was the wrong signalling. It should be called a postage and handling fee- or something like that with no charge for the product". "They expressed unease with the board meetings and asked how I thought they could be improved. Ben said that none of the 5 board meeting minutes have been approved. I said it was the chairman's prerogative to approve anything they wanted- and what was the problem- how come nothing was approved. We did not agree said Ben. I said it was acceptable not to agree how to do things but not on what was actually said. I suggested Hugh [Wolley] take the minutes and they turn on the recording device on an iphone. I made a long speech about how experienced Nicholas was with the 3rd sector crowd and David was one of the more thoughtful experienced investors I had come across/ they said David refuses to talk to us because he said we don't listen. Oh I said, that is not good for you is it to have your biggest most experienced investor feel unappreciated- not very clever… And left it silent for 20 seconds".

273. Mr Lakey protested in cross-examination that Mr Berman did not voice it like that at the meeting: "we left that meeting under the impression that he was going to talk to Will about being our chairman". Mr Macabuag said the email was an accurate reflection, including as to Mr Mellor: Mr Berman "completely shut it down". He was not disheartened, as he thought that Mr Lakey might now listen to what the board had been saying for months.

274. I do not doubt that the email was accurate. Why would it not be? Or, on Mr Lakey's account, why would there be such a disconnect between the strong language it uses, and what he says was used?

275. It did not put Mr Lakey off. A few days later he was telling Mr Macabuag that he had a list of replacements.

276. Mr Macabuag, though, did think he ought to report to Mr Gammon what had happened at the meeting, and about his concerns about Mr Lakey. Mr Gammon confirmed that there had been investor concern for some time; it seemed his behaviour had crossed a line; and that he needed "to talk to lawyers and only do exactly what they say, followed to the letter, and to talk to every shareholder and share my concerns".

277. On 25 September Mr Gammon told Mr Berman that since the meeting "Nate has been persistently reaching out to me… He has now texted me to say 'I have now found out what Ben is planning behind the Board's back and it is not OK. I now share your view on him and want to make a permanent change'. I don't know what Nate has uncovered… This may be the pivotal moment for Nate". A couple of hours later Mr Mellor was writing "I would say the tipping point has been reached".

278. It is actually not clear from the emails what it was which caused this shift. Mr Macabuag explained it as his upset that despite his telling him not to, Mr Lakey had chosen to raise the issue of Mr Mellor at the Berman meeting; and the issues which had arisen with Dr Roche the previous week, and those with a patent, and those with some threatened litigation, which will be investigated below. Neither Mr Macabuag nor Mr Mellor, though, at this point regarded the outcome as necessarily being the removal of Mr Lakey. Mr Macabuag wanted to take advice: "As a designer, as an engineer, you don't predefine the outcome before you understand the steps". Mr Mellor had in mind that permanent change might be the removal of Mr Lakey, or the appointment of an interim CEO.

279. There were now conversations between Mr Macabuag, and occasionally Mr Mellor, and Peter Finding, Alix Beese and Chris Keen at Taylor Vinters. Between 25 and 30 September Mr Macabuag also called all the investors save for Huw Jones, to whom Mr Gammon spoke, and Mrs Mellor, who was aware of matters from her husband. He regarded the status quo as now unsustainable. He was also concerned about the legal costs, as was Mr Gammon, who regarded it as a red flag for later funding; but Mr Mellor viewed themselves as damned either way. "I believed that we just needed to take each day as it came and try to save the company, follow legal advice and for me to be as fair as possible in this dispute to both Nate and Ben".

280. The response from the investors was that they all supported the plan to take legal advice; just as they would later be supportive of the decisions to offer Mr Lakey settlement terms, to suspend him, and ultimately to dismiss him.

281. Interestingly, on 27 September, in among the Mr Carroll: Mr Lakey WhatsApps, is this from Mr Carroll:

> "I'm gonna assume you're already thinking about it but if you haven't you need to start considering either Mitt post Nate or Ben post Mitt because this is not sustainable and I personally think it would be immoral to take anymore money off investors

under current circumstances… I'll stick with you both and do what I can to help and resolve but this situation is pretty fucked up…".

282. The same day, Mr Finding wrote to Mr Macabuag:

"Good to speak earlier, and thanks for the briefing. As discussed, I think it would be helpful if we prepared a strategy document for you on potential options to achieve your aims of (in order of urgency):

1. Removing BL from day to day activities.

2. Removing BL as director.

3. Reducing to x% BL's shareholding.

This would take into account both the corporate and employment aspects of the company's relationship with BL…

If you could please send us the chronology of relevant events, and your collection of emails, that would be very helpful".

283. In cross-examination Mr Macabuag said he had sought advice on what to do, as matters seemed to have crossed a line. He had expressed his concerns to Mr Finding, and this was a lawyer's note of proposals.

284. On 29 September Mr Macabuag WhatsApped Liz Coffey: "I thought we made some profound progress when we all met up last time- but things with Ben seem to have reverted to how it was before, but worse".

285. There were still dealings between Mr Macabuag and Mr Lakey: the business was still continuing. On 30 September they had breakfast together. In an effort to be conciliatory, Mr Macabuag says he told Mr Lakey he could draw up a list of candidates. Mr Lakey says that Mr Macabuag himself suggested Mrs Kerr and Dr Roberts; but Mr Lakey dismissed them as lacking adequate experience.

286. Also on 30 September Taylor Vinters sent through their terms for provision of employment advice. The scope of their services was described: "We will be advising on the employment and corporate aspects of the proposed removal and/ or settlement with Benjamin Lakey… Initially this will involve strategic advice on potential options to achieve your aims of (in order or urgency)", and then the aims as above.

287. Mr Macabuag described his thinking at this point.

> "This goes back to some of the first conversations I had with Ben, that the point of us coming together is that we're pursuing this goal of being useful to people with limb difference, and that that goal is bigger than any one of us. And I reiterated that at the start of when I started working with Ben, and I reiterated continuously. If there's a situation that at some point in the future arose where I wasn't the right person to be there, or Ben wasn't, or Nicholas or any of the employees, then we should be open to that in the goal of pursuing the mission. And I think that's right. I think that's fair. It would be wrong to assume that you should be entrenched in something indefinitely, because the thing that you're doing is more important than any one person".

288. That was consistent with the quotation which opened this judgment, and with the Founders Agreement with its foregoing of shares; and I do not doubt it. In more formal legal language, Mr Macabuag's defence describes his "growing concerns as to the harm that the Petitioner was doing and would do to the interests of the shareholders".

289. On 1 October Mr Macabuag and Mr Lakey had another disagreement over charging for the beta product. Mr Macabuag actioned a suggestion of Mrs Kerr's: he took a straw poll of those in the office. Most agreed with him. Mr Lakey was upset both at the result and the method: it was, he thought (with some irony, given his own singular approach), a matter for the board. His petition speculates that as the beta trial was in the event free, it should be inferred that the timing of his removal was influenced by his objections to that policy. It is clear from the above that that was only one aspect. It is also a difficult inference when, on his own case, matters could have been settled by a board resolution; and were there one, there is no doubt that it would have been in favour of a free trial.

290. That morning Mr Macabuag had emailed Taylor Vinters: "Sorry to press on this… Is there any updates on a plan to remove him from operations?".

291. Their advice came through later that day. It began by repeating the priorities and described itself as "high-level advice on potential strategy. Additional advice is likely to be required in due course in relation to any option which the Company decides to pursue". A summary of the "suggested approach", subject to "any additional concerns or issues that you may highlight", was that Mr Lakey be

suspended pending a disciplinary investigation, so achieving his removal from operational matters and the first priority.

292. "The Company will then need to set up a disciplinary investigation… we suggest an independent individual is appointed by the Company to carry out this investigation.

"Subject to the outcome of the investigation process, the Company can consider if it wishes to pursue a formal disciplinary process or, as an alternative, seek to enter into without prejudice discussions with Ben. It is likely that without prejudice discussions may be the smoothest and fastest way of bringing the relationship to an end".

293. Having set out the areas of concern, the advice goes on to note that, absent discrimination or whistleblowing, the Employment Tribunal will not be open to Lakey as he had under 2 years' service.

"Subject to your comments on the above, from an employment perspective there is no obligation on the Company to carry out a lengthy (or any) termination process. One option would be to call Ben to a meeting to set out all of the above issues and bring his employment to an end with immediate effect (and without notice) for acting in a manner which is 'materially adverse' to the interests of the Company.

"However, as any such termination process would also have an impact on Ben's shareholding (if the Company can demonstrate that Ben has committed a serious breach of his contract of employment, or is guilty of any gross misconduct or any wilful neglect in the course of his duties which results in termination of his contract), we suggest the Company follows a fair and reasonable process in effecting any dismissal.

"Making a decision (in these circumstances) without first completing a reasonable legal process could leave the Company vulnerable to legal action if it attempts to rely on the Bad Leaver provisions contained in the Articles".

294. There is a separate section headed "Removing Ben as a Director":

"…it appears that the right to appoint or remove Founder Directors in both the Articles and the SSA is jointly held. Therefore, to remove Ben as a Founder Director in a clean manner we would need to amend both the Articles and the SSA.

"To amend… a resolution must be passed by at least 75% of the shareholders. Therefore a large part of this exercise will depend on how Ben's shareholding is treated on termination".

295. It ends with a heading "Without Prejudice Discussions":

"The ultimate objective of the Company is to remove Ben as soon as is reasonably practicable. Given that this is the driving motivation, there is an option here for the Company to consider bringing Ben's employment and involvement in the Company to an end by offering him a settlement package".

296. The advice also attached the ACAS guidance on disciplinary investigations "to provide you with an overview of how the process should be conducted", although that was addressed primarily to internal rather than fully independent investigations.

297. Mr Hackett draws out certain aspects of that advice, in particular that it posits an investigation followed by a further inquiry or settlement stage. That is certainly one of the options, and Taylor Vinters' view is that immediate dismissal, while available against Mr Lakey as employee, is inadvisable because of the potential shareholding consequences. The essence of the advice is fair process, given Mr Lakey's rights under the Articles and SSA. Mr Mellor acknowledged candidly that he had not taken from this letter that an independent investigation might not be the end of the process. Mr Macabuag confirmed that he wanted immediately to stop Mr Lakey from continuing in the actions he perceived as harmful to Mitt, but beyond that in his mind all options were open.

298. For his part, from 1 October Mr Lakey was consulting his mentors about his own concerns. He viewed those relationships as "entirely confidential pursuant to the terms of his Royal Academy of Engineering Fellowship".

299. One of those communications was to Adrian de Ferranti.

"Unfortunately things haven't improved at Mitt in terms of our board and chairman relationships… Nate and I have agreed that the time is right for our company to make a change and find a new chairman for the next phase of our growth… Any and all advice in this new territory for us would be very much appreciated!".

In reply that evening Mr de Ferranti recommended obtaining legal advice.

300. When Mr Macabuag found out about this, he emailed Taylor Vinters on 24 October: "'Nate and I have agreed' is a complete fiction".

301. Another 1 October communication of Mr Lakey's was to Hersh Shah.

> "We have been having a lot of troubles at Mitt in terms of our board governance and chairman relationships. It's our chairman's first time investing, first time being a chairman and is life-long friends with our lead investor- who first proposed he takes the role of executive chairman".

302. As to Mr Mellor, those are each of them tendentious and erroneous statements.

303. On the evening of 1 October Mrs Kerr WhatsApped Mr Macabuag: "Really think this has blown up. Had Ben on chat for long time. I've said I can't fix it. You two have to or go to the Chair. I don't think that will be pretty…". The reply was: "Oh my goodness, I can't believe he's still going on this. (all I do is apologise for this guy). I can't say too much but rest assured this is coming to an end VERY soon".

304. Over the next few days Mr Macabuag and Mr Mellor worked together on reimagining Mitt without Mr Lakey, guided by Taylor Vinters. Mr Macabuag was responsible for all legal instructions and management of process.

305. On 3 October Mr Mellor sent Mr Macabuag a "Draft short term plan", with the two of them on the front, as "Chairman" and "Co-Founder". It was directed at the process against Mr Lakey. The first heading was "Ensure due process", the second "Aim for a long term 'constructive outcome'" which has three bullets: "Ben treated fairly"; "Is proud to have been part of founding Mitt Wearables"; "Remains a champion for limb different people and hopefully for Mitt as well". It digested the Taylor Vinters advice, and discussed possible settlement; there was a draft suspension script; a heading "Re-invigorating the business", "Provisional next steps" including "Nicholas and Nate need to ensure they are following the Taylor Vinters guidance"; Mr Wolley's draft outline for attracting an interim CEO; and task and scenario charts. This was a professional and considered document which took into account the interests of Mitt and of Mr Lakey in a scenario where he might be leaving.

306. It was not a complete cure for Mitt's ills: Mr Mellor said it did not seek to alleviate his concerns about recruitment, where "I was trying to cut through this cloud of people that was somehow involved with the business". He agreed that for his own

part he had come to the view that the likely outcome was the dismissal of Mr Lakey on a Good Leaver basis.

307. On 4 October Liz Coffey met Mr Lakey and WhatsApped Mr Macabuag: "I think you guys are at a critical juncture now. You will need to figure out how to talk through the challenges asap".

308. On 6 October Mr Lakey emailed Angus Baker to seek his advice:

"Having a lot of trouble getting Nate's help on all of our previously agreed founders tasks… I think a bigger underlying issue is that our chairman has been non-existent the past few months. We've spent 30 minutes with him since July… And since he is not around to keep us honest and accountable, things continue to be difficult between Nate and I because I've been trying to keep us both accountable which in Nate's mind I am sure means trying to rule over him- which I do not want to do!".

He says that Mr Mellor is "old friends with our lead investor", holds shares "in his wife's name", and is governing to Mr Gammon's "preference instead of for the entire group of shareholders"; as there is a small pool of potential chairmen "I don't want to have David [Gammon] or our chairman hear we are searching before releasing the chairman. Just want to do this in the most respectful and political way possible".

309. Again, Mr Lakey is seeking advice on a basis objectively filled with inaccuracies, including the idea that there was some division among the shareholders and therefore some misdirection of the directors' aims. The only outlier was him.

310. The mutual complaints as to failure to progress the business continued. A WhatsApp from Mr Lakey to Mr Carroll on the morning of 7 October said that Mr Macabuag had "no interest in solving the problems quickly… Every day of delays costs us £1,500. It's a day that delays us from product launch. A day that lowers our valuation as well since we will have less progress, sales/ feedback to show by the time we run out of money".

311. Early that afternoon Mr Lakey emailed Mr Keen of Taylor Vinters: "I need some guidance. We have been having some difficulties working with our chairman the past few months. Nate and I were wondering what the process is to remove a chairman". On receipt, Mr Keen telephoned Mr Macabuag who confirmed he did not agree it.

312. That evening, Liz Coffey was asleep when Mr Macabuag sent her a WhatsApp at 2345: "…at least a decision has been made about going forward… I've got news to update you with".

313. At around the same time that Mr Lakey had been emailing Taylor Vinters, they had been advising Mitt on his suspension pending an investigation into his alleged misconduct, and providing a suspension letter and a settlement letter for use the next day.

314. Whatever the merits of their beliefs as to Mr Lakey's conduct, it is clear from the above that in deciding to suspend Mr Lakey, Mr Macabuag and Mr Mellor believed genuinely that they were acting in the best of interests of Mitt; and that they were doing what they could to understand and recognise Mr Lakey's own rights, and to deal with the issue with regard to its practical effect on him and his future. They were also listening to and following their understanding of advice. While both thought that Mitt would now be better off without Mr Lakey and, as their defences admit, wanted him removed, and while Mr Mellor thought that the outcome of the process would be his dismissal on Good Leaver terms, it would be wrong to say that his removal was the inevitable outcome of the process, let alone the outcome whatever the content of the independent investigator's report.

Removal and suspension

315. At 1807 on 7 October Mr Lakey was sent a request for a meeting at 0815 the next morning by Mr Wolley, which he attended. During the meeting he was sent various notifications, which he did not see until later: an 0805 message that Mr Macabuag had signed into his Google Drive account and changed the password; an 0807 email notifying a change to the password for Mitt's Instagram account; and at 0808 a notification that Mr Macabuag had signed into his work email account. These were, Mr Macabuag said, "precautionary steps".

316. At the meeting Mr Wolley gave Mr Lakey the Suspension Letter. There must have been copies, as Mr Lakey says this one was signed by Mr Wolley himself, although Mr Macabuag signed one as well. Nothing now turns on that, although that fact had been used to support an argument that the process was unauthorised. He also says he received the Suspension Letter first, although the intent had been that he should first

get the Settlement Letter, and then be handed the Suspension Letter only if he did not agree its terms. Mr Wolley has not given evidence for anyone.

317. By the Suspension Letter Mr Lakey was

"suspended from work until further notice pending investigation into the following allegations:

Inappropriate tone and approach to Board meetings and day-to-day management matters.

Attempting to exclude a co-founder from investor meetings.

Seeking to undermine the Board.

Working for a competing entity.

Attempting to draft a patent competing with a patent the Company is developing in conjunction with a grant partner.

Withholding legal advice from a co=founder and planning to also withhold such information from the Board.

We reserve the right to change or add to these allegations as appropriate in the light of the pending investigation.

Your suspension does not constitute disciplinary action and does not imply any assumption that you are guilty of any misconduct. We will keep the matter under review and will aim to make the period of suspension no longer than is necessary. Your suspension may be lifted at any time and with immediate effect.

During your suspension, we shall continue to pay your salary in the normal way. You are also entitled to your normal contractual benefits.

You will continue to be employed by us throughout your suspension and you remain bound by your terms and conditions of employment…

In order to ensure impartiality, the Company has decided that it is necessary for the disciplinary investigation to be handled by an independent person. Details of the independent investigation and further information in relation to the investigation process will be provided to you as soon as is reasonably practicable.

> You are required to co-operate fully with the investigation process… However, you are not otherwise required to carry out any of your duties...
>
> Your email account has been suspended and you will no longer have access to our computer network until the investigation and any subsequent disciplinary process (if applicable) has been completed.
>
> When the investigation has been completed, the Company will write to confirm whether you will be required to attend a disciplinary hearing. If we consider that there are grounds for disciplinary action we will inform you of those grounds in writing and you will have the opportunity to state your case at the hearing.
>
> If you know of any documents, witnesses or information that you think will be relevant to the matters under investigation please make the independent investigator aware (once they have made contact with you). If you require access to the premises or computer network for this purpose, please let me know as we may agree to arrange this under supervision".

318. Mr Lakey says "I felt completely blindsided. I remember trying to look at the letter and being in complete shock". He told Mr Wolley none of it was true, who replied "something along the lines of the board deciding to take a different direction", and that he had a letter with a settlement offer. Mr Lakey left the coffee shop and telephoned Liz Coffey, who told him to collect the Settlement Letter. Mr Wolley told him that "the board wanted me to accept the offer and that I should try and leave with dignity". Mr Lakey said he was not leaving as he had done nothing wrong. Later, Liz Coffey put him in touch with Withers.

319. The Settlement Letter was in the name of Mr Wolley on behalf of Mitt. It began

> "I write further to our meeting of today's date to confirm that Nate and the investors are seriously concerned that they have lost trust and confidence in you and, consequently, they are all questioning the future tenability of your ongoing involvement with Mitt… As a result, Nicholas, Nate and the investors are also seeking to progress the search for a standalone Chief Executive Officer faster than they had initially envisaged".

320. The allegations were then set out, including some heads which are immaterial.

321. "In the interest of fairness and transparency, the Company has decided that it is necessary for any applicable disciplinary investigation to be handled by an

independent person. One outcome of any independent investigation process (and any subsequent disciplinary process) is that you could be found to have committed a serious breach of your contract of employment and/ or be found to be guilty of gross misconduct. In such circumstances you would be treated as a 'Bad Leaver' under the Company's Articles… and your shareholding in the Company would automatically convert into Deferred Shares.

Notwithstanding the above, all those involved with the Company are mindful that any formal process would necessarily lack dignity. Therefore, as an alternative, the Company is prepared to offer you a settlement agreement to bring your ongoing involvement as an employee and Director… to an end on more advantageous terms for you (which recognise your commitment to the Company to date). The Investors and your co-founder are aligned on this position".

322. The offer was a cessation of employment on 25 October; normal pay and benefits until then; payment in lieu of 30 days notice and accrued but untaken holiday; a "tax free ex gratia severance payment (further details of this to be communicated as soon as possible after this meeting)", and on those same awaited terms termination "on the basis that you retain an agreed percentage of your equity".

323. Mr Lakey returned briefly to the office with Mr Wolley. He then went to Liz Coffey's flat, as she says "upset, angry and in a state of disbelief"; he "wanted to get as much data as possible to defend himself… but… his access to Mitt's server had been blocked". He was therefore by now actually aware of it, even if he had not yet been informed of it through a reading of the Suspension Letter.

324. It was clear enough from the Settlement Letter, but on 9 October Mr Wolley emailed Mr Lakey to tell him that Mr Mellor "confirms that all other shareholders… are fully supportive of this move to reach a settlement agreement with you. They hope that this is possible, that you can leave with some dignity, as a good leaver, and remain as a shareholder, proud of what you have co-founded".

325. Withers' first letter was 11 October: "our client's suspension should be lifted without delay and his access to the office, work email account and the computer network reinstated".

326. Taylor Vinters replied on 14 October to confirm continuation of the suspension and appointment of an independent investigator, whose details would be provided.

327. The other Taylor Vinters letter of 14 October was another offer letter. It referred to attempts to telephone and email Claire Christy at Withers on 9 October. "Our client is prepared to enter into an exit agreement on the core terms set out below. Please note that this is made with a view to concluding the matter swiftly, and is not intended to be negotiable". The offer was the same as the Settlement Letter, except that details of the severance payment and the shareholding were now given: the "tax free ex gratia severance payment… is the equivalent of three months' gross salary" (which would be £10,000); for the shares, Mr Lakey was to be treated as a Good Leaver under the Articles (so would receive 5 or 6 thirty-sixths of 50,000 Ordinaries, depending on how the completed months were calculated). The offer was open until 4pm on 16 October. During trial this was called "Offer 1".

328. Mr Lakey discussed it with Withers, and worked out the share percentage. He considered it "absurd" and it was not responded to within the offer period.

329. On 16 October Mr Lakey was discussing the general situation with Mr Carroll, who observed that "if one of them gives you a decent amount for your shares you can start again"; Mr Lakey: "The potential of what we have is not worth £1m. I will not be leaving Mitt". By that, explained Mr Lakey in cross-examination, he meant he thought it was worth much more.

330. Mr Macabuag telephoned Mr Carroll on the same day and told him that "Mitt should continue without" Mr Lakey because his views on its future direction differed from his, the chairman's and the investors'. Mr Carroll asked why therefore there were allegations of misconduct, a question Mr Macabuag did not answer directly, instead suggesting that Mitt wished to settle.

331. The next day Mr Lakey told Mr Carroll that "The only counter offer would be Nate reduces his shareholding to 18% and becomes a creative director who comes to the office 3-4 times a week (as he has been the last 2 months) and reports directly to the new chairman". What is notable about that is its recognition that one or other had to go for Mitt to have a chance of viability.

332. Withers replied to Offer 1 on 18 October: Mr Lakey was "not interested in discussing terms of an exit with the company". They also proposed mediation "to facilitate discussions and to consider all options": a course which falls some way short of anticipating settlement.

333. Also on 18 October Mr Macabuag had his end of week meeting with employees. He gave a presentation on long term roles without reference to Mr Lakey. He considered it inappropriate to do so where he was suspended and facing an investigation which might lead to dismissal.

334. On 21 October Mr Macabuag circulated an email among the investors, actually drafted by Taylor Vinters, asking for confirmation of his understanding that all investors have lost confidence in Mr Lakey, as Mr Lakey seemed to think otherwise. It had gone on to note that "the company does not have limitless funds. These funds were invested… to assist limb loss patients and we cannot spend such sums on protracted legal correspondence or potential litigation. My understanding is that, given the current situation, shareholders would wish to consider whether the company is the appropriate vehicle to achieve this purpose, or if an alternative vehicle would be preferable". Mr Gammon, Mr Hobhouse, Mr Berman and Mr Pinnington all affirmed the same day, Huw Jones and Mrs Mellor the next. An acknowledged hope behind this letter was that Mr Lakey would see that all were opposed to him, and that Mitt was of doubtful viability once legal fees came to be incurred. Those were facts. It was always a long way to hypothesise from them that once Koalaa came to be incorporated, that was to draw value from Mitt.

335. Mr Beese of Taylor Vinters also provided further advice by email on 21 October: "We consider that the Company has two primary options at this point. Much depends on how firmly we can reasonably maintain the position held to date, and therefore whether an independent investigation would give us the result we want… Either way, it seems that the relationship between Ben and Mitt has broken down and will need to be severed one way or another". The position he refers to seems to be the evidential position.

336. Two options were given. The first was "To proceed with an independent investigation and to inform Ben of loss of trust across all shareholders". The Taylor Vinters interpretation of the arrangements was that while Mr Lakey's employment could be terminated at any point, it would require him and Mr Macabuag to act jointly to remove him as a director (to reiterate, advice which I consider incorrect, bearing in mind the ability of Mitt to effect removal under Founders Service Agreement, and that of the shareholders under section 168, where there was gross misconduct; but Mr Macabuag and Mr Mellor were plainly operating against a background of the advice they received, rather than advice they didn't). So they viewed the outcome of the investigation into gross misconduct important, as then Mitt could treat Mr Lakey as a

Bad Leaver. The potential of that might be as a goad to his accepting an offer to leave as a Good Leaver. "We should make it clear that there is no guarantee that an independent investigation will recommend that disciplinary action is appropriate… or indeed that Ben has committed 'gross misconduct' or 'wilful neglect'".

337. The second option was mediation as proposed by Withers. "Our initial thoughts are that this appears unrealistic given Ben's current expectations of returning to work"; but it might be productive were Mr Lakey told of shareholder discontent.

338. Which course should be selected awaited input from Mr Macabuag, sent in the early hours of 22 October. That chosen was the independent investigation, although Taylor Vinters reiterated that there was no guarantee that Miss Berry would find gross misconduct.

The independent investigation

339. On 22 October Mr Lakey received Mitt's instructions to Miss Berry, signed by Mr Macabuag and including his summary chronology of events and a zip file of "relevant background documents".

340. Mr Lakey originally alleged that Mr Macabuag knew that some of all of the allegations were untrue, or was "reckless or negligent" thereto. There were five heads of allegations:

340.1 "Worked with a competing entity", which has come to be known as the "Conflict Issue";

340.2 "Withheld legal advice from a co-founder and planned to also withhold such information from the Board", not to any extent followed through at trial;

340.3 "Attempted to exclude a co-founder from investor meetings", which refers to meetings in September 2019 between Mr Lakey and Mr Hobhouse, the Berman meeting (the complaint being that Mr Lakey did not want Mr Macabuag to attend, as Mr Lakey wanted to discuss the removal of Mr Mellor), and a meeting with Mr Pinnington which Mr Macabuag was asked not to attend, and steps taken to hide the venue so that he couldn't: these have not been covered at trial;

340.4 "Attempted to draft a patent competing with a patent the Company is developing in conjunction with a grant partner", which has become the "Patent Issue";

340.5 "Adopted an inappropriate tone and approach to Board meetings and day-to-day management matters", which has split into the "Board Pack Issue", the "Draft Minutes Issue", and the "Email Issue".

341. Brief particulars were given of each head, followed by a "Cause for concern" section; so, for example, for the last issue this was:

"Potential to bring Mitt into disrepute by failing to observe and seeking to disrupt corporate procedure and practice; Failing to follow company procedure of signing board minute meetings in a timely fashion; Distributing documents with unapproved changes; Unacceptable tone and refusal to collaborate with colleagues".

342. Miss Berry was told that these matters had caused Mitt "very serious concerns", and that it considered the allegations "require a thorough, independent investigation". Mitt "of course reserves the right to change or add to these Allegations as appropriate in light of the pending investigation". She was instructed to:

"1. Conduct a thorough independent investigation into each of the Allegations.

2. Your investigation process should include reviewing such documents and interviewing such witnesses as you consider necessary and appropriate".

343. Miss Berry was asked to provide Mitt with a preliminary list of witnesses for interview. As to documents "If you require any documents in addition to those provided contained in the Investigation File, please liaise with me to obtain these (and ensure that they are added to the Investigation File). The Company will, separately, ask Ben to provide you with any documentation that he considers relevant to the investigation".

344. Her task was to review the investigation evidence and reach conclusions on whether, in relation to each allegation, it was (a) well-founded; (b) amounted to a "serious breach" of Mr Lakey's obligations including but not limited to those under his Employment Agreement, the Founders Service Agreement, the Articles, and/ or the SSA, or as a fiduciary; and/ or gave "rise to a case to answer for 'gross misconduct' or 'wilful neglect in the discharge of his duties'".

345. She was to prepare "an independent investigation report" explaining the investigations, the evidence, and setting out "clearly your reasoned conclusions and recommendations" on each question, and highlighting "any other matters which reasonably indicate grounds for other action or enquiry". In the event, the Berry Report did not contain recommendations, but particularly as both sides had legal representation, nothing can turn on that; indeed, it may be thought straying into territory beyond that of an independent investigator.

346. For this thorough and independent report there was an estimate of 5 days work at £1,000 per day, including the time taken to gather the evidence, some of it by way of interview.

347. One issue raised by Mr Lakey is that within that timescale this could never have been a thorough report. That is by-the-bye. The real issue is how long Miss Berry actually spent, not what she charged. Nobody believed that she achieved all she did within 5 days.

348. There is then the issue of tendentious instructions, including the chronology. They were on their face Mitt's account of its concerns, which Miss Berry was then to investigate. They were never bound to succeed. In the event, not only did Mr Lakey engage fully with the process, through lengthy written submissions and interviews, but Miss Berry found for him in some regards. There was nothing inherently unfair in the instructions.

349. On 24 October Miss Berry contacted Withers to tell them separately of her appointment and role. She proposed an interview with Mr Lakey the next week; and asked for any relevant documentation from him, and dates of availability, by close of business the next day.

350. Withers provided a holding response on 25 October: "I had hoped to have instructions from my client today but they have not yet come through". Mr Lakey was fermenting his own plans, as shown by his WhatsApp to Mr Carroll of later that afternoon: "I'm trying to delay the investigation so I can get access to the drive and more emails and organise that evidence first". Mr Carroll warned him by return: "Think you need to request access to your drives and emails to the investigator". He reiterated that advice on 28 October.

351. That was the date of Mr Lakey's more substantive response, through Withers to Miss Berry and Taylor Vinters: "Ben is currently unable to respond to the allegations

comprehensively as the company cut off his access to the company systems, including his company email account, on 8 October… In order that he has a proper opportunity to review his records and documents and respond fully to the allegations, the company will need to restore his access to the company's systems, in particular google drive and his email account… He has some documents in his possession but there are further records and documents he needs to rely on". The Withers letter also said that Mr Lakey had been signed off from work by his doctor, for stress and related reasons, from 25 October until 1 November.

352. This request for open access was allowed in Taylor Vinters' reply of 29 October, though on qualified terms: Mr Macabuag would meet him the evening of the next day, or at the weekend, to return to him his personal laptop and to supervise access to Mitt's systems, which would be done at the RAE.

353. In cross-examination it was put to Mr Macabuag that supervision was a "ludicrous suggestion", given Mr Lakey had had unfettered access just weeks earlier. But, said Mr Macabuag, he was now suspended; and while there no specific concerns as to his use of the documents, "we were worried that it was an unknown, and we had a duty to the people, the users on there who had medical records, who trusted us with details of their children, photos of their children, to make sure that that data was treated with the utmost care, so it would be completely inappropriate to allow someone who had been suspended by the company to have unsupervised access". Mr Macabuag was also the correct person, he said, because if it were a Mitt employee they would have had to have been given explanations which might in the future be prejudicial to Mr Lakey.

354. Mr Lakey could have responded on the point, had he chosen. As it was, mid-afternoon on 29 October, he hacked himself into Mitt's Google Drive. This has become the primary allegation against him. As it was added to Miss Berry's enquiry, it will be dealt with below.

355. There followed a pause in the investigation, as witnesses had to be lined up around Miss Berry's availability.

356. On around 8 November Mr Lakey's name was removed as project manager from Mitt's grant application to the Innovate UK Global Challenges Research Fund.

357. On 20 November Mr Macabuag wrote to Taylor Vinters: "Just wanted to touch base now that the investigation is about to start, and wanted to ask what our plans were

after the outcome. I'm guessing if Sophia finds gross misconduct then the plan is simple, as we'd be able to dismiss Ben as a bad leaver or negotiate a better deal with him". But if something less than gross misconduct "what is our plan for bringing this to a close" in terms of dismissal as an employee, and removal as director and shareholder.

358. Mr Macabuag said "I think after… he broke into the account, that damaged even further the likelihood of everything being completely fine"; here, he was just seeking a "full suite of options". Taylor Vinters' response, directed at how Mitt can "forcibly terminate Ben's employment" if that cannot be agreed following the investigation, was essentially a restatement of its 1 October advice.

359. Miss Berry interviewed Mr Lakey twice, at the end of November and 6 December. On 22 November he had given her "names of relevant people to talk to. However, she chose not to speak to a number of people", identified in Mr Lakey's reply as "Dr Roche, Dr Sharma, Alexandra Thornton-Reid (the TV lawyer who advised in respect of Mr Bonser's allegations), Dr Kaye, Mr David Griffiths (an IP adviser at the Imperial Hackspace) and Mr Carroll, despite being asked to do so by the Petitioner". This will be addressed further below.

360. Mr Lakey's own approach was, as may be expected, thorough:

"From the time I was suspended and for the purposes of the investigation, I started to work on showing that every single allegation was false, spending many hours a day on that task".

The Berry Report: the Issues

361. The Berry Report was produced to the parties on 16 December. Miss Berry concluded that Mr Lakey had "committed serious breaches of duties or obligations that he owes to the Company" in respect of the Conflict Issue, the Patent Issue, the Board Pack Issue, the Draft Minutes Issue, the Email Issue, and the Google Drive Issue which had been added after the 29 October access. The other allegations were not upheld. The breaches of duty were as director and, expressly as to the Google Drive Issue, and otherwise impliedly (unless reference to his being under an "obligation" is meant expressly to encompass this), of his employment.

362. The treatment of the Report at trial has been varied, because of the parties' different interpretations of its status. Mr Parfitt is an example of one extreme, that the court has no need to look at it at all, save to satisfy itself that it is a bona fide report, because the Leaver provisions are all-definitive as to the consequences for Mr Lakey's shareholding. As discussed above, I consider that he is right on the latter point; but I do not think that his wide consequence follows: the correctness of the Report's conclusions may be relevant to the good faith in which it was produced, and relied on; and the Issues also pertain to rights under the Employment Agreement and the Founders Service Agreement (which, at the least to the extent they affect Leaver status and Mr Lakey's shares, are proper subjects for this petition), and to the circumstances in which a section 168 removal may be legitimate. For Mr Hackett, Mr Lakey has never been removed fairly using the Report, whether from its use by Mitt, or from its own procedural fairness, or because of its erroneous conclusions given Mr Lakey's case that he had committed no wrong at all.

363. The result has been that while there has been considerable testing of the evidence on the Issues, on which I will make findings, that evidence has been different in substance and deponent from what Miss Berry heard; and in its focus.

364. It is not the task of this court to second guess her; it is, though, to assess whether the Report was bona fide, and procedurally regular; and whether any Issue was, on the evidence the court has, made out. Those are one set of exercises. The other is to assess the use the parties made of the Report, based on their understanding of it.

The Google Drive Issue

365. Although chronologically last, I start with this as it seems to me clearly to constitute gross misconduct, and a breach of Mr Lakey's obligations under the Employment Agreement, the Founders' Service Agreement, and the CA06.

366. As above, the Suspension Letter informed Mr Lakey that his email account had been suspended and until completion of the investigation he would have no access to Mitt's computer network. He read and understood this on 7 October, because he raised it on that date with Liz Coffey, and on 25 October with Mr Carroll, who advised him, twice, of the need to make a formal request. On 28 October Withers made that request, and on 29 October Taylor Vinters offered supervised access.

367. On 29 October Mr Lakey hacked in, an expression he may not have liked, perhaps because his process was relatively simple, but which denotes unauthorised access.

His WhatsApps to Mr Carroll give us a contemporaneous report. At 1503 Mr Carroll asked "Have you spoken with the investigator yet?"; at 1504 was Mr Lakey, jubilant: "I just got back on my email! Don't know why I didn't try this before. The email reset was my Canadian uni email account"; "What???! So they haven't blocked you?" "They reset my password but I was able to put an old password in and get a verification email to my ualberta email… I just have more evidence now. Like the weekly plans and all that".

368. In cross-examination he said "I think I felt like I downloaded everything, but on later reflection I didn't download all the folders. I was missing stuff, actually". He agreed that his resetting of his password meant that Mitt itself could not access the email account. He also agreed that the Google Drive contained "all of the company's business documents", including medical histories and photographs, including of children and their conditions; financial data including forecasts and business plans; intellectual property; and future designs. He further agreed, in the skilful hands of Mr Clerk, that if not authorised this was a serious data breach.

369. Mr Lakey confirmed that he understood from the Suspension Letter that his email account was suspended; and he knew it was through that account that the Google Drive was accessed.

370. He never thought Mitt would not find out. On 30 October it was advised by Google of Mr Lakey's access, his change of his password, entry into the administration settings, and his removal of Mr Macabuag as an "admin" user, effective until 0902 that morning.

371. On 30 October Taylor Vinters wrote to Withers:

"We have been made aware of a series of actions, apparently by your client, which appear to breach the terms of his suspension and which give rise to concerns regarding the security of our client's commercially sensitive and confidential information".

They told Withers that his email account had again been suspended, with the consequence that Mitt itself could not access emails sent to that account, "which obviously has a detrimental effect on business options" (which again Mr Lakey agreed in cross-examination); and sought assurance that no more unauthorised attempts to access would be made, which was never forthcoming.

372. A series of excuses or explanations have been proferred by Mr Lakey.

372.1 He says that actually he could access the system; but seeking to access it was contrary to the terms of his suspension, and his actual access was not direct (not that that affected the prohibition).

372.2 On 31 October he said during more WhatsApps with Mr Carroll that "I was asked to respond to their lawyer on why I was in the Google Drivehaha (letter didn't say I couldn't sign back in…)". But his cross-examination confirmed that he did know that this was "an instruction not to access the company's computer network".

372.3 He regarded his solicitor as being "quite unresponsive" around this time; but if so he could either have pressed her, or himself sought authorised access.

372.4 He says that as the instruction was originally from Mr Wolley, it was unauthorised. That was not his view at the time, which is why Withers was seeking access; nor is it a point of any substance.

372.5 He says that although his "understanding was, unless it had been agreed with the company, [he was] prohibited from accessing the computer network", he needed the information which had been requested several times before. At the time of his intrusion there was an open offer for supervised access. Not only had that not been followed up, but there could be no realistic objection to it.

372.6 In his petition he put forward the excuse that his access was as director, to allow him to fulfil his functions. If that had been his purpose then the defences admit that would be a proper reason. But it wasn't: as he said in cross-examination "I changed the password so I could get the documents and everything I needed to defend myself at the time".

372.7 Finally, there is the after-the-event justification that he found Mr Macabuag had been deleting relevant documents, so threatening a fair investigation. On entry his first act was to check the trash. He discovered that on 27 October Mr Macabuag had deleted a document headed Mitt Restructuring Plan, last edited on 24 October. This document had been given an innocuous title (hardly) so that Mr Lakey would not have looked at it before. It included an updated organisational chart including £1,000 pm to the presently-unpaid Mr Mellor, and Mr Wolley as holding share options, but no reference to Mr Lakey.

372.8 Mr Macabuag explains that this was a "draft organogram", by now of the possible shape of Mitt if Mr Lakey left, but first created in July 2018 and since then proceeding through 49 iterations. It constituted continuous "organisational musings" rather than any fixed plan. In any event, in evidence I accept, he said that there was no deliberate deletion: deletion was automatic in Google Drive consequent on his moving the document to his own personal hard drive.

373. The varied and unsupportable excuses and explanations do not help Mr Lakey when it comes to assessing this conduct. This action drove to the question of what trust could still be placed in him in the context of a small start-up company, still in its r&d phase, reliant on at least one further round of investment, and hopefully building towards significant third party investment, operating within a specialised and deeply-sensitive medical sphere. While the suspension of Mitt's access to this account was over only about 18 hours, and while Mr Lakey could have accessed at least some of these documents by legitimate process, he in fact obtained unrestricted access to highly sensitive corporate and personal information, deliberately contrary to due instruction from Mitt, and contrary to a process which had been suggested but to which he had not conveyed a response; further, that access was for personal reasons and not those of Mitt, and side-stepped his own solicitors and the advice he was receiving from Mr Carroll. I do not doubt that as employee that constituted gross misconduct, nor as a director: it was a breach of any and all of sections 171-175 CA06 (and, to be clear, I am not suggesting that the nature of the breach was magnified because it fell under more than one section). He could not seriously be retained in such circumstances.

374. It follows that unless the process itself of the investigation was challengeable, Mr Lakey was susceptible to being removed under the Employment Agreement and the Founders Service Agreement, with the effect of being a Bad Leaver under the Articles; and he could also be removed under section 168.

375. As it is relevant to the validity of process, there were later communications about access to Mitt's documents.

376. On 5 November Liz Coffey contacted Mr Macabuag to request supervised access for Mr Lakey, which she was told had already been offered.

377. On 6 November Mr Lakey emailed Miss Berry to draw her attention the deletion of what he described as a "key investigation document". He also sought a range of documents including Mr Macabuag's employment agreement (there wasn't one), and

all his emails to all involved in or named in the Issues. She replied on 13 November, copying in the solicitors, explaining that she could not decide the deletion point, asking Mr Lakey to an interview on 22 November, and recording Taylor Vinters' contention that they had made offers of reasonable access.

378. The next day Mr Lakey responded to confirm his attendance at interview, and that he would send "allegation response documentation with plenty of time" to read before.

379. On 15 November Taylor Vinters confirmed to Miss Berry that there had been no response to their letter of 13 November again offering supervised access; so "the Company has taken the reasonable decision to instruct you to proceed with the investigation without providing Ben with access to the Company systems in advance of the investigation meetings".

380. The same day Withers wrote to say that Mr Lakey would speak to her about the documents at the meeting the next week.

381. As already remarked, in the event Mr Lakey's submissions were voluminous, and cross-referenced to multiple documents. He made no further efforts to gain legitimate access.

The Conflict Issue

382. Direct and indirect conflicts of duties, or of interests and duties, which fell within section 175 CA06 were described by Article 12 as a "Conflict Situation", which also prescribed modes of authorisation by the directors.

383. This concerns a transaction which never proceeded. Its facts are convoluted, and the trial has not been of sufficient length for anyone to consider it worth testing them all.

384. In short form the position was this. As part of his MRes, on 21 March 2018 Mr Lakey incorporated Revive Controls Limited ("Revive") as sole director, being joined by Mr Macabuag on 20 December 2018 before the company was dissolved on 7 May 2019. He also drafted a proposal whereby Revive would take a licence of a patent from Imperial concerning a myoelectric control software system. Imperial had filed a first patent application for this in about July 2018, and a "corresponding PCT patent application" on 16 July 2019. It was the product of the work of Mr Lakey and three others; and he was listed as one of the four inventors and would therefore receive co-inventor royalties from any licence: hence the potential for conflict.

385. The software system was "not specifically focussed on controlling prosthetics", but they were a potential use for it. Mr Lakey and Mr Macabuag had discussed it from about November 2018, and both believed that it could be beneficial to Mitt. So Mr Lakey suggested to Mr Macabuag, the only other director at the time, that Mitt should consider utilising it. Mr Macabuag had the idea of incorporating a newco, Mitt Controls, which would build a portfolio of patents, including this. Both viewed it as in Mitt's interests to hold it, although another third party was currently in licensing discussions. The exploitation of this patent was referred to in Mitt's February 2019 business plan.

386. In March 2019 the patent received a prize from Imperial, in which Mr Lakey shared, and around then the third party, Open Bionics, dropped out from negotiations. On 3 March 2019, copying in Mr Macabuag, Mr Lakey alerted Taylor Vinters to his being a co-inventor on the patent of which it was proposed Mitt Controls take a licence, with a view to its onward licence to Mitt. Mr Lakey asked for a discussion with Taylor Vinters about "this patent management, legal structure of a spin-out and licensing deal".

387. Whether that happened is not known; nor is why Revive was allowed to lapse.

388. On 27 June 2019 Mr Lakey emailed Rebecca Santamaria-Fernandez at Imperial saying he wanted to go ahead with licensing into Mitt; and from then until 9 September there was correspondence, copying in Mr Macabuag, about a potential licence.

389. On 4 July 2019 Shruti Sharma at Imperial sent heads of terms to Mr Lakey and others, copied to Mr Macabuag: "As per our conversation yesterday, we need to discuss and agree on the following points for the IP licence". There are blank entries for royalty on net receipts, annual fees and milestone fees, and patent cost reimbursement, and a series of outline terms. At that point Mr Lakey spoke to her to say he could not be involved in negotiations. Mr Macabuag said that for his part "I don't recall paying it much mind. I always said to Ben: this patent is your thing, it's separate". It was not a Mitt priority.

390. On 14 August Mr Lakey was emailing Mr Wolley, informing him of the patent, and the proposed Imperial licence to Mitt; Mr Lakey had spoken to them again yesterday; "Do you see any downside to this IP being licensed to Mitt if there are zero costs to us, and only a revenue share if a product is ever made and sold with it included?".

"Since I am an inventor on the patent, it is a conflict of interest for me as Mitt to negotiate the deal for my own invention. I might need your assistance on this as they recommended they corresponded to Nate but I do not want to distract him from the current main goal of finishing the design of the sleeve. Let's chat more about it tomorrow morning".

391. This was not, nor had ever been, hidden. Mr Macabuag's mind was probably on other things, but it suddenly came alive to the issues over the patent on 9 September. On that date there was a telephone conference between Mr Lakey, in the office with Macabuag, and Dr Sharma and Niall Marshall of Imperial. Mr Macabuag said he was really just overhearing the call, rather than participating. He heard discussion of ranges of percentages, which was what triggered his concern. Mr Lakey agrees he was talking terms, and told Imperial that Mitt would not accept any upfront costs or set fees. It was because of the conflict that Mr Lakey told Imperial that its proposal must be sent to Mr Macabuag only.

392. Dr Sharma sent it on 29 September, by when Mr Macabuag was taking advice from Taylor Vinters on his issues with Mr Lakey. The email began: "Following my call with Ben, please find initial licensing terms…". At the end it said "I look forward to receiving your counterproposal" to the proposed royalty rate of 5% of net receipts and the rest of the terms, which were in bare outline extending over a dozen or so bullet points.

393. So, even if not in accordance with the formal terms of Article 12, Mr Lakey had been informing Mr Macabuag (if not, from his appointment, Mr Mellor) of the conflict and the negotiations; and neither bound nor intended to bind Mitt into anything without Mr Macabuag's approval. More, the other party to the licence, Imperial, was aware of the conflict and that it had to deal with Mr Macabuag to finalise any deal. I am not persuaded that this was a situation reasonably to be regarded as giving rise to a conflict of interest: the conflict was acknowledged, and was to be addressed. Even if that is too beneficent a view, I do not think these circumstances would amount to a serious breach, or gross misconduct.

The Patent Issue

394. The facts here are also convoluted. The essential complaint is that Mr Lakey drafted or allowed the drafting of a patent which competed with one the Company was

developing with Dr Roche, to the detriment of their relationship with him. That detriment was temporary, and the allegation shows that no such patent was ever filed.

395. Dr Roche was described in its marketing as Mitt's clinical lead. Mr Macabuag described him as "supportive of the mission, and an incredible ambassador in the field, a really really important person". Their relationship is now repaired, as is that between him and Mr Lakey: on 30 January 2020 Dr Roche was emailing him, hoping that the dispute with Mitt was resolved amicably and giving, with hindsight, his view on this Issue:

"I think the IP issue had occurred as a lot of progress was happening at the same time, and was easily rectifiable".

396. Mr Macabuag had designed Mitt's product around the summer of 2017. By December 2018 Dr Roche was working on a prosthetic gripping tool which sent electronic signals to the user's forearm. As is usual, he was also preparing a patent to protect his intellectual property.

397. In late August 2019, Mr Lakey was the lead in preparing instructions to Taylor Vinters to draft a patent for the Mitt product.

398. In mid-September 2019 Mr Macabuag travelled up to Edinburgh to meet Dr Roche. Among their conversations he told him about the application for the Mitt Patent, "and the details thereof". Dr Roche was extremely displeased at what he regarded as a trespass. Mr Macabuag agreed that "the two applications described the same technology".

399. The critical point here is that the technology was not the same, so ought not to have been described in the same way. No-one has suggested that the drafting errors were Dr Roche's.

400. Mr Lakey agrees that he prepared the technical specifications for the Mitt Patent, supervising an intern, Gino La. The specifications were passed to an expert solicitor, Samantha Kaye, at Taylor Vinters. What Mr Macabuag had described to Dr Roche was his understanding of the patent, as it was not until 19 September that Mitt received its patent in draft, and Mr Macabuag was in Edinburgh the two days before. Mr Lakey also indicates that the two patents were different as drafted, which shows an acknowledgment that they ought to have been, in that the Mitt Patent related to auto-tightening of the sleeve socket through environmental sensing, whereas the

Roche Patent tightened through user muscle activity. Neither Mr Macabuag nor Dr Roche viewed it that way, so far as Mr Macabuag understood what was meant by "environmental sensing" at all.

401. I must prefer their views because on 30 September Mr Lakey sent Dr Roche the draft Mitt Patent, and on 6 October he responded:

"I have noticed some conflicts in the text which overlap with my idea, discussed and documented with you on December 15 2018, that describe a closed loop circuit to transmit sensation from a terminal device proportionally to the constricting of the sleeve".

He then suggests excisions to the proposed wording.

"I do not think you have intentionally overlapped the wording, as we have been working closely together on this idea since its conception and I suspect ideas might have got confused between Gino's invention of a self-tightening sleeve and my non-invasive haptic feedback system using a soft sleeve. The two systems are different and should be reflected independently in the two independent patent applications… I think we should definitely combine the two ideas into one device, as this would be very beneficial for patients, and I'm looking forward to us developing these ideas together… Please send the updated patent draft when you've had a chance to review these conflicts".

402. In WhatsApps later same day Mr Lakey replied to state that actually some of the concept of tightening was from Mr Macabuag's third-year thesis; but Dr Roche responded "I think somewhere along the line the two ideas have been confused and merged as one. This isn't the case". He explained that further later that day:

"This is my main issue, the closed loop system is central to my idea, balancing EMG with sensory input, and incorporating this into Mitt's passive soft sleeve… What I am objecting to is that closed loop control idea being taken to another patent application which I'm not party to".

403. Mr Lakey replied:

"I don't believe the patent lawyer meant closed loop as user sensory input but just environmental sensing from the pressure sensors on a tool to tighten the sleeve. We can take out the closed loop part".

404. Dr Roche responded:

> "Yeah man, I think that's fair. I recognise this is mutual gain team effort. But I am conscious that this is now a publicly funded project, so I have to protect the way public funds are spent. Which means protecting the core idea".

405. Mr Lakey says "I knew Aidan Roche better than anyone. I had no personal motivations to ruin this relationship". The point, though, is attribution for what went wrong; and Mr Lakey was in charge of the Mitt Patent process. The necessity to re-draft was bound to lead to extra expense, and upset to Dr Roche in the meantime.

406. What I am unable to draw from that error, which I accept was Mr Lakey's responsibility, is a serious breach of duty. It was neither serious in itself, nor causative of significant loss or disruption. Although it should not have happened, the problems were addressed in the ordinary course of settling the wording of a patent application.

407. I add, considering the Conflict Issue as well, that that I do not find as did Miss Berry on her different facts does not mean that I do not think they were capable of being raised, or, more seriously, that they were raised as part of a device to seek to ensure the removal of Mr Lakey through tendentious allegations and instructions. There were facts behind each which might lead to a finding of breach; and I do not doubt that Mr Macabuag was genuinely concerned by those facts, and hence right to take formal advice on them. Indeed, having formed the opinion that they were serious, he was bound so to do.

The Board Pack Issue

408. This is one of the subdivisions of the "inappropriate tone and advice" categories in Miss Berry's instructions. Similarly to the previous two Issues, while there is a breach, it is minor. Mr Mellor himself said in cross examination that he would not dismiss someone for a "simple thing" like late provision of board pack, though it was "often a problem" and "always regrettable".

409. The specific allegation relates to the board pack for the 18 July 2019 board meeting, delivered by Mr Lakey only the day before; yet by clause 5.3.1 of the SSA bound to be circulated "at least 48 hours before the meeting".

410. Despite the late circulation, and clause 5.3.1 providing that "no business shall be conducted at a meeting" unless there had been such circulation, it was agreed to proceed.

411. In his petition, Mr Lakey denies it was specifically his responsibility. He is right to say that the SSA did not allocate the task to anyone specifically. In relation to that for June, Mr Macabuag had on 8 June WhatsApped Mr Lakey "I completely forgot about the board pack", to which Mr Lakey replied: "We can send it Monday morn. I'm going to go hard on it tomorrow when I'm back. That's on me to polish up after we both put our thoughts down, and be responsible for with Nicholas". As Mr Macabuag says, "It had always been the responsibility Ben took on his shoulders, and it was certainly one that Ben asked for me to leave him to do".

412. There was also an excuse for the July delay: in the days leading up to the 18 July meeting Mr Lakey had been in China visiting Mitt's proposed manufacturer. He received the link to Mr Macabuag's presentation on 16 July. On 17 July Mr Mellor chased: "Ben and Nate, Do you think you could send out the briefing documents ASAP. These should normally go out with the Board agenda so that the Board has time to prepare for the meeting and we can use the time more productively discussing the issues it raises rather than reporting on what has happened". They were sent out at 2219 that day, after Mr Lakey and Mr Macabuag had reviewed them.

413. Although Mr Mellor sought them from both, Mr Macabuag said that "It had always been the responsibility Ben took on his shoulders, and it was certainly one that Ben asked for me to leave him to do". That makes sense, given their roles.

The Draft Minutes Issue

414. As recorded above, an outcome of the board meeting of 12 August was a consensus to the in principle appointment of an interim CEO, even if not a formal vote.

415. The next day Mr Mellor circulated draft minutes to Mr Lakey, Mr Macabuag, Mr Gammon, and Mr Berman (who had given his apologies for the meeting). They included:

> "Nicholas suggested bringing in an interim CEO to help the team accelerate the business and provide in-house day to day guidance, leadership and mentoring. There was agreement that this would help and identifying such a person would be a priority".

416. Mr Gammon agreed those minutes as accurate.

417. Mr Macabuag and Mr Lakey were in their period of reconciliation. After receipt of Mr Mellor's draft, Mr Macabuag forwarded a draft reply to Mr Lakey, although they were sitting at the same desk, discussing. "It was the interim CEO title that incensed Ben", he recalled.

> "Great minutes, captures the discussion well I think… Slight teeny tiny amendments in the last paragraph if I can suggest them- just so we don't get confused later. Could we change the interim CEO title? I still think Ben and I together are leading the ship. But what we do totally agree is finding someone with, as you say, guidance, leadership, and mentoring, willing to get their hands dirty- not necessarily day to day but definitely more than twice a month What that title is I don't mind (project manager?), but interim CEO might confuse things. Hope that makes sense!".

418. Mr Lakey's actual reply of the same date, circulated to the original recipients plus Mr Wolley, was:

> "You've summarised the meeting very well and it looks great to us… We've made a slight adjustment to the last paragraph. Sorry we couldn't connect on the phone tonight. If you want to make any further changes, please feel free to call us and then we can finalise these as quickly as we can".

419. Mr Lakey circulated this proposal to Mr Wolley as well, as he said he was supposed to assist in the signing-off of minutes, as he was with the yet-unagreed July's; and to Mr Berman, who had not been present.

420. Mr Macabuag had not approved the final proposed version.

421. The obligation on all Mitt's directors was to seek in good faith to agree an accurate record of resolutions and material discussions at the board meeting, speedily: by clause 5.3.7 of the SSA a copy of the minutes was within 14 days to be sent to the Investor Directors or Observers. Altering the title of the proposed appointee was a breach of that duty by Mr Lakey, and indeed Mr Macabuag. That was a post-meeting suggestion, which might have been recorded as such and dealt with at the next board meeting. That was so even though what was circulated was expressly a draft.

422. By itself, this seems a technical rather than a serious breach of duty: it was expressly a draft suggestion, inviting comments; other than Mr Wolley and Mr Berman, those to whom it was circulated knew what had happened, and those two could easily find

out from others; steps could have been taken, but perhaps because of what was shortly to unfold, were not, to ensure their agreement, despite (it is alleged, and Miss Berry finding) Mr Lakey not convening calls for that very purpose. What lay behind the upset, although this was not made clear in Miss Berry's instructions, was that this was perceived as a pattern of behaviour from Mr Lakey; and that would make the matter of greater gravity, particularly combined with, for example, the non-provision of Board Packs.

The Email Issue

423. The obligation of confidentiality was within clause 15 of the SSA, in the stringent terms already quoted, with an exception (among others) for disclosure to professional advisers.

424. The RAE mentorship scheme was subject to confidentiality. Its "Enterprise Fellows Welcome Pack" said that "All aspects of the mentoring relationship should be treated as confidential". Mr Lakey had understood from the RAE that "awardees were encouraged to highlight any problems they were having in developing their business and that all information would be treated confidentially".

425. Miss Berry found a breach in Mr Lakey's 6 October 2019 email to Mr Baker, manager of the RAE Enterprise Programme, on the bases that he was not a mentor at all, and that the email went beyond the weekly report which Mr Lakey usually provided (one of Mr Lakey's explanations). To repeat:

"Having a lot of trouble getting Nate's help on all of our previously agreed founders tasks… I think a bigger underlying issue is that our chairman has been non-existent the past few months. We've spent 30 minutes with him since July… And since he is not around to keep us honest and accountable, things continue to be difficult between Nate and I because I've been trying to keep us both accountable which in Nate's mind I am sure means trying to rule over him- which I do not want to do!".

426. He mentions that Mr Mellor is "old friends with our lead investor", holds shares "in his wife's name", and is governing to Mr Gammon's "preference instead of for the entire group of shareholders"; again we hear that Mr Mellor and his wife are "first time investors", and he is a "first time chairman"; and he tells Mr Baker that "Hersh, Adrian and Phil O'Donovan… all said" that those factors were "big red flags". "We will be needing a new chairman and Ana mentioned the Academy helped James at mOm find one… Nate and I need to decide how this change is done". As there is a

small group of potential chairmen he does not want Mr Mellor to hear about it: "I don't want to have David [Gammon] or our chairman hear we are searching before releasing the chairman. Just want to do this in the most respectful and political way possible".

427. In fact, as Mr Lakey was constrained to agree in cross-examination, the "non-existence" of Mr Mellor was simply wrong, barring a fortnight in August when he had been on holiday. There was the 12 August board meeting, and the emails over the minutes the next two days; and on his return emails on 30 August; and calls on 5, 10 and 11 September; emails on 18 September; and Mr Mellor was in the office, "briefly" said Mr Lakey, on 20 September. All this as an unpaid non-executive chairman. The friends, false shareholding, partial decision-making, first-time investment and chairmanship, and co-desire of Mr Macabuag have already been discussed, and were also each wrong.

428. It is worth repeating clause 15.1 of the SSA to which the 15.2.1 right to make disclosure to a professional adviser was an exception. The Shareholders agreed to:

"keep all information which relates to the business activities of the Company and this Agreement confidential. No such party shall reveal any such confidential information to any third party save in connection with the performance of his obligations hereunder or otherwise for the purposes of the Business and in any event on taking all reasonable steps to preserve the confidentiality thereof…".

429. The contents of the 6 October email were confidential information: details of Mitt's business, and difficulties with its business, of which the outside world would not be aware. I am prepared to accept that by the email Mr Lakey was genuinely seeking to obtain advice on how to remove Mr Mellor in a respectful and politic way. There was then an obligation on Mr Lakey to ensure that confidentiality should be maintained by the recipient. Mr Baker was not a professional, so not subject to professional rules of confidentiality. Neither is there satisfactory evidence that he was covered by the RAE's mentorship confidentiality: he was the manager of the scheme, not himself a mentor. Mr Lakey was therefore taking an undue risk in presenting this information concerning the allegedly-calamitous state of Mitt's board to Mr Baker. Moreover, he was actually presenting it to further his own individual perception of events, rather than on behalf of himself and anyone else; and on bases which were multiply false, (just as he had to the mentors themselves).

430. This was to run the risk of putting this (in fact erroneous) account into the public domain, which would plainly prejudice Mitt, both directly, and because Mr Gammon, connected with the RAE, was alleged to be the focus of its business concerns. It may be noted that Mr Lakey had somehow got wind of what had happened at mOm.

431. So, insofar as Mr Lakey was taking advice on this confidential information as individual Shareholder, he was doing so risking its not being kept confidential. Insofar as he was doing so as director, he was additionally failing to present a true picture, and utilising mentors' advice provided on the same false basis; moreover, to adopt his own phrase, he was doing so for the "sectional interest" of himself alone, rather than genuinely in the interests of Mitt.

432. In those circumstances, as employee and as director I consider that he was in serious breach of his duties; again, as director, a breach of any and all of sections 171 to 175 CA06. This was, again, conduct which drove to the trust between the board and the Investors, at a time when their trust would be necessary to ensure Mitt's survival through the second funding round.

Post-Berry Report

Mr Lakey's challenges

433. On its receipt on 16 December Mr Lakey immediately challenged both the conclusions of the Berry Report and its process. He wrote to Miss Berry: "You stated that I would have the opportunity to discuss any doubts [as to] my evidence you had". "I believe that there is additional information that is extremely valuable to investigate the allegations you are upholding. Please allow me to provide the relevant documents and information as well as" interview Dr Sharma, and speak to Dr Roche. "I do not believe this investigation has been completed to its fullest extent until all of the relevant information has been provided".

434. Mr Lakey had already provided long written submissions, and been interviewed twice. He had been represented during the process by Withers. What his additional documents and information were is not specified. The list of all those Mr Lakey wished interviewed has already been given. Miss Berry records that list, and says that "I decided that it was not necessary to interview them. I have explained why I reached that conclusion below when dealing with the allegation that they were

involved in". She also confirmed that none of the heads in which she found against Mr Lakey turned on disputed oral evidence.

435. She recorded Mr Lakey's request that more documents be obtained from the Company: "I concluded that this documentation did not pertain to the five allegations I had been instructed to investigate".

436. These were rational and considered decisions by the independent investigator.

437. She was also careful to adopt a methodology favourable to Mr Lakey: "where there was no contemporaneous document to support the allegation against BL by the Company (or an agreement by BL that such an event had occurred) I would not uphold the allegation against BL"; and where there was no interview with someone who might have been relevant, as with Mr Berman in respect of the allegation that Mr Lakey had sought to exclude Mr Macabuag from meetings with the investors, she weighed the matter in Mr Lakey's favour.`

438. As it was, aside from the interviews with Mr Lakey, she held two interviews with Mr Macabuag, and single interviews with Mr Gammon, Liz Coffey, Mrs Kerr, Ms Mendez Guerra and Dr Kaye.

Offer 2

439. Mr Macabuag says that there had been no decision taken on what to do with Mr Lakey before receipt of Report. Its whole point was as an independent review to see if his conduct was sufficiently serious to merit removal.

440. On receipt he discussed the Report with Mr Mellor and Mr Beese. Their conclusion was to make one final settlement offer.

441. On 17 December Taylor Vinters wrote to Withers with an offer open until noon on the 19th. The "Company is currently reviewing the… report… and is considering appropriate action", but "given the severity of the issues, it is very likely that your client will be dismissed for a serious breach of his contract of employment/ his service agreement and/ or be dismissed for gross misconduct. In such circumstances your client's engagement with the Company would be terminated with immediate effect… and he would be treated as a bad leaver". "Notwithstanding the above, all those involved with the Company are mindful that termination… on these grounds would likely lack dignity for your client and have potentially significant ramifications on his future career".

442. So it proposes "more dignified and advantageous terms": pay and benefits to 19 December; payment in lieu of his 30-day contractual notice period; payment in lieu of all accrued but untaken holiday; and treatment as a Voluntary Leaver. The last would give him half of the accrued Shares of a Good Leaver, as opposed to the worthless Deferred Shares.

443. There was no response. Mitt had become aware that Withers had ceased to act for Mr Lakey on 18 December, so the offer was passed directly to him as well.

The removal of Mr Lakey

444. Met with silence, Mr Macabuag, Mr Mellor and Mr Gammon discussed matters further. They also took more advice from Taylor Vinters. A 19 December note from them recorded the Report's finding of serious breaches, Offer 2, and no engagement. As there had been no engagement, "the Company has considered on balance to seek to forcibly remove Ben Lakey as an Employee and Director", "with immediate effect without notice or payment in lieu of notice"; a termination letter had been prepared.

445. Taylor Vinters advised that it was possible to terminate the directorship immediately in light of the findings of substantial breaches, "ideally" at a board meeting, relying on the Founders Service Agreement. "This approach is certainly not without risk as it is non-compliant with the Companies Act and is in breach of the Articles and Shareholders Agreement… even if he was to bring… a challenge the Company could follow a more detailed procedure under s.168 Companies Act 2006"; "…the option of settlement (post termination) always remains open to the Company".

446. Mr Lakey was in Canada on 19 December, when he received the Termination Letter signed by Mr Macabuag on behalf of Mitt. It referred to the Report's findings of "serious breaches of duties or obligations". "In view of the seriousness of such findings and acting in the best interests of the Company, it has been decided that your employment with the Company should be terminated with immediate effect…". "In addition to the above, pursuant to clause 6.1 of your Founders Service Agreement, the Company has also taken the decision (in light of the contents of the Report) to terminate your statutory directorship… with immediate effect… for a serious breach of your obligations as a founder". "Finally, in accordance with the Company's Articles of Association you will be treated as a bad leaver…".

447. On 20 December 2019 a notice of Mr Lakey's termination of appointment was filed at Companies House.

448. Mr Macabuag and Mr Mellor do not in their defences dispute that the termination as director was wrongful, although they do not identify on which of the petition's hypotheses that is. As it is, there was no board meeting at this time which approved removal; nor was there a section 168 resolution. The removal was, though, in accordance with one strand of Taylor Vinters' advice of 19 December.

449. However, there is no like formal complaint in respect to the mode of Mr Lakey's removal as employee. It is just said that he had committed no wrong.

450. It follows that, even with reference to employment only, on the true interpretation of the Articles, Mr Lakey was a Bad Leaver. I would add, with reference to his directorship, he having been found to have committed a serious breach of his Founders Service Agreement, and having in fact been removed, that that the formalities of his removal as director were on this basis not met would not affect anything: he would remain someone under Article 7.3 who "Leaves in circumstances where he commits any serious breach of his… service contract".

451. To the extent that his removal required a resolution whether of the directors or of the Shareholders, it was a formality which could thereafter have been effected at any point. As director he was outvoted two to one. The Shareholders had from September 2019 been supportive of the process; and became the more so by the time of the section 168 resolution on 28 August 2020.

452. Mr Lakey maintains an optimistic point that he could not be removed under section 168. That depends firstly on there being no recharacterisation of his Shares; but that was automatic upon his becoming a Bad Leaver. Secondly, it makes the unwarranted assumption that because no-one other than Mr Macabuag then voted (and hence on the first hypothesis there would be equality), none of them would have done. They did not vote because it was not necessary, and because by that time not only was the petition presented, in its extravagant and unjustified terms, but Mr Lakey was threatening to join to it anyone who voted against him. His section 169 representations were circulated among the Shareholders, as they had to be. They cited the presentation of the petition

"against *inter alia* Mr Mellor and Mr Macabuag in relation to their actions concerning me and Mitt. I make these written representations expressly without prejudice to those proceedings. I further reserve my right to amend the Petition to complain that my removal as a director at the Meeting would amount to additional unfairly

prejudicial conduct and to add any participant to my removal as a respondent to the Petition".

453. It is hardly surprising that nobody wished to put their hand in that cauldron.

454. Mr Gammon says such threats were repeated at the meeting; and was furious that Mr Lakey should seek to abuse shareholder democracy in that way.

455. This leaves the point on whether any removal was fair after the investigation only.

456. Mr Lakey says such a course would be unfair: he ought to have had the right to comment on the Report, and/ or to attend a disciplinary hearing or appeal, as set out in Taylor Vinters' advice, the Suspension Letter and the ACAS Code of Practice.

457. There was no prescribed procedure, and beyond the investigation none was set in train. The investigation was not only by an independent third party, but a specialist barrister, who received submissions and documents and conducted interviews leading to the Report which, whether one accepted its conclusions in their entirety or not, was a cogent and considered production. The Code of Practice was directed not at such external investigations, but internal.

458. The touchstone was that the procedure should be fair. As Mr Macabuag confirmed in cross-examination, the "fairness of the process was central to my mind. We wanted to follow Taylor Vinters' advice to ensure that it was fair". Asked why there was no subsequent disciplinary process, he answered that it was not clear to him that that was required for fairness. It was also the case that "the company is in a very, very fragile state. We have very little time. There's no chance of getting any money in… if there's a protracted legal process… it's not an option".

459. There is nothing at the conclusion of trial which indicates that an additional process would have led to any different answer. The points Mr Lakey raised immediately with Miss Berry were that he had more, unidentified, documents, and that he wanted her to hear from other witnesses, a point she had already considered. As that indicates, he did not seem then to believe that fairness determined a further process. Further, Mr Macabuag was surely right to consider the process, its length, expense and disruption, against the background of the state of Mitt: running down its cash resources not pursuant to the idea for which the money had been invested, but on an individual's upset. As Mr Carroll had already said to Mr Lakey, there was an element of morality to consider in the use of Mitt's monies.

460. Nor actually was there consistent advice from Taylor Vinters that the investigation was only round one. Even in its 1 October advice the matter was left open: "Subject to the outcome of the investigation process, the Company can consider if it wishes to pursue a formal disciplinary process or, as an alternative, seek to enter into without prejudice discussions with Ben". Its provision of the ACAS guidance was just "to provide you with an overview of how the process should be conducted" rather than a binding precedent. As I have already observed, the essence of Taylor Vinters' advice on 1 October, and this applies later, was "fair process, given Mr Lakey's rights under the Articles and SSA".

461. The Suspension Letter gave no representation that there would be a further process. Instead: "When the investigation has been completed, the Company will write to confirm whether you will be required to attend a disciplinary hearing. If we consider that there are grounds for disciplinary action we will inform you of those grounds in writing and you will have the opportunity to state your case at the hearing". Whether that was considered the right option would depend on the nature of the Investigation, and its conclusions.

462. The Taylor Vinters 21 October advice did not specify two stages, nor their 19 December advice. Nor did they reply to Mr Macabuag's 20 November missive about "what our plans were after the outcome. I'm guessing if Sophia finds gross misconduct then the plan is simple, as we'd be able to dismiss Ben as a bad leaver or negotiate a better deal with him", to remind him of stage two.

463. I note that the form of this further enquiry is not specified; nor how it would be paid for.

464. In the event it would have been an otiose frittering of scarce Mitt funds.

Mr Mellor

465. As already explained, the case against Mr Mellor is now that, in the words of Mr Hackett's closing note, he "caused Mitt to ignore Taylor Vinters' repeated advice to follow a fair process in terminating Mr Lakey's involvement with the business, or even to mediate with Mr Lakey"; he did so because he operated under the erroneous belief that Mr Lakey could not receive more than as a Good Leaver.

466. Whatever motivated Mr Mellor, and he openly accepted that he had never understood the Taylor Vinters advice as requiring two stages, the process was fair, for the reasons

above. Although mediation was raised by Withers, it was not suggested even by them that it would achieve final resolution; and given Mr Lakey's then position that Mr Macabuag ought to be diluted, and his subsequent position that his removal was effected through a sham which was part of a wider scheme, which has only been withdrawn at the end of trial, there can be no sensible belief that it would have achieved anything.

467. In fact, it can be seen from the terms of the offers which were made that Mr Mellor and Mitt were keen to give Mr Lakey more than they otherwise might in order that he could leave head held high with no negative effect on his infant career.

468. Mr Mellor cannot seriously be criticised for not having in mind the breadth of possible orders under section 996 CA06; and indeed even one specialised in the field might consider that any order would be constrained by the basis on which it was made, including the provisions in the parties' binding agreements.

The state of Mitt, the incorporation of Koalaa, and the Licence

469. The 21 October letter to the investors had floated the idea of an alternative vehicle to Mitt for the exploitation of the idea. It was not specific, Mr Macabuag saying that "At this point Koalaa wasn't even a twinkle in my eye", rather a generic response to a situation in which the idea had potential continued viability but the company exploiting it had internal issues and limited money, an unknown amount of which would be spent on the issues rather than the business.

470. In around October 2019 Miss Polnareva, a Cambridge MBA, drew up further financial projections for Mitt which showed its funds expiring in April 2020, but earlier on more pessimistic projections. She wrote a note at their end:

"Basically what going through this assessment tells me is that you are going to have to raise regardless in the spring, as it is likely that you will not make it until then. Q1 2020 is a pivotal moment but it is coming too soon- considering the need to wait for beta feedback before adjusting the design".

471. Not within that was the expenditure on legal fees concerning Mr Lakey. Mr Mellor recollected that in the end they were around £60,000, although Mr Phillips said they had been compromised at a little less.

472. Also proceeding from early November through to Christmas 2019 was the beta trial, with triallists paying around £15 for post and packaging. Mr Macabuag summarised the feedback as being that the product on its own was not enough:

"you can give people a prosthetic, but people want support, training and guidance. They want services in and around the product. It showed that if we put it out to market directly to consumers as Ben was pushing for it wouldn't have worked".

473. The trial therefore did not live up to the simple hope expressed at its outset by Mr Macabuag in his "end of year reflective email… to sort of anyone who had been involved with Mitt over that year", that it would "prove the product is great, and ready to be used by customers".

474. On 6 December 2019 the forthright Mr Phillips was introduced to Mr Macabuag and Mr Mellor, having met Mr Wolley in September 2019. He became its interim COO on 22 January 2020, for a short period until March. His diagnosis of its state was this:

"Mitt was in a challenging financial state at this point; it was a start-up with no revenue and only a sketchy commercialisation plan and it was clear it would run out of money very soon".

"It was obvious to me that Mitt's approach was tainted with two main faults. The first was that all the Mitt products were being sourced from a specialist manufacturer in China… Long lead times and manufacturer's minimum order quantities placed further substantial demands on scarce funds available for working capital.

"The second was that Mitt intended to focus exclusively on direct-to-consumer sales. This approach did not address adequately the need to establish clinical validation and acceptance of new medical products to underpin consumer confidence in them. Also, the investment in marketing costs to establish direct to consumer sales can be very high especially in a niche and highly fragmented market… Furthermore, such a model was bound to fail as in the UK home market there is no existing direct-to-consumer market for prosthetic arms; the vast majority of people here go to the NHS… In addition, Mitt had no plan in relation to service, how you go about reaching people, getting them fitted, taking feedback and providing education".

475. In the first half of February 2020 Mr Phillips discussed Mitt's financial situation with its board and the investors, primarily Mr Gammon, against a cash runway for Mitt of March or April. "Mitt required further funding to survive".

476. Initially, that approach garnered some support. On 11 February was a board meeting at which Mr Macabuag reported that a £150,000 fundraise was ongoing; of which £125,000 was "currently committed". That was at the first funding round price of £11.91 per share (with a pre-cash valuation of £889,546), with a proposed further round in summer 2020. Mr Gammon recommended that they close there at the end of the month, and raise the £25,000 balance by the end of March. They discussed Mitt's exit plan as "most likely… some form of private listing in 2-5 years".

477. Mr Macabuag then drafted a letter to the investors telling them of the close at the end of February, to check the amounts they were allotted, and asking if they knew anybody for the £25,000.

478. Matters were not, though, as certain as that. In his cross-examination Mr Phillips said that in the minutes "indicated" might have been better than "committed".

479. On 13 February Mr Hobhouse, who had not been at the board meeting, reacted to Mr Macabuag's letter, and one of the 7 February from Mr Lakey sent to himself and the other Investors:

> "Can we have a discussion/ Board view on the Ben future. If we are to be involved in more expense and distraction these funds will not cover it. How do we get this nonsense off our plates?".

480. The result of this intervention, and Mr Phillips' discussions with Mr Hobhouse and other investors, to whom Mr Hobhouse had also spoken, that day and the next, was that the investment proposal collapsed. The investors were, said Mr Phillips,

> "unwilling to invest any more in Mitt; while they thought it had minimal chances of commercial success with its strategy and were uncomfortable with the distraction and potential expense of actions being taken by Mr Lakey".

481. Mr Lakey had not been inactive since his removal.

482. He had made a substantial data subject access request of Mitt on 22 January, to which Mr Phillips was to reply on 21 February, noting that owing to the high volume of documentation requested, which would have to be considered and possibly redacted

to protect others, it was likely to take 3 months to respond to; and while there would be no charge to Mr Lakey, it was estimated to cause Mitt to incur more than £10,000 in costs.

483. His letter of 7 February, which in Mr Gammon's view sullied Mitt as an investable proposal, and in Mr Hobhouse's view made it "uninvestable", was lengthy and included claims of false allegations made by, and fraud perpetrated by, Mr Macabuag. It ended with "I have been left with no choice but to pursue legal action against my co-founder".

484. On 11 February Mr Lakey lodged a County Court claim for his January unpaid wages, which in the event, as with another month's, was met.

485. On the horizon, then, was the prospect of further substantial legal expenditure addressing Mr Lakey's issues, sucking away the use of any invested funds.

486. As Mr Phillips said, in the days after the board meeting "we'd moved fairly quickly to a position where it was clear that no new money was going to come into Mitt".

487. Mr Hobhouse explained his reasons.

"I invest in a business because of its people. Where there are co-founders, the relationship between the co-founders is vital for the business's success. If the co-founders do not get on, the business is not going to work. This is because any pitch that a business is going to make is compromised by the dysfunctional relationship and it will be virtually impossible to raise funds. I certainly would not invest in a business with a dysfunctional relationship between the co-founders".

"I was unwilling to invest any further money in Mitt once I was aware of the breakdown of the relationship between Mr Macabuag and Mr Lakey. There was no future in Mitt once I and the other investors were not willing to make further investments".

488. Mr Gammon told the court "I can't tell you how common it is in a start-up for a student, inexperienced founder to be asked to step aside or leave in favour of a more experienced CEO". However, "…no one would put money into Mitt as it was sullied", as in his view it had been since Mr Lakey had been proclaiming that it needed a new chairman, when its existing chairman had founded Merlin and is a "person who actually knows what he's doing in this sector". Investors had choices.

Mr Berman had been saying since summer 2019 that he did not wish to be involved further, but would make a donation.

489. Mr Mellor saw Mitt as "weeks away from insolvency with its current payroll. None of its investors were prepared to put any more money in…", because of the "dysfunctional relationship between the Petitioner and Mr Macabuag". He also made the point that without further investment from the Investors "it would not have been possible to raise funds from external investors", who would not touch it as a proposition if its original investors were no longer interested.

490. Mitt's position was now dire. In Mr Phillips' words

"Mitt had made no sales and there were no sales imminent in the pipeline. Without new investment, Mitt simply did not have the cash runway left to pay its staff and its operating costs or to meet its liabilities…".

491. Mr Macabuag recalled that

"Mitt was running out of cash and the model suggested by Ben Lakey to sell the product online for cash showed no sign of getting revenue. The investors had made it clear that they wouldn't invest further in Mitt. Mitt wasn't getting any money and was still paying salaries and legal fees… Mitt had weeks left".

492. Mr Gammon, though, said to him that he could "get people excited about a new company".

493. He and Mr Phillips reacted to the situation with admirable speed. On 14 February Mr Phillips emailed him, headed "NewCo approach": "Keen to bounce a possible way forward off you". He elaborated in a telephone call, suggesting the "possibility of setting up a new company that would license the Mitt technology, address the weaknesses in Mitt's strategy, offer a broader service to the limb loss community and be a more attractive vehicle in which to invest". As he said in cross-examination, "I was trying to propose an approach that would mean that Mitt wouldn't go bust".

494. By the 18 February Mr Gammon was emailing Mr Phillips and Mr Mellor, believing he had shareholder agreement to "find a way to protect the IP whilst engaging in full commercial activity": there would be a newco with mirror shareholdings but a different board, and a separation of the IP; but it was not at this stage clear which company, new or old, would do what. In reply, Mr Phillips suggested newco as the trading vehicle.

495. Koalaa was incorporated as the newco on 3 March. Its board was new in the sense that it was and has remained Mr Macabuag.

496. On 11 March Mr Phillips prepared cash flow forecasts for Mitt and Koalaa. But for a time to pay agreement with Taylor Vinters it would have been negative already. With it the negative was in May 2020. Its cash became positive only with an offloading of its staff into Koalaa.

497. Mr Phillips confirmed that the "only viable alternative [to what became the Licence] was for Mitt to enter some sort of insolvency procedure"; but the forecasts showed "Mitt could remain solvent with the benefit of the Licence [and] so long as its creditors agreed to be flexible".

498. Mr Phillips' support for the newco scheme was "driven very much by the finances".

499. Mr Mellor had additional, wider, motivations, drawn from his consideration of Alex Lewis and his role as a representative of the limb-different community, meaning he "felt I had a responsibility to explore every avenue of keeping Mitt… alive".

500. One was that "If Mitt could be kept viable, then both would be able to use it as a springboard in their careers, and it would make any settlement more likely".

501. Another was that Koalaa was able to offer jobs to Mitt's youthful employees, who otherwise would have been made redundant.

502. Mr Macabuag had a lengthier, and again principled, perspective. In the summer of 2017 he and Mr Chidwick had had the idea of an "Amazon for prosthetics", with "all the information and a support structure available". The beta trial had reaffirmed this idea, and on its back Mr Mellor had been talking about adding services to Mitt, for the benefit of the limb-different community, before the investors confirmed they would put no more into it.

503. It was put to Mr Macabuag that this could have been done through Mitt. "No. In fact we tried it. It wasn't taking… Mitt the company and Mitt the product had become one thing". As shown in the Tulloch email:

> "people saw Mitt as a product and that was it. And that was the feedback from the beta test… we thought we were designing the iPhone… we thought we'd make this product and give it to someone and they'd love it. And the results of the beta were:

yeah, this product is fine… but as a person I need this, I need training, I need support, I need help… People were describing all these services that didn't exist";

"…the Beta trial suggested that it wasn't the product. That was the point: that the entire business was structured wrong… What you needed to do was put the person at the centre and have a service support for that person that could knit together whatever they needed, which be products, it might be advice, it might be talking to other people with limb-difference… it's a dimensionally different business". The Mitt product became one offered by Koalaa.

504. It was again suggested to Mr Macabuag that this could be progressed through Mitt, and he expounded again:

"people still only saw Mitt as the product. And we couldn't get out of that narrative. And we couldn't get out of the narrative that the NHS thought 'Oh, this product is trying to displace clinics…'".

505. On 20 March 2020 Mr Macabuag was to write to Huw Jones from Howard Group describing the new situation:

"We're shifting towards a commercialisation of the business now, and the whole business is so much more than just the Mitts, there's the products themselves but there's the attachments, there's the service support, the community aspect, so we want to build a brand- a new brand. Koalaa is the working name of the new company to take this forward. Added benefit of complete legal separation from Mitt. So if a certain someone wants to be a nuisance the liability is aimed at Mitt".

Mr Macabuag was mistaken on the last.

506. In his cross-examination Mr Mellor was of the view that Mitt could have undertaken some of Koalaa's offering; but it couldn't raise the money.

507. Koalaa was to offer the Mitt as one of its products. By August 2020 it was also able to regain interest from the NHS in the Mitt product, through Kiara Roche, the CEO of the charity LimbPower. Koalaa's key purpose was distinct, though: to "provide a holistic prosthetic support service for a user", including, if needed, different devices from different companies; and digital or physical product. Its main product was not the Mitt but its own product with its own patents, being, unlike the Mitt, a wrap-around prosthetic. Most of Koala's revenue has been from sales to institutions.

508. On 11 March a Mitt board meeting discussed Koalaa's approach to license its IP and acquire all its trading assets. Mr Gammon confirmed that investors were "unlikely" to put more money into Mitt as it stood. Mr Mellor was authorised to negotiate the proposed licence, the heads of terms of which Mitt's board approved. Mr Hobhouse and Mr Berman were also in remote attendance.

509. The Licence was therefore the only way to preserve Mitt in any form and fulfil the variously-perceived benefits. The alternative was an insolvency procedure. Solicitors' advice had already been taken on the not unusual idea of separating ultimate ownership of the IP from the production company. Mitt was to become a company whose sole business was as an IP-licensor.

510. Mr Mellor's negotiating hand was not a strong one. As Mr Macabuag said, by the time of transfer Mitt had "no contracts, no partnerships and no customers other than the beta-triallists" who were told Koalaa would be the exclusive distributor of the Mitt product. Mr Mellor's view was that "There was no scenario open to the board whereby funds would be put into Mitt to allow it to keep trading as it had traded before". Mr Macabuag, director of each and understanding the high-level terms, left the negotiating to Mr Mellor and Mr Phillips.

511. The Licence was in the event executed on 6 May 2020. By it Mitt sold its physical assets at written-down book value, and licensed its IP for a royalty of 5% of Net Revenues from Licensed Products, being those sold by Koalaa utilising its IP. Net Revenues were Koalaa's invoiced amounts less all direct costs of sale and trade discounts. It may be recalled under the Conflict Issue that this is the same rate as Imperial was proposing to charge Mitt for its use of that patent.

512. We have no expert evidence on the point, despite Mr Lakey's evidence that it was "not a fair number", his petition's stating that it "did not represent commercial terms", and Mr Hackett's opening that it was "self-evidently inadequate" and "commercially illogical". Mr Mellor, with his accurate belief that "the Mitt-Koalaa licence represented the final opportunity to salvage something from Mitt", and with his experience, considered that the 5% was "a significant proportion given Mitt would have no overheads, including… manufacturing costs". Mr Phillips, who suggested the figure, which was one he had been propounding since talking to Mr Gammon on 14 February, also regarded it as a standard figure:

"I arrived at this figure based on my understanding from working in the industry that usual practice in the medical devices industry was a royalty fee of around 5%".

513. He had also considered an academic article by Howard G. Zaharoff, originally published in 2004 and updated in June 2012. Although not contemporary, he regarded it as a cross-check; and based on his experience of seeing a few deals in the field, and hearing about more, he thought it accurate:

"Every deal I have ever seen in this sort of space [ie "lab tech and life sciences"] has been on… a net royalty rate of about 5%".

514. Although negotiating for Koalaa, with his experience as Mitt's recent interim COO he also thought it fair for it: "They're about to go bust".

515. Negotiations were therefore rapid. Both sides used solicitors, Taylor Vinters acting for Mitt.

516. In the event, the Licence was timely. Mr Mellor described how coronavirus "severely constrained prosthetics services in the UK, as any discretionary health appointments were cancelled".

517. The petition's notion that the Licence was not in Mitt's best interests "in return for the consideration provided or at all" would therefore have been rejected, had it not been withdrawn before closing.

518. As at November 2022, the date of Mr Phillips' witness statement, £15-20,000 had fallen due under the Licence, but nothing yet paid. There was confirmation at trial that some amounts had since been paid. However, in the event, within 9-12 months of the Licence Koalaa ceased to use Mitt's IP as it wanted to develop new products, suited to in-house manufacture, in particular directed at prosthetics of use immediately post-amputation.

519. There were allotments of shares in Koalaa at nominal value in April 2020, replicating the non-deferred Mitt shares. Mr Hobhouse was one of the allottees: "I agreed to invest in Koalaa because the Board and the Executive were all going in the same direction, and it seemed like the only way forward". However, he withdrew before the funded first round which completed by September 2020 at a pre-cash valuation of £889,578, being replaced by an additional £25,000 from Rockspring. In May 2021 there was a second round at £11.4619 per share, at a pre-cash valuation of £2,000,850, to which the only subscriber was a new party, the British Design Fund, at

a price of £125,000. On its different terms, Koalaa has apparently, then, been a success.

Final matters

520. I must thank each counsel and, where they had them, those behind them, for their genuine assistance in this heavily-fought case over ground which was not at all times firm. I must acknowledge separately the input of Mr Parfitt and Mayer Brown International LLP, who have been acting on a pro bono basis for Mr Macabuag: a very substantial commitment to what has turned out to be a successful position.

521. The petition is dismissed.