Neutral Citation Number: [2022] EWHC 596 (Ch)

Case No: CR-2020-003966

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

IN THE MATTER OF KLIMVEST PLC
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: Thursday 17 March 2022

Before :

HHJ MARK CAWSON QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

ERIC DUNEAU	**Petitioner**
- and -	
(1) KLIMT INVEST SA	
(2) KLIMVEST PLC	
(3) FREDERIC SENEGAS	**Respondents**

- -
- -

Daniel Lightman QC and Max Marenbon (instructed by **Marriott Harrison LLP**) for the Petitioner and Third Respondent
Charlie Newington-Bridges (instructed on a Direct Access basis) for the First Respondent

Hearing dates: 2-4, 7-9 and 15 February 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HHJ CAWSON QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, and by release to BAILII.

The date and time for hand-down is deemed to be 10.30 a.m. on 17 March 2022

HIS HONOUR JUDGE CAWSON QC:

CONTENTS	PARAGRAPH
Introduction	**1**
Relevant individuals and entities	**8**
Witnesses and my assessment thereof	**10**
Introduction	**10**
ED	**17**
FS	**25**
Other witnesses in support of the Petition	**26**
Witnesses in opposition to the Petition	**27**
Factual narrative	**37**
Introduction	**37**
Origins – CATS	**38**
EDUCATS	**51**
Incorporation of the Company – 2002	**58**
Plc, listing and public offer – 2006	**77**
Further acquisitions	**84**
2010-2018	**87**
P1C approach and sale of the Company's assets in January 2019	**95**
Events after the sale of the Company's assets to P1C	**126**
Presentation of the Petition	**168**
AGM on 24 May 2021	**179**
Just and equitable winding up	**184**
Loss of substratum	**200**
ED's and FS's case	**200**
MB's/Klimt Invest's case	**208**

Introduction

1. This case concerns a petition ("**the Petition**") presented by the Petitioner, Mr Eric Duneau ("**ED**"), on 14 October 2020 seeking an order that Klimvest Plc ("**the Company**") be wound up under section 122(1)(g) of the Insolvency Act 1986 (the "**1986 Act**") on the basis that it is just an equitable that the Company be wound up.

2. The Third Respondent, Mr Frédéric Sénégas ("**FS"**), supports the petition, but did not have locus standi to join as a petitioner because his shares were held in the name of an institutional nominee when the Petition was presented.

3. ED is the beneficial owner of 3,348,793 shares (representing 44.05% of the issued shares) in the Company, of which 1,750,000 are registered in his name and 1,598,793 are held on

his behalf by a nominee, Interactive Brokers LLC. He was a director of the Company from its incorporation in 2002 until he was excluded from this role following an annual general meeting ("**AGM**") of the Company held on 24 May 2021.

4. There are three Respondents to the Petition:

   i) The First Respondent ("**Klimt Invest**") is a company incorporated in Luxembourg whose 100% beneficial owner and sole directing mind is Mr Michel Balcaen ("**MB**"), who has been a director of the Company since its incorporation. Klimt Invest holds 3,665,880 shares (representing 48.22% of the issued shares in the Company), of which 3,249,000 are registered in its name and 416,880 are held on its behalf by a nominee. 163,871 shares (representing 2.16% of the issued shares in the Company) are held by Adrien Pol ("**Mr Pol**") through Tosca Invest, these shares having been acquired in December 2019 and January 2020. It is ED's and FS's case that Tosca Invest/Mr Pol hold these shares as nominee for MB/Klimt Invest, or at least that Mr Pol (through Tosca Invest) acts in concert with MB, so as to give MB (though Klimt Invest) effective control of the Company.

   ii) The Company is nominal Second Respondent to the Petition. Having sold its assets and business in January 2019, its sole significant asset is cash reserves of approximately £8 million. The Company was not represented at this trial, and adopts a neutral stance.

   iii) FS, the Third Respondent, who is now the holder of 369,950 shares (representing 4.87% of the issued shares in the Company).

5. ED and FS contend that it is just and equitable that the Company be wound up for a number of reasons, namely:

   i) The purpose, or substratum, of the Company has come to an end, or has failed following the sale of the Company's assets and business in January 2019;

   ii) ED is entitled to expect a return of his investment in the Company in the light of assurances alleged to have been given to him by MB prior to the sale of the Company's assets in January 2019 that the Company would be wound up;

   iii) There was an agreement or understanding between MB and ED, giving rise to equitable considerations, that ED would be entitled to serve on the Company's Board, and MB has, as from 24 May 2021, caused ED to be removed from the Board in breach of that agreement or understanding;

   iv) The Company was founded on the basis of a personal relationship of trust and confidence between ED and MB which has broken down;

   v) ED has justifiably lost confidence in the management of the Company, which has become dysfunctional.

6. MB, through Klimt Invest, opposes the Petition. It is, in essence, Klimt Invest's case that:

   i) The purpose, or substratum of the Company has not come to an end or failed on the basis that, prior to the sale of its assets, the Company had become what was, in essence, an investment holding company, and that purpose can, and is intended

by MB/Klimt Invest who now control the Company, to be achieved through the investment of the Company's cash reserves in promising technology companies;

ii) MB did not give the assurances alleged in respect of the winding up of the Company, and, in any event, it is neither pleaded nor demonstrated that any such assurances were relied upon;

iii) The Company is a public company listed on a French exchange, and as a matter of law there is no scope for maintaining that the Company was a quasi partnership, or a Company in which equitable considerations of the kind contended for by ED and FS could arise. In any event, it has not been established, on the facts, that the Company operated as a quasi partnership, or that equitable considerations based on alleged agreements or understandings as between ED and FS ever arose. Consequently, there is no proper scope or ED and FS to complain in respect of ED's exclusion from acting as a director, or to contend that the Company was founded, or latterly operated, on the basis of a relationship of trust and confidence between ED and MB which has broken down.

iv) A reasonable offer has been made to ED which provides him with an alternative remedy which he has unreasonably declined to take up.

v) Further, and in any event, ED ought, as a matter of discretion, to be prevented from obtaining the relief that he seeks by reason of the fact that he does not come to Court with clean hands.

7. ED and FS were represented at trial by Mr Daniel Lightman QC and Mr Max Marenbon, instructed by Marriott Harrison LLP. Klimt Invest has not instructed Solicitors and appears through MB as a litigant in person, albeit instructing Mr Charles Newington-Bridges of Counsel to represent it at trial on a direct access basis. I am grateful to Mr Lightman and Mr Marenbon, and to Mr Newington-Bridges, for their helpful written and oral submissions, and assistance through the course of the trial.

Relevant individuals and entities

8. The following table sets out the key relevant individuals concerned with the circumstances behind the Petition:

Name	**Description**
Randall Anderson ("**Mr Anderson**")	US qualified attorney. Company Secretary from November 2014.
Antoine Andre ("**Mr Andre**")	Shareholder and former employee. Witness in support of the Petition, who gave evidence at trial.
Christian Augustin ("**Mr Augustin**")	Shareholder. Witness in support of the Petition, whose witness statement was admitted in evidence.
Michel Balcaen ("**MB**")	Co-Founder of the Company with Mr Duneau, and Chairman of the Board. Through the First Respondent, Klimt Invest, the largest shareholder in the Company. Witness for Klimt Invest.

Dan Charron ("**Mr Charron**")	Representative of Canadian private equity fund Partner One Capital (P1C), the purchaser of the Company's assets and business in January 2019
Tony Coates ("**Mr Coates**")	Director of the Company from April 2005, and former director of DACG.
Jean-Francois Delcaire ("**Mr Delcaire**")	Shareholder. Witness in opposition to Petition who did not attend at trial.
Eric Duneau ("**ED**")	Co-Founder of the Company with MB, and second-largest shareholder. The Petitioner.
Jeff Forwood ("**Mr Forwood**")	Director of the Company from May 2010 until his arrest in 2017.
Paul Griffiths ("**Mr Griffiths**")	Non-executive Director of the Company from February 2020.
Markus Ludwig ("**Mr Ludwig**")	Sold ELS AG to the Company and stayed on as an employee. Claims unpaid contingent compensation from the Company from this sale.
Adrien Pol ("**Mr Pol**")	Shareholder in Company from December 2019 (through Tosca Invest). Witness in opposition to the Petition who gave evidence at trial.
Paul Santini ("**Mr Santini**")	Former employee who claims Klimt Invest holds shares on trust for him. Witness in opposition to the Petition who gave evidence at trial.
Guillaume Schub ("**Mr Schub**")	Shareholder and former employee. Witness in support of the Petition, whose witness statement was admitted in evidence.
Frédéric Sénégas ("**FS**")	Co-founder of CATS and WizArt with ED and MB. Major shareholder and former employee of the Company. As Third Respondent, supports the Petition, and gave evidence in support thereof.
Nicolas Vasseur ("**Mr Vasseur**")	Shareholder and former employee. Witness in support of the Petition who gave evidence at trial.
Fabien Vigne ("**Mr Vigne**")	Shareholder and former employee. Witness in support of the Petition who gave evidence at trial.

9. The following table sets out the key entities and concepts concerned with the circumstances behind the Petition:

Name	**Description**
Assima	The Company's name until it was changed on 28 January 2019 following the sale of its assets and business to P1C.
Assima Training Suite ("**ATS**")	The Company's training simulation software
CATS	The original project of ED, MB and FS, the name used by the company they incorporated to pursue it (CATS Development S.a.r.l.) in 1995, and the original translation software
DACG UK Ltd ("**DACG**")	A UK training company acquired by the Company in 2005
EDUCATS	The original name for the training software developed by ED when conducting business through CATS
ELS AG ("**ELS**")	A German software distributing company acquired by the Company in 2011 from Mr Ludwig
ERP	Enterprise Resource Planning*: "the integrated management of main business processes, often in real time and mediated by software and technology"* (Wikipedia)
IMS	A Danish "rapid learning" company acquired by the Company in 2007
FCPR Innovacom 5 ("**Innovacom**")	An institutional shareholder in the Company from June 2004, whose shares were acquired by ED in June 2019.
IVS	A former institutional shareholder in the Company whose shares were acquired by Tosca Invest (Mr Pol) in January 2020.
Kaplan Technologies	A South African training simulation software company acquired by the Company in 2012
Klimt Invest SA ("**Klimt Invest**")	The First Respondent. A Luxembourg company solely owned and controlled by MB.
Klimvest	The name of the Company from 28 January 2019.
Olas	An Irish SAP (enterprise software) partner and SAP consulting company acquired by the Company in 2007
PartnerOne Capital Inc ("**P1C**")	A Canadian private equity fund that acquired the Company's entire undertaking through Partner One Acquisitions Inc by an Agreement dated 25 January 2019 ("**the P1C Purchase Agreement**")
SAP	Enterprise Resource Planning (ERP) software developed by the German Company SAP

System Link Enterprise Solutions Inc ("**System Link**")	A US training company acquired by the Company in 2005.
Tosca Invest SAS ("**Tosca Invest**")	A company used by Mr Pol as the vehicle for acquiring shares in the Company from IVS and X-Ange.
Truffle Capital ("**Truffle**")	Institutional Investor and former shareholder in the Company whose shares were acquired by FS in June 2019.
WizArt	The new business name and corporate group through which ED, MB and FS continued the CATS/EDUCATS project from approximately 1997 to 2002. It retained the translation software and the business relating thereto after the spin-off of the training software into the Company. The trading subsidiary was acquired by the Company in 2006.
WizArt Invest Soparfi	Top holding company incorporated in 2004 to hold the original WizArt shareholders' interests in the WizArt group after Innovacom's investment.
WizArt Software S.A.	Original holding company of the WizArt Group, originally named CATS Software S.A.. Liquidated in 2004.
WizArt Software SAS	New intermediate holding company for the WizArt group incorporated in 2004 for the purposes of Innovacom's investment.
WizTim	Name for the training simulation (*"cloning"*) software/business of the WizArt Group, prior to the Company's incorporation. Later renamed ATS (Assima Training Suite).
WizTom	Name for the translation software/business of the WizArt Group, prior to the Company's incorporation. Later renamed AMS (Assima Multilingual Suite).
X-Ange	Former institutional shareholder in the Company whose shares were acquired by Tosca Invest (Mr Pol) in December 2019.

Witnesses and my assessment thereof

Introduction

10. The following gave evidence in support of the Petition:

    i) ED;

    ii) FS;

    iii) Mr Andre (by video link from France);

iv) Mr Vasseur; and

v) Mr Vigne (by video link from France).

11. In addition, ED and FS rely upon the witness statements of Mr Augustin and Mr Schub, in respect of which ED served notices under s. 2(1) of the Civil Evidence Act 1995 and CPR 33.2 allowing them to be admitted in evidence.

12. The following gave evidence in opposition to the Petition:

i) MB;

ii) Mr Santini (by video link from France); and

iii) Mr Pol (by video link from Houston, USA).

13. It had been expected that Mr Delcaire would give oral evidence at trial, but he did not do so. A late hearsay notice was served on 4 February 2022, the third day of the trial, but it has not been satisfactorily explained as to why he was not able to give oral evidence, even by video link.

14. In assessing the evidence, I bear firmly in mind the much repeated observations made by Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse Ltd* [2013] EWHC 3560 (Comm) at [15] – [22] with regard to the unreliability of memory, and his caution to place limited weight on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. I consider this caution to be particularly apt in the circumstances of the present case given that certain events in question date back to 1993 or 1994. I am assisted by the fact that there is a great deal of contemporaneous documentary evidence, such as emails, that has greatly assisted me in determining the questions of fact that arise for consideration.

15. I do, however, take into account the importance stressed by the Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645 at [88] of making findings by reference to all the evidence, that is both documentary evidence and witness evidence, placing such weight as the circumstances require on each. Further, in testing what has been said by a witness, it is plainly appropriate to do so as against the inherent probabilities of the relevant situation, and considerations such as the consistency (or otherwise) of a particular witness' evidence with other evidence, the internal consistency of that evidence, and the consistency of that evidence with what the witness might have said on other occasions – see e.g. *Kimathi v The FCO* [2018] EWHC 2066 (QB), at [98].

16. There is one further forensic issue that is of some relevance. As pointed out by Mr Lightman QC, the witness statements relied upon by Klimt Invest failed in a number of respects to comply with Practice Direction 57AC relating to trial witness statements in the Business and Property Courts. Paragraph 4.1 of the latter provides that a trial witness statement should contain a standard form of confirmation, signed by the witness, including the following: *"I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge."* Klimt Invest's witness statements contained no such declaration. This is said by ED and

FS to be a matter of some concern, in particular in relation to the evidence contained in Mr Pol's witness statement, and MB's role in the preparation thereof.

ED

17. ED's and FS's background is as highly skilled software engineers. MB's background, on the other hand, is a commercial one, as an experienced entrepreneurial businessman.

18. I am invited by Mr Newington-Bridges to find that ED was an evasive witness, who gave evidence that was neither honest nor straightforward. This criticism was directed at ED's general demeanour and manner of answering questions rather than being directed at particular answers to particular questions. However, Mr Newington-Bridge focussed upon the circumstances in which ED came to acquire Innovacom's shares in the Company in June 2019. As to this, Mr Newington-Bridges described ED's conduct as having been *"profoundly dishonest"*, and maintained that it *"may even be illegal"*.

19. I will return to the circumstances behind ED's acquisition of shares in the Company from Innovacom in more detail in due course. Whilst I consider that ED may have been guilty of a degree of naïveté, and may have acted in a manner inconsistent with any relationship of trust and confidence of the kind that ED maintains subsisted between himself and MB, but which MB disputes, I am not persuaded that ED did act in a profoundly dishonest manner as contended.

20. Whilst it was put to ED that he had been guilty of *"insider trading"* in sharing information with Innovacom in relation to the affairs of the Company, including information obtained from the Company's accountants during the *"closed period"*, no clearly articulated case as to insider dealing has been advanced by reference to the relevant statutory provisions relating to insider dealing in Section 52 et seq of the Criminal Justice Act 1993.

21. Further, although it has been alleged that ED manipulated the share price in respect of the Company's shares prior to his *"off market"* purchase from Innovacom, it has not, in my judgment, been cogently explained how this alleged manipulation took place, nor how it might have affected the price that ED paid for the shares that he acquired from Innovacom.

22. In addition, whilst it is alleged against ED that he acted in breach of Rule 9 of the Takeover Code in failing to make an offer to other shareholders, I am satisfied that ED was unaware of any obligation that might have arisen under Rule 9, and that this explains why no action is taken by the Take Over Panel ("**the TOP**") after the circumstances behind his purchase of Innovacom's shares had been reported to the TOP by MB and investigated.

23. In short, I am not satisfied that any of the above matters demonstrate the dishonesty on the part of ED that is alleged by MB/Klimt Invest.

24. I do have some reservations about the explanation given by ED as to how he, through his SIPP, came to purchase five shares at a price of €0.15 shortly prior to the Innovacom transaction, and I have similar reservations as to the reliability of ED's answers under cross examination to questions relating to an email dated 25 January 2019 in which he had made reference to requesting a *"change in the Board"*, suggesting in evidence that

he was referring to Mr Coates and not MB. However, notwithstanding these reservations, I generally found ED's evidence to be truthful and reliable.

FS

25. Again, I found FS's evidence to be truthful and reliable.

Other witnesses in support of the Petition

26. I found each of Mr Andre, Mr Vasseur and Mr Vigne to be honest and truthful witnesses doing their best to assist the Court. The fact that they were employees of various subsidiaries of the Company means that they were able to provide helpful evidence as to the scope of the Company's business, and the purpose for which it carried on business.

Witnesses in opposition to the Petition

27. I agree with Mr Lightman QC's submission that it is appropriate to begin with the evidence of Mr Pol.

28. I regret that I did not find Mr Pol to be a satisfactory or truthful witness. Whilst I will consider the factual issues that arise in more detail later in this Judgment, the following summarises the reasons why I do not find Mr Pol to be a credible witness:

    i) Mr Pol did not, in my judgment, satisfactorily explain the circumstances in which he, through Tosca Invest, came to purchase shares in the Company. This is a matter of some importance, in that the email correspondence demonstrates that by mid-2019, MB had identified the strategic importance of seeking to acquire the shares in the Company held by IVS and X-Ange. Although MB had a voting majority at that time, he was liable to lose it within two years as the shares acquired by ED and FS in June 2019 from Innovacom and Truffle gained enhanced voting rights. The email correspondence shows that MB had identified that this could be prevented by acquiring the shares held by IVS and X-Ange. However, if MB were to seek to acquire the shares himself, that would trigger an obligation under Rule 9 of the Takeover Code to make an offer to other shareholders, which MB was not (immediately at least) in a position to fund. It is ED's and FS's case that MB, in these circumstances, procured his friend, Mr Pol, to acquire shares on his behalf, in order to cement his majority control. MB's case in response to this is that he simply passed on the opportunity to Mr Pol, which Mr Pol independently took up.

    ii) In paragraphs 8 and 9 of his witness statement, Mr Pol stated that he purchased the shares in question *"following a contact with [MB] who introduced me to two potential sellers"*, going on to say that he bought shares because he thought that it was *"a low risk decision with the discount offered on the asset value"* and because *"of the Company's declared intent to make the investments on promising technologies."* In paragraph 13, Mr Pol went on to say that he purchased the shares: *"on the basis of the public information provided by the Company in press releases or in its filed accounts."*

iii) Under cross examination, Mr Pol was pressed to identify where the Company had expressed its *"declared intent to make new investments on promising technologies"*, and to identify the press releases or filed accounts that he was referring to. In response, Mr Pol was unable to identify any press releases, and suggested that the declared intent to make investments on promising technologies was to be found in the Chairman's Statement in an Interim Report for the six months ending 30 June 2019. However, despite being given the opportunity over a short break in the hearing to find and identify where, in this document, the *"declared intent"* had been expressed, he was unable to do so. He then sought to place reliance on the Company's accounts for the year ended 31 December 2018, but was, again, unable to find where in that document the suggested *"declared intent"* that he referred to be found. The forensic importance of this is that other evidence suggests that it was only well after Mr Pol purchased (on behalf of Tosca Invest) shares in the Company that MB publicly manifested an intention to use the cash reserves retained by the Company to invest in promising technologies.

iv) Further, in paragraph 5 of his witness statement, Mr Pol asserted that after MB moved to the UK (around 2000), *"our contacts became tenuous"*. This accorded with paragraph 23.5 of Klimt Invest's Amended Points of Defence, which referred to long-standing *"professional"* connections between Mr Pol and Klimt Invest. However, under cross examination, it became clear that the relationship between Mr Pol and MB was considerably closer than the impression given by Mr Pol's witness statement, and went beyond simply a professional relationship in that the evidence was to the effect that, amongst other things:

a) MB had been accustomed to go for dinner at Mr Pol's apartment in Paris with Mr Pol's wife and daughter on a regular basis;

b) Since Mr Pol had stopped living full-time in Paris in 2012, he had seen MB approximately 10 times;

c) MB had known another member of Mr Pol's family for some 30 years;

d) MB had been invited to Mr Pol's daughter's wedding;

e) MB and Mr Pol would keep in regular contact by telephone; and

f) Disclosure has revealed a number of fairly intimate emails written in French, which read in fairly stark contrast to more formal correspondence that has been disclosed between MB and Mr Pol, written in English.

v) MB was a director of one of Mr Pol's companies, Edinat (later known as Business Documents). In his witness statement, Mr Pol said that MB *"never had a financial interest"* therein, MB's role being to provide *"independent views on its running"*. However, under cross examination Mr Pol accepted that MB had held 250 shares in this company, which Mr Pol explained was because this was a precondition to MB being a director. However, Mr Pol could not explain why MB held 250 shares, whilst another director only held one qualifying share, nor

could Mr Pol explain why MB had been a director since 1994 and the incorporation of the relevant company.

vi) Klimt Invest has disclosed a formal letter, written in English, dated 10 November 2020 from Mr Pol to MB sent shortly after the presentation of the Petition, expressing concern with regard thereto. Mr Pol accepted that the contents of this letter had been discussed with MB before it was sent, but was unable cogently to explain the use therein of words and expressions that MB, with his better command of English than that of Mr Pol, has developed a habit of using, including, in particular, the use of the verb *"to trigger"*. In addition, in this letter dated 10 November 2020, Mr Pol used the expression *"going concern"* in relation to the Company, but under cross examination was unable to explain what the expression *"going concern"* meant. Despite Mr Pol's protestations to the contrary, I was left with the overwhelming impression that MB had been behind the writing of this letter in order to simulate opposition to the Petition.

vii) On a number of occasions, Mr Pol gave the impression of being visibly flustered, and of playing for time in the answers that he gave.

29. In the light of the above, and in particular what I consider to be the inclusion of false evidence in Mr Pol's witness statement, I feel unable to place any significant reliance upon Mr Pol's evidence save to the extent that it is supported by contemporaneous documentary evidence. In particular, I do not accept Mr Pol's evidence that he, through Tosca Invest, purchased shares in the Company as an independent investment decision. I find that it is more likely that Mr Pol (through Tosca Invest) purchased the shares that he did, either as nominee for MB/Klimt Invest, or at least on the basis of an understanding between MB and Mr Pol that the latter, as a friend of MB would support MB in asserting majority control over the Company.

30. I consider that the fact that Mr Pol's witness statement includes what I found to be false evidence necessarily taints MB's own evidence. Whilst MB did not accept that he had drafted Mr Pol's witness statement as such, contending that he had only sent to Mr Pol a framework in respect of the issues that he wished Mr Pol to cover in a witness statement, MB did accept that he had read Mr Pol's witness statement after Mr Pol had sent it back to him, and that Klimt Invest served the witness statement thereafter. On this basis, I consider that MB must have known that he was, on behalf of Klimt Invest, placing before the Court a witness statement that was at least economical with the truth, and that in calling him to give evidence, he was calling Mr Pol to give false evidence.

31. The reliability of MB as a witness is, I consider, further undermined by the following:

i) Within an application seeking disclosure filed three days before the commencement of the trial, which such application included a statement of truth, MB admitted having made a mistake in his *"prior statements"* that he had never had any financial interest in Mr Pol's companies. The application went on to state that in 1995 Mr Pol had asked MB to become a board member of Edinat, and that the latter's articles of association required that MB, as a director, held shares. This expressed change of position followed the service of the trial bundle that contained documentation showing that MB had held shares in Edinat in 1995. However, documentation subsequently disclosed shows MB to have been

a shareholder from the incorporation of Edinat in 1994, which undermines the corrective explanation given in the application.

ii) There were inconsistencies between the evidence of MB and the evidence of Mr Pol. Significantly, whilst Mr Pol admitted that there had been discussion between himself and MB with regard to the contents of the letter dated 10 November 2020, MB denied that there had been any prior communication in respect thereof.

iii) I gained the impression that MB, on a number of occasions, tactically elaborated on, so as to actually change, his evidence. Thus, for example:

a) MB gave a number of accounts as to the Company's purpose at its incorporation. Initially he agreed that it was *"to design, develop and market software solutions for the training industry as defined in the 2002 Assima shareholders' agreement using cloning technology and focusing on large roll-outs of enterprise software."* However, he subsequently suggested that the Company's purpose was to be *"a player in the software industry"*, and later sought to suggest that his current proposed investment strategy for the Company, which he described as being to invest in new technology projects, was itself *"in the memorandum."*

b) On 24 December MB sent an email to Mr Charron at P1C at a time when the latter was contending that £8 million of the consideration to be paid by P1C should be frozen for 12 months, the purpose of the email being to argue against so much being tied up for so long. He maintained in this email that he and ED both had mortgage commitments that had to be met the next year, that they planned to cover from the sale proceeds. This accords with ED's case and evidence that the underlying assumption, bolstered by assurances given by MB, was that following the sale to P1C, the proceeds would be distributed to shareholders as soon as possible following the liquidation of the Company. However, in giving evidence, MB suggested that he had falsely represented to Mr Charron that he and ED had mortgage commitments that they needed to meet in order to seek to agree more favourable terms from P1C. On this basis, MB has, either way, demonstrated a willingness to lie, either by making representations to Mr Charron that he knew to be untrue, or now to the Court in his evidence.

iv) On a number of occasions, I gained the impression that MB was deliberately seeking to avoid answering the question put to him if the answer was liable to be unhelpful to him. This included giving lengthy explanations, which did not address the question actually posed. I accept that it is possible that this is a result of the fact that MB's first language is French. At one stage in his evidence MB did seek to suggest in answering a question that he had a limited command of English. However, when later in his evidence Mr Lightman QC complimented MB about his *"very sophisticated command of English"*, MB thanked Mr Lightman QC for the compliment. I gained the impression that MB, who has lived in this country for many years, does indeed have a very sophisticated command of English, and I do not therefore consider that the way that he

answered his questions can be explained by reference to a limited command of English.

32. On the whole therefore, I did not find MB to be a satisfactory or reliable witness, and I consider that I need to exercise considerable caution before accepting his evidence, at least unless supported by reliable contemporaneous documentation. Further, to the extent that there is any conflict between the evidence of MB on one hand, and that of ED and FS on the other hand, I prefer that of the latter.

33. So far as Mr Santini is concerned, whilst I do not consider that he sought deliberately to mislead the Court, there were a number of oddities about his evidence:

    i) He is not registered as a shareholder in the Company, but claims to be the beneficial owner of some 76,956 shares in the Company held on trust for him by Klimt Invest;

    ii) Although claiming to be the beneficial owner of the shares, he has not received any dividends in respect of them, notwithstanding that dividends have been paid on the shares in question, including dividends totalling €15,000 paid on his shares in 2016. Further, Mr Santini was unaware that MB had sent a letter of claim alleging a breach of pre-emption rights on the part of ED on Mr Santini's behalf;

    iii) Mr Santini's witness statement did not disclose that MB, through Klimt Invest had owed him €30,000;

    iv) In an email dated 20 June 2019 to Mr Coates and Mr Anderson, MB discussed the potential purchase of IVS's shares in the context of Rule 9 of the Takeover Code. MB raised the possibility of transferring back to Mr Santini *"the stake I have on trust for him in Klimt"*. He identified a risk that Mr Santini might side with ED and FS, but described that risk as *"controllable"*. When questioned about this, Mr Santini's response was that whilst MB might have thought that he could have controlled him, that was not in fact the case.

34. Mr Santini maintains that he would be financially prejudiced by the liquidation of the Company bearing in mind that he had acquired shares when they commanded a price of €6.15, and he expresses support for MB's current strategy of investing the proceeds of sale held by the company into *"promising new technology companies, external or incubated by"* the Company. However, in view of the matters that I have referred to in relation to the basis upon which Mr Santini's shares are held, I consider that I must treat his evidence with some circumspection.

35. So far as Mr Delcaire is concerned, there are, again, a number of oddities about what he says in his witness statement. Although he claims therein to have held shares in the Company for a long time, having bought shares on 11 June 2012, the returns to Companies House suggest that he only became a member on or after 29 April 2020, being first named in the confirmation statement submitted in 2021. Further, whilst he claims to hold approximately 31,000 shares in the Company, the confirmation statement submitted to Companies House shows him as holding only 12,467 shares.

36. As I have already mentioned, no satisfactory explanation has been provided as to why Mr Delcaire did not attend at trial in order to be cross-examined, with a hearsay notice only been served very late in the day. Given that there are a number of matters that might usefully have been explored with Mr Delcaire in cross examination, I consider that I must place very limited weight upon what Mr Delcaire says in his witness statement.

Factual Narrative

Introduction

37. Having considered the credibility and reliability of the witnesses, it is now necessary, before considering the issues that arise for determination, to consider in some detail the factual background.

Origins - CATS

38. ED and FS were both students together in Montpellier where they both won a first prize for student software engineers awarded by the European Commission. By 1993 or 1994, both MB and FS were working for the Belgian subsidiary of a large French software company in Brussels, MB as regional manager of the Belgian operation, and FS in software development. ED was, at the time, working for another French software company, in which role he would come into contact with MB and FS.

39. Each of MB, ED and FS was interested in starting their own business. ED and FS wrote software programs, and had in mind to create new software and build a business around it. MB, who had no software expertise, but who did have business and managerial experience, was interested in starting his own business. Knowing of ED's and FS's desire to create their own start-up business, MB would take ED and FS out for a pizza on a regular basis where their respective ideas were discussed.

40. In consequence of these discussions, MB, ED and FS decided to go into business together, with MB being responsible for fundraising and sales, and ED and FS doing the computer programming required to develop the software around which the business would be built. By further working upon a software translation application that had developed for MB's and FS's employer, ED and FS developed the so-called CATS technology. This worked by intercepting the interactions between a computer's operating system, such as Windows, and an application, such as Microsoft Word, by forming an independent layer between the operating system and the application. This enabled the application to display content other than what it was programmed to display. Thus, an application developed only in English could display its entire interface in another language such as French, Spanish or Chinese, without the need to rebuild the application. The CATS technology has been variously described as *"cloning software"* and *"simulation"* technology.

41. Matters were formalised as between MB, ED and FS in a Shareholders Agreement dated 28 April 1995 ("**the 1995 CATS Agreement**"). This was the first of a number of agreements in fairly prescriptive terms drawn up by MB with little if any input from either ED or FS. Under cross examination, ED accepted that the 1995 CATS Agreement set out all that had been discussed and agreed between the parties at the time that the agreement was entered into.

42. The 1995 CATS Agreement recited, amongst other things, that MB, FS and ED had: *"agreed to combine their respective resources and skills in a software publishing company project (hereinafter referred to as Cat Systems). Cat Systems intends to design and market software intended to facilitate the internationalisation of computer applications."* This recital thus reflected the intention to build a business around the design and marketing of software facilitating the translation function described above.

43. The 1995 CATS Agreement provided for two phases, an initial phase from the launch of the product to the establishment of the CATS technology, and then a second phase involving the incorporation of a company, in fact CATS Development S.a.r.l., through which the development and marketing of the software would be conducted.

44. So far as the first phase was concerned, the 1995 CATS Agreement provided, amongst other things, that the parties had agreed: *"in good faith to make all the resources at their disposal available to the project, with the overall constraint of minimum financial and professional risk-taking"* (Article 2).

45. So far as the second phase is concerned, it was provided, amongst other things, that:

    i) The issued shares would be held as to 65 by MB, 20 by FS and 15 by ED (Article 15);

    ii) All contributions would be financed by MB (Article 16);

    iii) The corporate purpose would be defined when filing articles of Association, but *"must be limited to activities relating to software publishing",* with any change requiring the majority of 8/10th (Article 20);

    iv) FS and ED would both be employees of the company (Article 23);

    v) MB undertook in good faith to do his best to devote himself full-time to the company as soon as possible (Article 25);

    vi) Shareholders were given pre-emption rights (Article 28);

    vii) MB agreed that *"because of his position of majority shareholder"*, he had *"specific obligations towards the small shareholders"* committing, amongst other things, to inform them in advance of an intention to seek a buyer for his holding, and to allow minority shareholders to benefit from identical conditions, and to inform all potential buyers of the obligations towards the minority shareholders (Article 30); and

    viii) The parties agreed that the agreement was subject to French law, and subject to the jurisdiction of the Paris Commercial Court.

46. In the event, the software development proceeded, CATS Developments S.a.r.l. was duly incorporated, and the latter began to carry on business developing and marketing the CATS translation software based on the cloning technology described above.

47. On 31 June 1996, MB, ED and FS entered into a new Shareholder Agreement ("**the 1996 CATS Agreement**"). This was expressed as replacing the 1995 CATS Agreement, albeit that it contained provisions that substantially replicated those

contained in the 1995 CATS Agreement. The main purpose of the 1996 CATS Agreement was to provide for the introduction of a new holding company, CATS SA, that would wholly own the existing company, and *"hold all the direct and indirect rights relating to the products developed by its subsidiaries in particular those which were previously the property of CATS Development"* (Articles 3 and 4). It was provided that the corporate purpose of CATS SA would be identical to that of the existing company (Article 6).

48. Article 7 of the 1996 CATS Agreement went on to provide that:

> *"The main objective of the parties is to valorize their participation in CATS SA as much as possible and as quickly as possible and MB undertakes to respect and implement this priority, which can be obtained from two manners:*
>
> - *Seize any sale opportunity that will be made under very advantageous conditions (multiple of turnover,*
>
> - *Introduce the company to a stock market."*

49. In fact, as I understand the position, CATS SA was never incorporated as a holding company. Rather, in 1997, MB caused to be incorporated in Luxembourg, a company known as CATS Software SA, which then established subsidiaries through which the CATS software business was conducted, albeit that CATS Developments S.a.r.l. never appears to have become a subsidiary of the latter, and was eventually liquidated. Thus by 1998, CATS Software SA had established CATS (UK) and WizArt R&D LLC (a company incorporated in the USA) as subsidiaries. The shares in CATS Software SA were held as to 65% by MB, 15% by ED, and 20% by FS.

50. By 1999, CATS Software SA had changed its name to WizArt Software SA, and as a Luxembourg incorporated holding company with shares therein held as to 65% by MB, 15% by ED and 20% by FS, operated through a number of subsidiaries, namely WizArt Canada Inc, WizArt UK, WizArt France, WizArt R&D LLC (USA) and WizArt USA Inc (USA).

EDUCATS

51. By 1998, other uses were being considered for the CATS technology, and ED and FS came up with the idea of using the same cloning technology to inject guidance, or tutorials into the relevant application (such as Microsoft Word) so as to better enable training in the use of the application. After coding prototypes and doing market research, a way was developed, using the same technology to intercept the entire user interface and all interactions, to make a complete clone of the application to be used for training, rather than training on the real application. This training project, which was based on the same code as the original translation software, was called *"EDUCATS"*.

52. EDUCATS was subsequently renamed *"WizTim"*, and the original CATS technology was renamed *"WizTom"*.

53. The position of the business as at the beginning of 1999 is reflected in a detailed *"Strategic plan 1999-2000"* prepared by MB on 31 January 1999.

54. In October 1998, there was an unsuccessful pitch for the sale of the WizTim side of the business to Cegos, but MB made known that he had put up the WizTim side of the business for sale in any event.

55. By August 2000, MB had moved to live in London, and was followed by ED. ED has explained that he moved to London believing that there was a more entrepreneurial climate in the UK, and also because he wished his children to be bilingual.

56. On 27 November 2000, MB and ED signed a document headed *"Modus Operandi for the creation of the Training subsidiary of WizArt Software"* ("**the 2000 WizTim Agreement**"). MB expressed himself as signing this document on behalf of *"WizArt Software",* and the document was expressed as being a contract between ED and *" WizArt Software",* The recitals to this document envisaged WizArt Software creating a *"dedicated structure for the sale of software and services dedicated to Training activities"*, and the document went on to provide for the establishment in 2001 of a subsidiary for this purpose, with ED being *"appointed head of this training entity as of the signing of this document."* The document went on to provide that: *"He will be in charge of its operational and commercial management. As such he benefits from WizArt's standard commission plan. He will have a seat on the Board of WizArt Software as General Manager of Training Activity."*

57. However, matters did not turn out as envisaged by the 2000 WizTim Agreement in that shortly before the latter was due to be carried into effect, MB informed ED that he had come to an arrangement with FS to the effect that he had exchanged what was, in effect, FS's 20% interest in the WizTim (training) project, in return for FS having an increased interest in WizArt, which was to continue the WizTom (translation) project. On this basis, it was proposed that the WizTim project be pursued through a new corporate vehicle in which MB and ED, but not FS, would have an interest, with MB holding 65% of the issued share capital, and ED holding 35% of the issued share capital. This was the genesis of the Company.

Incorporation of the Company – 2002

58. On 19 April 2002, MB caused Klimt Invest to be incorporated in Luxembourg as a corporate vehicle through which to hold his shares in the new company that it had been agreed should be incorporated.

59. The Company was incorporated on 29 April 2002, with the name *"Assima Ltd"*.

60. It is ED's evidence that he chose the name *"Assima"* because he wanted the Company to be top of the alphabetical catalogues in software exhibitions, and because he wanted to include the word *"sim"*, to capture the concept of software simulation, with the extra *"s"* being added to avoid the name sounding like the Russian surname *"Asimov"*, and with an additional *"a"* for balance.

61. The Company's objects, as set out in its Memorandum of Association included, at paragraph 3(A)(i), an object in fairly wide terms relating to carrying on business in respect of the computer industry, including carrying on business as software publishers, computer programmers, and manufacturers, developers and dealers in computer software and hardware and peripheral equipment etc..

62. However, the objects went on:

    i) At paragraph 3(A)(ii), to refer to carrying on business as: *"a general commercial company"*;

    ii) At paragraph 3(B), to refer to carrying on: *"any other business which in the opinion of the Company, may be capable of being conveniently or profitably carried on in connection with or subsidiary to any other business of the Company and is calculated to enhance the value of the Company's property."*

    iii) At paragraph 3(J), to refer to subscribing for, taking, purchasing or otherwise acquiring either for cash, shares or debentures in the Company or any other consideration any other company or business which, in the opinion of the Company, might be carried on so as directly or indirectly to benefit the Company.

    iv) At the conclusion of paragraph 3, it was stated that none of the objects set forth in any sub-clause of paragraph 3 should be restrictively construed, and that the widest interpretation should be given to each such object, such that none of such objects, except where the context expressly so required, should be in any way be limited or restricted by reference to or inference from the terms of any other sub-clause of paragraph 3, or by reference to or inference from the name of the Company.

63. Both MB and ED were appointed as directors of the Company on incorporation.

64. On 2 September 2002, MB and ED entered into a Shareholder Agreement in respect of the Company ("*the 2002 Shareholder Agreement*").

65. As had been the case with the other agreements between the parties referred to above, the original of the 2002 Shareholder Agreement was in French, but English translations thereof have been used for the purposes of the trial, from which I have quoted. MB and ED are referred to in the original French version of the 2002 Shareholder Agreement as *"associes"*, a translation of which is *"partners"*. However, I consider that I should attach limited significance to the use of this expression absent expert evidence as to the distinction between a partner and a shareholder in French law, and given that there is an alternative meaning for *"partner"* in French (*"partenaires"*), and that the expression *"associe"* has, in at least one other document in this case been used as meaning shareholder notwithstanding that shareholder generally translates as *"actionnaire"*.

66. The preamble to the 2002 Shareholder Agreement refers to the purpose thereof as being to set out a number of rules relating to the operation of the Company, with the *"associes"* acknowledging that the 2002 Shareholder Agreement is *"the only valid agreement governing their relationship as shareholders of [the Company], and that this Agreement takes precedence over any other oral or written agreement or understanding."*

67. The 2002 Shareholder Agreement refers to the *"purpose"* of the Company as being: *"to design, develop and market software solutions for the training industry. This object encompasses software publishing, consulting and assistance activities, carried out with [the Company's]'s own resources or with partners [partenaires]."*

68. The following *"Rules"* of the 2002 Shareholder Agreement are of particular relevance:

    i) Rule 2 provided that the removal or dismissal of any person from a management position should be made by the board, by decision *"representing at least 75% of the capital"* of the Company;

    ii) Rule 3 provided that the operational management of the Company and its future subsidiaries would be carried out by ED, and that in the event of removal or dismissal for any reason other than gross misconduct, ED would receive a severance payment of £100,000 in addition to statutory entitlement;

    iii) Rule 4 provided that the financial management of the Company and its future subsidiaries should be carried out by MB, and in the event of his dismissal or redundancy for any reason other than gross misconduct, he would receive a severance payment of £100,000 in addition to any statutory entitlement;

    iv) Rule 7 provided that MB and ED were on an *"equal footing"* in the event of a capital increase, and as such would be able to subscribe in proportion to their shareholding in the Company on any increase in capital;

    v) Rule 9 provided that neither MB nor ED might sell or transfer, in whole or in part, any interest in the Company without prior written notice to the other, such that each had a right of pre-emption over the shares sold by the other *"under the same conditions offered by the market"*.

    vi) Rule 12 provided that decisions of a strategic nature affecting the value of the Company should be taken by the Board with the majority representing 75% of the share capital of the Company, such decisions being expressed as including taking minority or majority stakes in *"complimentary companies"*, the sale or transfer of assets of the Company, investment policy in terms of creation of subsidiaries or offices abroad, and diversification strategy.

    vii) Rule 17 provided that the agreement was subject to English law and that any dispute relating thereto should be referred to: *"the arbitration authorities of the United Kingdom"*.

69. Innovacom became a shareholder in the Company in 2004 as part of a capital raising exercise.

70. At the same time, Innovacom, invested in the WizTom (translation software) business. As to this, by 2004, there had been a number of changes in how this business was structured. In short, WizArt Software SA was replaced as ultimate holding company by another Luxembourg incorporated company, WizArt Invest Soparfi, WizArt Software SA subsequently being liquidated. A new French incorporated intermediate holding company was introduced into the structure above other subsidiaries, which such subsidiaries by then included a new Swiss incorporated company, WizArt SA, which ED and FS maintain was introduced for tax purposes. The French intermediate holding company, WizArt Software SAS, was introduced because Innovacom required to invest and take shares in a French incorporated company. In the event, following the Innovacom investment, WizArt Invest Soparfi held 85.72% of the share capital of WizArt Software SAS, the balance being held by Innovacom.

71. Innovacom's investment in the Company was governed by an Investment Agreement, which annexed a Shareholders' Agreement which was expressed as being dated 28 June 2004 and made between Klimt Invest (1), ED (2), Innovacom (3) and the Company (4) ("**the 2004 Shareholders Agreement**"). The 2004 Shareholders Agreement was made in English and was expressed to be governed and construed in accordance with the laws of England and Wales.

72. The recitals to the 2004 Shareholders Agreement recited, amongst other things, that:

    i) *"The Company aims to become the reference company of the market of the training software"* (Paragraph 1).

    ii) The issued share capital of the Company was to be *"shared"* between MB and ED, and Innovacom (paragraph 2).

    iii) The 2004 Shareholders' Agreement was to replace and supersede *"all previous agreements which may have been made between the shareholders of the Company or made between [ED and MB]"*.

73. The following further provisions of the 2004 Shareholders' Agreement are of some relevance:

    i) Clause 2.1 set out pre-emption rights to apply on a proposed transfer of shares;

    ii) Clause 2.2 provided for Tag-along rights;

    iii) Clause 2.5 provided that the shareholding parties agreed in principle that shares in the Company be listed on the stock exchange of a regulated and regular trading European or North American stock market within the next three years, depending upon market circumstances, provided that the situation of the Company so allowed. Clause 2.5 further acknowledged that: *"with effect from the date that the Company is listed on the stock exchange, this Agreement shall become null and void save in respect of the accrued rights of the Parties."*

    iv) Section 4 dealt with the management of the Company, and contained an agreement that the Company should be managed by its Board of Directors, and clause 4.1 provided that so long as Innovacom held shares in the Company, the Board of Directors should consist of one member nominated by Innovacom, and two members nominated by ED and MB.

    v) Clause 6.1 was an entire agreement clause which provided, amongst other things, that no understanding, arrangement or provision not expressly set out in the 2004 Shareholders' Agreement would bind the parties.

    vi) By clause 6.20, it was agreed that nothing in the 2004 Shareholders' Agreement should constitute or be deemed to constitute a partnership between any of the parties thereto.

74. In February 2005 the Company acquired System Link in the USA, and in April 2005, the Company acquired DACG in the UK.

75. In February 2006, the Company acquired the share capital of WitzArt Software SAS from WizArt Invest SA, and thereby acquired the business and assets of its trading subsidiaries. It was ED's evidence that in 1998 he had copied the code from the WizArt translation software and used it as a base to write the code for the training software that became an asset of the Company when the Company was incorporated, but the Company had never purchased the intellectual property involved. The effect of the acquisition of WizArt Software SAS was to reunify the intellectual property.

76. In consequence of a share exchange that took place as part of the acquisition of WizArt Software SAS, WizArt Invest SA, in which FS had continued to hold shares, became a shareholder in the Company. Subsequently, through a process that it is unnecessary to describe in this judgment, FS became a shareholder in the Company in consequence of holding shares in WizArt Invest SA.

Plc, listing and public offer – 2006

77. On 11 July 2006, the Company was re-registered as a public limited company (plc).

78. Prior thereto, on 23 June 2006, Klimt Invest (1), ED (2) and the Company (3) had entered into a further Shareholders' Agreement ("**the 2006 Shareholders' Agreement**"). As reflected in the recitals thereto, the 2006 Shareholders' Agreement was entered into in contemplation of a listing (private placement and/or public offer) on Alternext of Euronext, a Paris-based stock exchange (**"Alternext"**). The recitals further recorded that the 2006 Shareholders' Agreement was to replace and supersede *"all previous agreements which may have been made between the Parties."*

79. So far as the 2006 Shareholders' Agreement is concerned:

    i) Clause 2.1 set out pre-emption rights as between the parties in the event that they intended to transfer shares to a third party;

    ii) Clause 2.2 consisted of a *"Lock Up"* provision providing that the parties should not proceed with a transfer of any shares held directly or indirectly for a five-year period, subject to certain provisions for release of shares as therein set out during the five-year period.

    iii) A second clause 2.2 made provision for *"Tag Along"*.

    iv) By clause 3.1, it was provided that the 2006 Shareholders' Agreement was entered into for a fixed period of 10 years as from the date thereof, and that it should terminate on the expiry of such 10-year period.

    v) Clause 4.1 consisted of an entire agreement clause providing that the 2006 Agreement represented the entire agreement between the parties in relation to its subject matter.

    vi) Clause 4.12 provided that nothing in 2006 Agreement should constitute or be deemed to constitute a partnership between the parties.

80. In anticipation of private placements and an admission to listing on Alternext, an Offering Circular dated October 2006 ("**the Offering Circular**") was produced. This document is relied upon by ED and FS, as well as MB/Klimt Invest, as relevant to the

issue as to what the purpose of the Company was, or at least as to what its purpose had become by the date of the Offering Circular.

81. I highlight the following passages from the Offering Circular upon which the parties place particular reliance:

i) The *"Historical background"* set out in paragraph 6.1.6 referred to the following, amongst other things:

a) It identified that the Company had been created in 2002 by MB and ED: *"establishing an R&D team to develop the first components of the training software offer, based on the cloning technology developed by its founders."*

b) The entry in relation to 2003-2004 referred to: *"Continuation of investments in R&D in order to increase the functional scope of the offer (generation of documentation, management of multilingualism, etc.) and the spectrum of targets and architectures covered."*

c) The entry for 2004 referred to the signature of an investment protocol with Innovacom *"with the objective of carrying out acquisitions."*

d) The entry in respect of 2005 referred to the acquisition of DACG and System Link, and described this as *"allowing [the Company] to both develop a "Services" offer and to develop its positions on the English, German and American markets."*

e) The entry in relation to 2006 referred to the acquisition of WizArt Software SAS, which was described as *"based on the same cloning technology as [the Company] and operating in the field of translation, presently in France, Canada and Switzerland."*

ii) Paragraph 6.2 was headed *"Investments"*, and set out details of the various acquisitions made by the Company to date, namely DACG, System Link and WizArt Software SAS. So far as the latter acquisition was concerned the point was made that WizArt Software SAS specialised in software translation of computer applications, and its main characteristic was that it used the same basic technology as the Company, but applied it to another functional area.

iii) In sub-paragraph 6.2.3, reference was made to the fact that: *"the Company is currently in negotiation with various companies. At the date of this document, these negotiations have not resulted in any firm commitments on the part of [the Company]"*.

iv) Paragraph 7 was headed *"Overview of Activities"*. It set out that the Company was a software company offering solutions designed to increase productivity in the development of large IT products, and that the original positioning of the Company had been to offer solutions for training users of IT applications. It then went on to state as follows:

> *"[The Company's] current repositioning is to cover more widely the needs of larger accounts in terms of project deployments, by providing a complete and integrated platform to automate the entire process from the functional specification phase to the analysis of user performance.*
>
> *This strategic development represents a considerable growth opportunity for the group, but does not represent a breakthrough, insofar as the technological base that will be used for the new offer is based on the same architecture choices as those that exist in the current offer.*
>
> *In short, Assima has a new technology and it wants to extend it beyond its current activity, which is training."*

v) Paragraph 7.1 was headed *"The product offering"*. How the cloning technology that underpinned the offering worked was explained in sub-paragraph 7.1.2 of the Offering Circular.

vi) Paragraph 7.2 was headed *"the service offering"*. At sub-paragraph 7.2.1, it was explained as follows:

> *"In 2004, Assima, which is involved in ERP projects for the training phase, decided to reorient its strategy to better meet the market's expectations.*
> *Originally, the company's positioning choice was to be a pure software publisher, i.e., to generate around 90% of its turnover from software licences and maintenance revenues. This was the case for the 2002, 2003 and 2004 financial years.*
> *However, Assima realised that this choice was likely to limit its activity and prospects in two ways: firstly, this choice did not allow it to respond to requests for full out-sourcing of training projects (although these generate regular and potentially significant revenue streams); secondly, it could place the Company in a position of dependence on large IT project integrators such as Accenture or Cap Gemini.*
> *This led to the two acquisitions contracted in 2005, first with DACG and then with System Link.*
> *Assima's new ambition is to propose a new approach to the management of problems encountered during the deployment of a software package, based on an innovative technological offer, and associated methodology and consulting services."*

vii) Paragraph 7.3 was headed *"Strategy and objectives"*, and sub-paragraph 7.3.1 went on to explain that:

> *"[the Company] intends to reuse the technological base underlying the training offer to build a new, functionally richer offer, covering the needs of large accounts from the specification phase to performance analysis.*
>
> *…*
>
> *The general principle is to extend Assima's offer at the very beginning of an application deployment project, by reusing the cloning technology to*

produce a simulation that is used in this context, as the prototype of the future application."

viii) Sub-paragraph 7.3.3 set out the Company's main priorities for 2006, namely:

"- To leverage the acquisitions made in 2005 (DACG and System Link) to significantly increase sales of software licences and related services,

- *Strengthen R&D resources in London and Paris to accelerate the enhancement of the existing offering in the training market and to produce the first components of the integrated offering for the change management market,*
- *Strengthen the Company's presence in important markets through targeted acquisitions,*
- *Develop a software licence sales activity through an indirect channel,*
- *Concentrate the resources of the American subsidiary on activities where the Company has the strongest competitive advantages (products and Documentation & Services)."*

ix) Sub-paragraph 7.3.3.3 further said this with regard to *"new targeted acquisitions"*, namely:

"The strategy guiding of [the Company's] acquisitions is based on the following priority objectives:

- *to strengthen the Company's presence in countries where it is already present,*
- *to establish itself in new markets,*
- *to strengthen R&D resources,*
- *expand the software product offering by integrating complementary solutions,*
- *expand the range of support services."*

x) Paragraph 19.2 made reference to Article 12 of the Company's Articles of Association as adopted on becoming a plc. It was set out that the effect thereof was that a double voting right was attributable to each fully paid-up share which had been held by a shareholder in his own name for at least two consecutive years.

xi) Paragraph 19.3 referred to the fact that MB through Klimt Invest, and ED, described as the founders of the Company, held 52.52% and 29.91% respectively of the Company's voting rights.

82. On 12 October 2006, six institutional investors became shareholders by way of a private placement, paying €5.70 per share. One can see from an annual return for the period ended 29 April 2007 that the institutional investors included Truffle, IVS and X-Ange.

83. On 17 October 2006 the Company was admitted to listing on Alternext.

Further acquisitions

84. Between 2007 and 2012, the Company made further acquisitions, acquiring IMS and Olas in 2007, ELS in 2011, and Kaplan Technologies in 2012.

85. Mr Newington-Bridges, in support of his argument that the Company became an investment holding company, points to the Company's balance sheet in its accounts for the year ended 31 December 2013, following the above acquisitions. He relies upon the fact that the Company's assets are shown as totalling some £11.6 million, of which some £8.9 million is made up of *"Investments".* The notes to the accounts show these *"Investments"* as being made up of the Company's holdings in subsidiary companies, shown at cost.

86. It is, however, to be noted that the Directors' Report accompanying the accounts for the year ended 31 December 2013 referred to the principal activity of *"the group"* as being too *"develop and distribute productivity software for training, support and translation of or on ERP applications such as Oracle or SAP, and to deliver related consultancy services"*.

2010-2018

87. In the historical narrative, it is necessary to go back to a further Shareholder Agreement dated 19 January 2010 expressed to be between ED and MB ("**the 2010 Shareholder Agreement**"). The 2010 Shareholder Agreement:

    i) The preamble thereto recorded that ED and MB were associated: *"in a project initiated in 1995, which was then transferred to [the Company], which brings together all the assets created since 1995"*, and went on to state that: *"The purpose of this pact is to confirm an agreement on an exit strategy for this project, in line with the interests of all parties, by 2012."*

    ii) Provided that ED would continue to exercise the powers of Chief Operating Officer, and that his powers would be *"extended"* commensurately with *"MB's withdrawal from* [almost] *all operational functions"* and relinquishment of the role of *"Executive Chairman of the PLC"* for that of *"Non-Executive Chairman."*

    iii) Provided that MB would use his shareholder powers to enforce compliance by the Company with the *"plan"* agreed between him and ED on the terms of the 2010 Shareholder Agreement, by removing the Board if they took *"critical decisions"* in opposition to it.

    iv) Recorded ED's and MB's common intention to *"confirm an agreement on an exit strategy for this project … By 2012"*, and provided that this should be implemented in one of three ways:

        a) If certain financial targets were met by the end of 2011, there would be a *"Sale of the Company"*, or a leveraged management buyout;

        b) If such financial targets were not met, then it was agreed that: *"MB will put a mandate to selling his controlling block of the company, knowing*

that the buyer will have to comply with its obligation to offer identical conditions to all other shareholders."

v) Concluded by stating that the purpose of the document was to: *"define a list of clear financial objectives that can be measured at horizon 2012 and to implement an organisation that aligns the interest of all components of [the Company] to the realisation of these objectives."*

88. In the event, no exit of the kind envisaged by the 2010 Shareholder Agreement was achieved.

89. It is further relevant to note that on 24 June 2013, Lazard prepared an Information Memorandum for prospective purchasers of the Company. This was prepared after Lazard had been instructed in January 2013 to find a buyer for the Company at a minimum price of £40 million. The Executive Summary to the Investment Memorandum contained a summary of the Company's *"Key Investment Highlights"*. This included the following:

"Assima has built a portfolio of software products, with its unique and patented cloning technology at the core

The solutions delivered on the back of the unique technology cover most clients needs for accelerating and de-risking large enterprise application rollouts.

Assima is now moving its technology advantage into a unique SaaS and cloud-based platform, Vimago, which will add a collaborative capability for improving further large ERPs deployments in multinational organizations

...

The first modules of this SaaS platform were officially released in early April 2013 after having been deployed successfully by a few selected large accounts in Ql 2013

The legacy solutions delivered by Assima generally create benefits to its clients which are measured in return on investments worth multiples of hundreds of thousands of dollars, sometimes millions of dollars

The new platform, Vimago, will continue to improve on Assima's value proposition in the Enterprise Application space ...

...

For many years, one of Assima's financial priorities has been to put a special effort on increasing recurring revenues, representing now 23% of revenues as well as software revenue, representing now almost half of the revenue"

90. On 11 October 2013 ED sent a message or statement to the Company's Board raising a series of issues concerning the management of the Company and its group, and making a number of demands. ED concluded this message by stating that:

"This is not a negotiation or a game of poker. I have had enough, and this is the critical point of no return. If there is no agreement, I consider myself free

> *to walk away from Assima, and will resign by end of next week, with all due consideration to my contract and duties to Assima. My freedom and peace of mind is worth more than a net £4,200 a month, and the elusive chase of the pot of gold."*

91. On 17 October 2013, ED sent an email to the other members of the Board, namely MB, Mr Coates, and Mr Forwood, copying in Mr Anderson, in which he further articulated his concerns. In the course of this email, he said: *"I am probably the only person who can say these things without fear …"*. It was submitted by Mr Lightman QC this was an indication that ED considered that he had an entrenched position on the Board, hence his ability to speak out. In the event, some form of accommodation was come to.

92. So far as ED's employment is concerned, reliance is placed by Klimt Invest/MB upon the fact that ED entered into a number of contracts of employment that contain provision for the termination of ED's employment. An example is provided by an Employment Contract dated January 2014 between Assima R&D UK Ltd and ED that provided, at clause 16 thereof, that ED's employment could be terminated on six months' written notice. It is said that this is inconsistent with ED having had any form of entrenched position in the Company.

93. By email dated 8 April 2016, MB wrote to ED and FS attaching a summary of the Company's capital as of 31 March 2016. This noted that a number of small shareholders and three of the institutional investors had reduced their stake, including Innovacom which had reduced its stake by 150,000 shares, but that these shareholders were still *"in the capital"*. The email commented that MB, ED and FS, between them, controlled 74% of the Company, that *"Innovacom & co"* held 25.5%, leaving *"0.5% of the real free float"*, i.e., shares traded on Alternext.

94. By letter dated 2 February 2018, ED wrote to MB raising further concerns regarding the management of the Company and the group referring to the fact that for years prior thereto, in agreement with the Board, he had started the process of *"giving back most of my responsibilities at [the Company], in a careful and controlled way."* ED expressed a desire to terminate his employment *"at a date and conditions agreeable to both parties"*, and he asked that a person be named who would negotiate this termination with ED over the next week. In the event, terms were agreed whereby ED took the benefit of accrued leave during the period from 1 July 2018 to 31 December 2018, on the basis that ED could, if he wished, choose to terminate his employment during this period, but that if he did not, he would continue in employment and would return to work under his existing contract of employment on 2 January 2019 in the same role and with the same responsibilities. These terms are recorded in a document signed by MB and ED on 20 February 2018. At paragraph 3 thereof, this document stated that: *"You will keep your current director's position in Assima UK R&D, Assima R&D South Africa and Assima Plc, unless you exert your right to leave Assima. In which case your director's position in the first two legal entities will be terminated on the day the company receives your notice of resignation."* This document thus recorded that ED would remain a director of the Company even if his employment with the other two companies mentioned was terminated.

P1C approach and sale of Company's assets in January 2019

95. By email dated 25 May 2018, Alvin Chai of P1C wrote to MB and ED expressing an interest in discussing the potential acquisition of the Company.

96. This led to P1C sending a letter dated 14 September 2018 to MB setting out terms and conditions under which P1C would be prepared to purchase the assets of the Company for £15 million subject to carrying out due diligence. It was this proposal that ultimately led to the P1C Purchase Agreement being concluded on 25 January 2019 between the Company and Assima Software SA (1) and Partner One Acquisitions Inc (2) at a reduced consideration of approximately £8 million.

97. There were a number of significant events between 14 September 2018 and the entry into P1C Purchase Agreement on 25 January 2019 in that:

    i) ED and FS maintain that MB made assurances to them that the Company would be liquidated following a sale to P1C in order to encourage them to go along with the sale, whilst developing his own plan to keep the Company going as an investment vehicle, and squeeze out other shareholders on disadvantageous terms, thereby misleading them as to his intentions;

    ii) MB denies giving any such assurances, saying that he was careful as to what he said, suggesting that he was in fact against the sale to P1C at the lower price achieved, and only really went along with the sale because of threats by ED and FS, acting in concert with Jérôme Lecoeur ("**Mr Lecoeur**"), a representative of Innovacom, to remove MB from the Board of the Company.

98. MB accepted under cross examination that P1C's £15 million proposal was something that he was interested in, and he also accepted that, at that time, the assumption was that the Company would be liquidated if this £15 million proposal led to a sale of the Company's assets. Thus, in an email dated 12 September 2018 to the Company's accountant seeking advice as to the tax position, MB, in the context of a sale to P1C, referred to delisting from Euronext, and after the delisting proceeding to the *"disbanding"* of the Company, and then distributing *"the cash to the remaining investors"*. Further, in an email dated 17 September 2018 to ED and FS, MB expressed the view that: *"The dissolution and liquidation of [the Company] may not take place before the end of Q2 2019"*, because *"we will have to produce a 2018 consolidation like the other years, which will not be done until the end of Q1 at best."*

99. On 2 November 2018 the Board of the Company convened an EGM on 26 November 2018 to consider the Company's *"strategic direction"*.

100. On 19 November 2018, having carried out due diligence, P1C made a reduced offer of approximately £8 million, expressed as being an offer for the share capital of the Company.

101. This reduced offer was considered at the EGM on 26 November 2018. MB regarded the £8 million offer as derisory, and in any event was not in favour of a share sale as opposed to an asset sale. There is some dispute as to who said what at this meeting. Whilst it is common ground that Mr Lecoeur was insistent that the Board should work to conclude a deal with P1C, and threatened to seek a change in the composition of the

Board if that was not what the Board intended to do, there is an issue as to whether ED and FS joined with Mr Lecoeur in threatening MB's position on the Board. FS set out his account of what transpired at the EGM in an email sent to Mr Randall on 27 December 2018.

102. I consider that this relatively contemporaneous account is likely to be the most accurate account of what transpired. According to this account, Mr Lecoeur was vociferous in insisting that the Board should conclude a deal with P1C, threatening to seek a change in composition of the Board at a subsequent EGM. However, FS says that he and ED kept quiet rather than siding with Mr Lecoeur, but at the conclusion of the meeting he, ED and Mr Lecoeur supported pursuing further a deal with P1C, whereas MB did not.

103. On 28 November 2018, MB sent an email to FS referring to an earlier call that day with Mr Charron (of P1C) in which the latter had made it clear that: "It's £8m or nothing." MB also said:

> *"Considering Monday's meeting I guess you're going to want to take the £8m offer and sell ([ED] confirmed to me that was his choice to).*
>
> *So you are leaving me the choice to accept the sale against my will, to call a GA to overturn the board and fire me. So I'll do as your narrow majority dictates.*
>
> *Once we have the delisting info we will set up a lawyer-to-lawyer call to see how to implement this.*
>
> *I only wish to be very clear on one point, after the transfer everyone will go their own way and I do not want to have any involvement in your future projects."*

104. On 29 November 2018, MB produced an Investment Memorandum. Its purpose is apparent from the penultimate page, where MB refers to the P1C offer in general terms, describing it as detrimental to the Company, its clients, its employees, and its operations in France, and then refers to the fact that *"all key shareholders"* apart from himself, with his 48% shareholding, were favourable to the transaction: *"focusing only at the short term financial exit benefit."* He went on to say: *"In this context, [MB] is looking for a strategic investor willing to back a buyout of all other shareholders, in conjunction with a transfer of the company HQ from London to Levallois-Perret were reside its French operations and R&D."*

105. MB's Investment Memorandum contains the following of potential relevance and importance:

i) Under a heading *"Company Overview"*, MB refers the fact that *"Assima"* is a software company, incorporated in the UK in 2002. It then refers to *"Assima"* operating in 12 countries, employing 155 employees etc, and as a listed company, providing for yearly audited accounts, and half year financial reports (unaudited), all of which were available. It is further stated that: *"Assima aims to "improve end-user performance and business efficiency" to maximise the value Companies can extract from their IT investments. This is done through the sale of* ***Train & Assist****, the recently released Cloud offering replacing the legacy solution* ***Assima Training Suite (ATS)****."*

ii) Further reference is made to *"Train"* and *"Assist"*:

a) Under the heading *"Train"*, it is stated that the latter is: "*the Cloud version of the legacy software Assima Training Suite (ATS), still based on Assima's unique and patented cloning technology, eliminating costly sound-box systems … Assima's core innovation is to generate software simulation based on a technology capturing screens at object level, transferring the native interactivity of the software in the simulation, when competitors create simulation based on screenshots, with no or limited interactivity …"*

b) Under the heading *"Assist"*, the principle was described as being that: *"when a user connects to the system at login, he is identified by the Assima Cloud platform, and the Assist module is going to monitor all his interactions with the system."* It was then said that this was: "*a brand-new solution which enlarges the original company value proposition, much beyond training, addressing business efficiency issues along with software usability problems."* During the course of his evidence, I asked MB as to whether, when he so described *"Assist"* as a *"new development"*, it had any connection with the original cloning technology. He replied:

> *"A. It was -- yes and no. No, in the way that the new development had not been done on the basis of the cloning technology. But yes, in the way that this architecture encapsulated, as one of the components, this whole product."*

106. A draft share sale agreement with P1C was produced on or about 3 December 2018. The recitals thereto described the Company as a: *"software publisher, specialised in training technologies and services for computer applications."*

107. In the event, for reasons that appear from an email dated 5 December 2018 from Mr Charron to MB (cc. ED), the proposed transaction with P1C reverted to a proposed asset sale effectively at £8.25 million, rather than a share sale. The principal reason was one of timing, and the time that would be involved in order to complete a share sale given the complexities of the shareholdings in the Company. Mr Charron estimated that a share sale would take some 3-4 months to complete, as against five weeks for an asset sale. P1C was not prepared to wait that long. Thus, the deal on the table reverted to an asset sale.

108. MB responded to Mr Charron's email dated 5 December 2018 by an email dated 7 December 2018, copied in to ED and FS amongst others. This email said that: *"we are still willing to discuss"* an asset sale, and it also included the following: *"You will appreciate that our objective will be to close out Assima PLC and Assima Software as quickly and efficiently as possible and we certainly cannot be left with liabilities which may not crystallise for several years."* ED and FS rely upon this as an assurance by MB that the Company would be liquidated post sale.

109. ED and FS also rely, as an assurance by MB, upon what he said to them in an email dated 8 December 2018, namely: *"As I told you by email yesterday, this deal should bring in around €1 per share. In my simulation I assumed that only its own costs would*

remain in the PLC, and that we would have effectively transferred all the other liabilities to x."

110. On 12 December 2018, notice was given of an EGM of the Company on 27 December 2018 to consider the £8.25 million asset sale proposal.

111. On 13 December 2018, MB emailed Mr Anderson in the following terms:

> *"We should know before the end of the week whether the deal with Aramco happens or not.*
>
> *If not we'll take the deal.*
>
> *Jay has created a cash crisis in the US which will be difficult to cope with."*

112. The reference to Aramco is a reference to an alternative arrangement that MB was exploring. As I read this latter email, MB had reached the view that if a deal with Aramco did not *"happen"*, then he considered that the terms offered by P1C should be accepted because there were financial difficulties that would be difficult to cope with. Under cross examination, MB accepted that there were cash flow difficulties at this time.

113. In an email dated 18 December 2018, MB wrote to FS, copying in ED, in which he referred to a discussion with Diversis that afternoon, as a result of which it had been concluded that it was not a serious alternative to the P1C proposal, and therefore that this lead should be dropped. I am unclear as to whether this related to the potential deal with Aramco. However, it is clear from this email that, in any event, the decision had been taken to *"keep pushing"* a contract with P1C, with a view to signing a contract on 2 January 2019, with a target for completion (payment) on 8 January 2019 (the email erroneously referring to 2017 rather than 2019). The email then went on to say: *"After that it will be necessary to ensure the payment of the dividend of Assima Software on the PLC and the dissolution of the latter."* This is also relied upon by ED and FS as an assurance by MB as to liquidation post sale.

114. However, on 20 December 2018 MB wrote to Tony Bale at HSBC. In this email, MB referred to the proposed asset sale with P1C, suggesting that the deal would be completed by year end with effect from the first week of January. He went on to explain that £4 million should be received into the Company in January, and then, £4.2 million *"from Assima Software as a dividend (from its sale proceeds of Assima Switzerland)."* He then went on to say that the Company would operate for at least six months, maybe longer, and then said: *"I may even continue to use it as an investment vehicle post buy out and de-listing."* There is no documentary evidence of MB having disclosed this latter intention to ED or FS, and I accept their evidence that he did not do so.

115. An issue then arose as to when the consideration of approximately £8.25 million proposed to be paid by P1C would be paid, P1C requiring that it be frozen for 12 months in order to be available to satisfy warranty claims. In response to this, in his email dated 24 December 2018 to Mr Charron that I have already referred to above, MB said that this would create personal financial issues for ED and himself in that: *"We both have mortgage commitments that have to be met next year, that we plan to cover from the*

sale proceeds. The basis of the assets sale deal was that it should be neutral to shareholders compared with the takeover option, and because of the warranty it is not."

116. In the event, a compromise was reached that £4 million would be frozen for 12 months, meaning that the balance of the consideration could be paid to the Company on completion. However, ED and FS rely upon this email as demonstrating that either MB intended that the sale proceeds should be distributed to shareholders, on a liquidation, or, alternatively, that he was prepared to lie to P1C with regard to the financial issues concerning ED's and MB's own mortgage commitments.

117. Further reliance is placed by ED and FS on the email dated 26 December 2018 from MB to FS and ED by which MB explained to the latter that Mr Charron had offered to reduce the amount that required to be frozen to £4 million, frozen for 12 months. This email went on to explain that the proposed sale would: *"create a situation of deep negative retained earnings"*, with the result that it would not be possible to pay a dividend or for the Company to buy back shares within the 12 month warranty period in any event. Thus, even the cash received on completion: *"will effectively be frozen for 12 months minimum."* He then went on to say: *"it is only after the 12 months that we will be able to start the process of liquidation."*

118. An EGM took place on 27 December 2018 at which it was resolved to proceed with the asset sale with P1C. MB held proxies on behalf of Klimt Invest, ED, Innovacom and X-Ange, which were exercised in favour of this resolution. The minutes record that:

> *"The chairman [MB] noted that the sale agreement is not yet in its final form and, in particular, there were ongoing discussions concerning the warranty provisions and their affect (sic) upon the Company's ability to distribute its assets to shareholders. All proxies were voted in favour of the resolution. The Chairman declared that the resolution had been passed."*

119. FS did not vote for the resolution proposed at the EGM on 27 December 2018, but abstained. It was put to him in cross examination that the reason for him not voting for the resolution was because he had not received any assurance that the Company would be liquidated and/or the proceeds distributed to shareholders. He denied this, saying that his concern related to the process, rather than the principle, and the delay that had been suggested. I accept his evidence in this respect. It was, in the lead up to the EGM on 27 December 2018, that FS wrote his email dated 27 December 2018 to Mr Anderson referred to in paragraphs 101 and 102.

120. Further negotiations took place regarding the terms of the P1C Purchase Agreement, but it was ultimately entered into on 25 January 2019.

121. A Board Meeting was held on 25 January 2019, after this agreement had been entered into. Ahead of this Board Meeting, ED wrote to Mr Anderson by email on 25 January 2019 setting out that he considered that the *"mission"* of the Company was solely:

> *"- to close at the earliest legal and practical possible time*
> *- to wind down the company in the most cost-effective manner, in respect to its legal obligations*
> *- to keep all proceeds of the asset sale, deducted from any medium-term operational cost, invested in the safest and most liquid investment account until dissolution*

- to distribute all proceeds left at closure, at the same moment, and equitably pro-rata to all its shareholders".

122. The email then went on to set out what ED considered was required at board level to achieve this, including: *"full support of ED/MB to achieve the principal above"*. The email then said: "*If I do not have the support of [MB] for this, it means I can anticipate trouble, and I will likely request a change of the Board at the earliest."* In evidence, ED said that by change of the Board, he was referring to removing Mr Coates from the Board. However, I consider it more likely that ED was referring to the position of MB.

123. At the Board Meeting itself, ED posed a number of questions to MB seeking, as I read them, assurances with regard to how the proceeds of sale would be dealt with. This meeting was recorded, although before the transcript was disclosed, MB denied the matters now relied upon by ED and FS had been said during the course of this meeting, MB suggesting that ED's and FS's version of events had been made up. However, the transcript having since been disclosed, MB now accepts, as plainly he must, that the matters recorded as having been said, were said. His initial denial is, I consider, a further factor that undermines the reliability and credibility of his evidence.

124. As to this discussion, the relevant extracts from the transcript disclose the following:

ED: *First is a common goal and the common goal is to close the company at the earliest legal and practical possible time. It is our common goal?*

MB: *Depending on the circumstances, it will be 2020.*

…

ED: *… At the moment I want to have some agreement in principle after this how we make it official or binding or what, I don't know. But just to discuss it and then to see how we can make it, so … Second, cost control. So to wind down the company, in the most cost-effective manner, in respect of its legal obligations. We just don't spend anything that is not due.*

MB: *Yeah*

ED: *… To keep all proceeds of the asset sale deducted for any medium-term operational cost invested in the safest and most liquid investment account until dissolution, basically to not bet the farm on anything stupid. So …*

MB: *Yes.*

ED: *And the last one: to distribute all proceeds left at closure at the same moment and equitably pro-rata to each shareholder.*

MB: *It's again, you know, Eric, it's, it's something that will happen in 2020 and we'll have to go through the process of an Assemblée Générale. It's just, it's a declaration of intent. So don't …*

ED: *At least it's a declaration of intent*

MB: *We can make this declaration of intent.*

ED: *You know.*

MB: *I'm fine. I'm fine with that.*

125. Following the Board Meeting, on 26 January 2019, ED sent an email to MB and Mr Coates (cc Mr Anderson) setting out: *"the principles we agreed at our Board meeting yesterday."* The email then set out the Company's *"mission"* in the same terms as he had done in his email sent to Mr Anderson the previous day. There was no response to this email.

Events after the sale of the Company's assets to P1C

126. By 20 February 2019, as evidenced by an email of that date, ED was in touch with Innovacom, but so too was MB as evidenced by an email from Mr Lecoeur to MB dated 22nd of February 2019 introducing Frédéric Humbert ("**Mr Humbert**") as his new contact. ED explains in his evidence that that he was concerned that MB would seek to *"move the goalposts"*, and he wanted to try and ensure that MB, or those aligned with him, did not acquire 75% or more of the Company's share capital. Thus he sought to purchase shares from Innovacom, in the knowledge that Innovacom was keen to make a quick exit, and was even considering selling its shareholding to a vulture fund.

127. On 26 March 2019, ED wrote to Mr Humbert, following up on a discussion the previous week, and stating that: *"the exit of shareholders from [the Company] faces some certain and non-recoverable costs, some known risks, some less controllable risks, and ultimately other costs and/or risks currently unknown,"* ED providing a list of these risks, and went on to state that as a result of the costs and risk that he had identified, he considered that an *"honest valuation"* of the Company was around £7.25 million, and he made an offer for Innovacom's shares at a considerable discount on par.

128. It is ED's evidence, as I have already mentioned in considering the credibility and reliability of the witnesses above, that he initially wished to purchase Innovacom's shares through his SIPP, and that in order to test whether he could do so, he placed an offer to purchase five shares at a price of €0.15 per share, far below the then market price of €0.57 per share. ED says that Innovacom agreed to sell, but insisted on an off-market sale, which meant that ED was unable to use his SIPP as the vehicle for the purchase. However, he says that he forgot about the share purchase instruction, and only subsequently discovered that he had bought the shares on the market at €0.15 per share shortly prior to his purchase of Innovacom's 1,501,669 shares on 11 June 2019, outside the closed period in respect of the Company's accounts.

129. There were a number of further relevant events that occurred in the period leading up to ED's purchase of the Innovacom shares on 11 June 2019.

130. On 18 April 2019, ED emailed Mr Humbert in order to *"let you know the latest news"* in respect of the Company. This referred, amongst other things, to a meeting between MB and Mr Coates and the Company's auditor, which such meeting was described as: *"Not very positive in terms of the reporting of the annual accounts."* The email concluded by suggesting that *"our transaction"* could be completed at best around 2 or 3 May 2019, but *"more likely during the week of the 13th to 17th May, once the official accounts are published."* MB/Klimt rely upon this email, as well as the earlier email of

26 May 2018, in support of the contention that ED was guilty of insider trading in using, and passing information to Innovacom, as potential purchaser, in this way.

131. By an email dated 30 April 2019, ED informed Mr Humbert that the Company was still not in a position to publish its 2018 Accounts, *"so we will be in default on the Alternext rules"*. He went on, in this email, to suggest that somebody was *"manipulating the Company's share price downwards by selling/buying 3 shares at a lower price than the threshold price"*. He added: *"It's not me, I withdrew all my buy/sell orders more than a week ago."* MB/Klimt Invest submit that this provides evidence that ED was, in fact, manipulating the share price because, contrary to what he said in this email, he had outstanding the purchase instruction on behalf of his SIPP in respect of 5 shares, and offering a price of €0.15 per share.

132. In response to this email, Mr Humbert commented that the manipulation of the Company's share price was *"impressive"* and that it would *"make our operation much more "normal" in the eyes of third parties ;)"*. This does lend some further support to MB/Klimt Invest's case as to manipulation on the part of ED. However, I note that in this chain of email correspondence, ED, in an email dated 24 May 2019 went on to explain:

> *"Regarding ALSIM shares, there was a trade last Wednesday of 10,000 shares at 0.575. No idea who is doing this... It seems strange to me (from a buyer's point of view) because nobody knows at this stage what Balcaen is planning for the next 12-18 months... And yesterday a complementary price manipulation, with 50 shares to sell at any price, which brought down the high/low thresholds again (0.386 / 0.55) without any trade. I suppose that the manipulation will continue until the release of the 2018 accounts, so another week."*

133. This would have been an odd email to write if ED had been complicit in share manipulation himself. Further, there is no evidence that the purchaser of the five shares that ED had placed at a price of €0.15 per share was connected with ED, and I do not recall it being put to him that there was any such connection. In the circumstances, whilst the explanation of a test sale in respect of his SIPP and a lack of recollection that the share order had been placed has caused me some concern and pause for thought, I am not persuaded that ED did deliberately manipulate the share price in some inappropriate way.

134. Further, as indicated above, given that no case in respect of insider trading has been developed pursuant to the relevant provisions of the Criminal Justice Act 1983, I am not prepared to find that ED has been guilty of any form of illicit insider dealing, an issue that I return to further below.

135. As to the 10,000 shares traded at €0.575 referred to in ED's email dated 24 May 2019, the relevant notification of PDMR share transaction reveals that this was a purchase by MB on 22 May 2019 of 10,000 shares at a price of €0.575. This was within the Company's closed period, and did not involve the making of an offer pursuant to Rule 9 of the Takeover Code.

136. On 28 May 2019 MB emailed Bernard-Louis Roque ("**Mr Roque**") of Truffle making an offer of €20,000 for 65,345 shares, and €50,000 for 157,908 shares. He went on to say: *"I can solve the problem of the 50% threshold by returning to one of the historical*

employees his [Company] shares that I hold for him in trust through Klimt Invest." I understand the reference to the problem of the 50% threshold to be a reference to Rule 9 of the Takeover Code, and the email suggests a way of seeking to get around this. In fact, the threshold under Rule 9 is a 30% threshold as the parties subsequently discovered.

137. There was further email correspondence between MB and Mr Roque, including an email dated 13 June 2019 to Mr Roque in which MB informed Mr Roque that the latter could place Truffle's shares on sale at €0.32 that afternoon and he (MB) would *"place a buy order opposite"*. In the event, Truffle did not sell to MB, but subsequently sold its shares to FS.

138. On 6 June 2019, the Company's accounts for the year ended 31 December 2018, which had been reviewed by the auditors and signed by MB, were published. Under the heading *"Going Concern"* on page 41 it was explained that the financial statements had been prepared: *"on the basis that the company is no longer a going concern … The financial statements do not include any provision for the future costs of terminating the business as the directors have no immediate plans to do so as this will only occur in late 2020 after all outstanding amounts due under the asset sale agreement have been received."*

139. It is against this background that ED's purchase of Innovacom's shares took place, ED purchasing 1,501,669 shares at a price of €0.22 per share. On 13 June 2019, ED informed the Board of the Company with regard to this off market transaction. A consequence of the transaction was that the shares acquired, by operation of Article 12 of the Company's Articles of Association, lost their double voting rights, and MB obtained majority voting control of the Company at that point.

140. As I have already said, it was ED's evidence that he was unaware that this transaction was liable to be caught by Rule 9 of the Takeover Code, ED believing that the relevant threshold was 50% and not 30%. I accept his evidence in this respect.

141. However, this did not prevent MB from causing ED's transaction with Innovacom to be reported to the Takeover Panel for breach of Rule 9, and informing Mr Humbert in an email dated 13 June 2019 that: *"[ED] was therefore fully aware of his obligation to report any major transaction in the share capital of [the Company] to the UK [Takeover Panel]"*. This was notwithstanding that in an email to Mr Coates and Mr Anderson written the same day, MB had suggested that it *"does not seem that Eric is aware of"* the obligation to inform the UK TOP. In the event, and accepting that ED had acted in ignorance of his obligation to make a Rule 9 takeover offer, the TOP did not, after investigating the matter, take any action against ED.

142. At no point has Innovacom made any complaint in respect of the transaction whereby it sold its shares to ED.

143. On 15 June 2019, MB emailed Mr Coates listing penalties to recommend that the TOP impose on ED. The email went on to suggest that if the penalty was large enough, then ED may become a *"forced seller"*. MB suggested that once he had ascertained the TOP's position, and after concluding his deal with Truffle, he would offer to buy ED's shares at the same price that he would pay Truffle, which would be €1,074,089 for

3,356,531 shares. He suggested that, thereafter, Klimt Invest would do a *"full on takeover tender"*.

144. Having been reported to the TOP, ED made submissions in response by way of a document dated 16 June 2019. Despite the limited time in which it was prepared, this was a very detailed document. It provided detailed information in respect of the history of the Company, as well as the particular trade with Innovacom. However, it made no mention of the accidental purchase of the five shares by ED's SIPP, a point relied upon by MB/Klimt Invest. Nevertheless, it did suggest that on Friday 14 June 2019, the Company's shares had been lightly traded with 150 shares being exchanged at €0.16 per share, and it referred to there being 65,000 shares for sale at between €0.32 and €0.40 per share with no taker, ED expressing the view that the shares were coming from either XAnge or Truffle.

145. On 18 June 2019, FS purchased 157,908 shares from Truffle.

146. On 20 June 2020, MB emailed Mr Coates and Mr Anderson, clearly displeased that ED had managed to purchase Innovacom's shares, and conscious of the effect of Article 12 in respect of the shares recently acquired by ED and FS. He observed, amongst other things, as follows:

> *"It means that I have two years to find the best way to do a tender.*
> *There is a way, I guess for me to strengthen my position.*
> *I could try to buy IVS stake and transfer back to Paul Santini the stake I have on trust for him in Klimt, and make sure that Kl voting rights remain unchanged.*
> *The risk that Paul sides later on with Eric and Frederic is real but controllable.*
> *The other option, if IVS price is not too high, would be to buy that stake and do a tender at that price.*
> *...*
> *I'd like to discuss with you how to implement the change of board that we discussed Once Eric will be disconnected from the running of the company he will become more flexible, having to guess what I do or prepare.*
> *..."*

147. It can be seen from this email dated 20 June 2019, that MB had identified the strategic importance of IVS's shares in preserving his majority after two years, when ED and FS would obtain double voting rights in respect of their newly acquired shares. However, the email recognised the difficulty created by Rule 9 of the Takeover Code in acquiring IVS's shares without making an offer to other shareholders.

148. MB returned to the theme in an email dated 22 June 2019 to Mr Anderson in which he raised the possibility of a takeover at €0.575 a share if he could get the funding in place. His calculation was that if he could acquire X-Ange's and IVS's shares, then: *"[ED] and [FS] will have to sell or risk being locked forever in a minority position ..."*

149. In an email dated 15 July 2019, MB observed that he would like to have *"everything in place by the end of the month (commitment of sale by X-Ange, IVS, Senegas - Funding/Line of credit - Takeover pre-validation of the tender), to do the tender before end of September. If I miss X-Ange and IVS shares, my position will be weak in two years time."* This, again, highlights the strategic importance to MB of acquiring the X-Ange and IVS shares.

150. In an email to Mr Anderson dated 5 September 2019, MB referred to the fact that he was still trying to *"find a solution to fund the Mandatory Tender."* However, he sought to run another option past Mr Anderson, based on the fact that a *"friend of mine"* was willing to *"lend enough to fund the buy-out of IVS and X-Ange (roughly €100K)."* MB went on to say that he had read about the concept of pre-paid forward contracts, and suggested in terms that he wished to consider whether this might provide a way around Rule 9 of the Takeover Code. He said that he wished to be sure that if ED *"hears about this, he could not obtain from Takeover panel that I open a Public Tender before I am ready."* MB forwarded to Mr Anderson a revised draft contract, which included a recital to the effect that: *"The Company used to be a software publisher, specialised training technologies and services for computer applications."*

151. So far as the *"friend"* referred to in the email dated 5 September 2019 as willing to lend enough to fund the purchase of the IVS and X-Ange shares, MB was cross-examined as to this. I am satisfied that his answer that it was not Mr Pol, but rather was another entrepreneur known to MB, was truthful.

152. There is no evidence that MB ever got himself into a position in which he was able to fund a mandatory bid as required by Rule 9 of the Takeover Code.

153. By an email dated 24 September 2019, MB ran another idea past Mr Anderson. This was to the effect that MB/Klimt Invest would first get contracted call options with IVS and X-Ange in place expiring on 30 November 2019, giving him the right to purchase their shares at €0.575 per share contingent on TOP validation. He would then approach ED and FS and make a written conditional offer to buy their shares at the same price. On the assumption that he could persuade FS to accept, there would then be two scenarios, ED either accepting, or not accepting the offer. When making the offer to ED and FS he would make clear that he intended to take a salary and had no intention of liquidating the Company in the foreseeable future, and instead planned to use the Company as an *"investment structure"* once *"all P1C related issues are sorted."* In the second of these scenarios, he would go to the TOP and ask them to authorise him to make an offer to all shareholders, apart from ED, who would have already rejected the potential offer. Doing things in this way, he would only require £500,000 worth of funding.

154. In the event, Mr Anderson advised against the course of action, suggesting that it would not succeed. Nevertheless, it does demonstrate a plan on MB's part to force out ED on disadvantageous terms, and not to liquidate the Company, but rather use it as an investment structure under his own control.

155. It was against this background that Mr Pol came on the scene and, through Tosca Invest, purchased X-Ange's shares in the Company on 24 December 2019, and IVS's shares in the Company on 13 January 2020.

156. In considering Mr Pol's credibility as a witness above, I have already considered in some detail the circumstances behind Tosca Invest's purchase of these shares, concluding that the explanations given by Mr Pol in respect thereof to the effect that this was some sort of independent investment made following an introduction to IVS and X-Ange effected by MB is not to be believed for the reasons that I have explained above. As I have already said, it is my finding that Mr Pol purchased these shares through Tosca Invest, either as nominee for MB, or at least in circumstances in which

MB could rely upon Mr Pol, as his friend, to act in concert with him, and to support him in maintaining his majority control over the Company.

157. My conclusions are further supported by the fact that MB had so clearly identified the strategic importance of the shareholdings of X-Ange and IVS in the correspondence referred to above. Further, whilst perhaps not the strongest of evidence in itself, enquiries made by ED of IVS and X-Ange do suggest that MB was behind the purchase. In an email dated 8 April 2020, Thomas Knudsen of IVS wrote that: *"I believe that I have already confirmed that to the best of my knowledge, it is [MB], directly or indirectly, who has acquired the shares that we have sold."*

158. On 12 February 2020, MB emailed ED, Mr Coates and Mr Anderson in preparation for a Board Meeting on 14 February 2020, in order to *"submit to you in advance the topics I plan to raise and related proposed resolutions"*. Under the heading *"PLC operation"*, he:

    i) Stated that he would like to add an external independent director to the Board, namely Mr Griffiths, who would be a non-executive director along with ED, with MB and Mr Coates becoming executive directors to *"continue to run and manage the PLC, as we have been doing since the asset sale."*

    ii) Recommended that an account be opened with the platform, Interactive Investors, onto which most of the Company's cash would be transferred to be invested *"in a portfolio of Listed companies bearing dividends."* This would be on the basis that: *"This portfolio will be fully liquid and be converted back into cash immediately if there is a change of policy decided by the board. I shall be in charge of managing this portfolio …"*

159. The email dated 12 February 2020 made no mention of MB's plan, mentioned in his email dated 24 September 2019 to Mr Anderson, to use the Company as an *"investment structure"* once issues with P1C were out of the way.

160. In the event, the Company's reserves have remained in cash.

161. The accounts of the Company for the year ended 31 December 2019 were signed off by MB on 23 April 2020. It is to be observed that:

    i) Under the heading *"Post-Balance Sheet Events"*, it was stated that the directors continued to monitor the effects of the Covid 19 pandemic but that: "… *given that the company has ceased to trade and exists purely to collect outstanding balances related to the sale of subsidiaries they do not anticipate any effect on the company."*

    ii) However, in his Chairman's Statement, MB stated: *"As of today, there is no plan and consequently no initiated process for a voluntary liquidation of the company. Such process would require, as a legal pre-requisite, the closing of all open liabilities, and then a validation by shareholders through an extra-ordinary resolution gathering at least 75% of voting rights. There is no indication today that such a high level of support exists for this outcome… This is a high-pressure context, but it is also one that can generate the highest*

returns. New opportunities will arise, and we need to be ready to seize them once the old assets sale has been digested".

162. It is ED's and FS's case that at the AGM on 30 June 2020, which was recorded by video, FS asked MB whether he could: *"explain how you see the future of the Company?"*, To which MB responded in a noncommittal way: *"... So far we have managed the company in a careful and prudent way, but the future is the future."*

163. In an email dated 10 July 2020 to Mr Charron, MB commented in respect of the Board of the Company: *"it's like the Paris listing, it seems a bit fake, but we need to respect the rules."* This is relied upon by ED and FS as a recognition by MB himself that although the Company was, and remains public and listed, the fact that only some 0.05% of shareholders are free float, means that it is, in reality, a public and listed company in little more than name only.

164. On 17 September 2020, MB emailed the other members of the Board stating that he would like to arrange a Board Meeting for the purposes of considering, amongst other things: *"Corporate PLC strategic review and development plans for 2021."*

165. Concerned that MB imminently intended to seek the Board's approval for the utilisation of the Company's monies for a new purpose, and in particular actively investing the monies in question, on 22 September 2020, ED's and FS's Solicitors, Marriott Harrison LLP, sent a letter of claim to MB on behalf of ED and FS. In this letter of claim, it was maintained that ED and FS were entitled to petition the Court to wind up the Company on the grounds that following the asset sale to P1C the Company's principal objects had been achieved, and it was therefore just and equitable that the Company be wound up on the basis that minority shareholders were entitled to expect that their investments would be returned to them.

166. It has been in response to ED's and FS's case as so articulated that MB has sought to suggest that no change of purpose is involved because the Company was, at the time of the asset sale, an investment holding company, and that as it is now intended by MB as the effective directing mind of the Company, that the Company should pursue an investment strategy, it cannot properly be said that the Company's objects have been achieved.

167. On 8 October 2020, Mr Coates drafted changes to the Company's draft Interim Accounts for the period to 30 June 2020, so as to state that management had prepared the interim financial statements on the basis that the Company was a going concern, in contrast to the position as disclosed in the audited accounts approved following the sale of the assets of the Company in January 2019.

Presentation of the Petition

168. The Petition was presented by ED, but not FS for the reasons explained above, on 14 October 2020.

169. On 4 November 2020, and prior to the first return date of the Petition on 2 December 2020, MB emailed ED's and FS's Solicitors with what MB/Klimt Invest maintain was an offer to purchase ED's shares in the Company subject to a legal opinion that the Company was able to purchase his shares, and subject to a valuation of ED's shares

"established by a specialised and independent firm." So far as the latter is concerned, it was said that: *"The mandate would be to provide a market valuation of [ED's] shares in [the Company], on behalf of [the Company] that would bear its costs."*

170. At no time has it been confirmed that legal advice has been obtained to the effect that the Company can purchase ED's shares. Further, ED has not engaged with the offer out of concern that it does not specify that his shares should be valued on a pro-rata basis without discount for minority status.

171. There was a preliminary hearing of the Petition on 2 December 2020 when directions were given.

172. An Amended Petition was filed on 15 December 2020 pursuant to permission granted on 2 December 2020.

173. On 25 January 2021, an EGM was convened to consider a resolution to place the Company in members' voluntary liquidation. The resolution was defeated by the votes of the majority, including Klimt Invest and Tosca Invest.

174. On 24 February 2021, MB/Klimt Invest filed Points of Defence.

175. On 26 February 2021, FS filed Points of Defence supporting the Petition.

176. Further directions were given by the Court on 27 April 2021, including provision for the service of Amended Points of Reply, which were filed on 30 April 2021.

177. At a Board Meeting held on 28 April 2021 reference was made by Mr Anderson to Article 86 of the Company's Articles of Association as adopted by the Company in 2009, which provided, amongst other things, that if it was the third annual general meeting following the annual general meeting at which a director had been elected or last re-elected, then that director was required to retire from office, albeit that the director would be eligible for re-election. It was said by Mr Anderson, effectively on behalf of MB, that this meant that as ED had been elected more than three years ago, he would retire by rotation at the next AGM, albeit eligible for re-election. Under cross examination MB accepted, as indeed was the case, that ED had not been elected as a director at any AGM, and that the position was that ED had been appointed as a director on the incorporation of the Company.

178. It is to be noted that in the course of discussion of this latter issue at the Board Meeting, and notwithstanding that the Company is a listed public company, Mr Anderson is recorded as having referred to the fact that the Company operated *"substantially as a close corporation"*.

AGM on 24 May 2021

179. In the event, and notwithstanding ED's objections, Article 86 was invoked at the AGM on 24 May 2021, and ED was required to submit himself for re-election. He was not re-elected because the majority (including proxies held from Klimt Invest, Tosca Invest and Mr Delcaire) voted against his appointment.

180. Further, at this AGM, the same majority voted in favour of a resolution in the following terms:

> *"To approve the investment strategy of investing in promising technology companies"*,
>
> after the conclusion of the present winding up proceedings.

181. On 12 June 2021, ED's shares purchased from Innovacom recovered their double voting rights having been owned for two years.

182. Thereafter, in the present proceedings, various further amendments were made to the statements of case, disclosure took place in November 2021, and witness statements were exchanged in December 2021.

183. On 22 November 2021, MB issued proceedings in Paris against ED and Innovacom seeking to challenge the share purchase transaction between them. Further, on 6 December 2021, MB filed a complaint with the Autorité Des Marchés Financiers ("**AMF**"), the French authority that regulates the Alternext Exchange.

Just and equitable winding up

184. Before considering the various grounds upon which ED and FS contend that the Company ought to be wound up on the basis that it is just and equitable to do so, it is necessary to consider the scope of the remedy.

185. Section 122(1)(g) of the 1986 Act provides that a company may be wound up by the court if … *"(g) the court is of the opinion that it is just and equitable that the company should be wound up."*

186. Section 125(2) of the 1986 Act provides further that:

> *"(2) If the petition is presented by members of the company on the ground that it is just and equitable that the company should be wound up, the court, if it is of the opinion –*
>
> *(a) that the petitioners are entitled to relief either by winding up the company or by some other means, and*
>
> *(b) that in the absence of any other remedy it would be just and equitable that the company should be wound up,*
>
> *shall make a winding up order; but this does not apply if the court is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."*

187. The remedy has been described as one of last resort and an exceptional remedy in the context of disputes between shareholders – see e.g., *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333 at [54]– [56]. This is reflected in the wording of Section 125(2) of the 1986 Act, which requires the Court to decline to make a winding up order where some other remedy is available, and the petitioner is acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. An alternative remedy might potentially be provided by pursuing a remedy under Sections 994-996 of the Companies Act 2006 ("**the 2006 Act**") on the grounds that the affairs

of the company are being or have been conducted in a manner that is unfairly prejudicial to the petitioner in his capacity as a shareholder, or by an offer to buy the petitioner's shares.

188. In *Lau v Chu* [2020] UKPC 24, [2020] 1 WLR 4656, at [20]-[21] per Lord Briggs JSC, the Privy Council held that the legal burden of proof is on the applicant to establish his or her entitlement to relief and, if so, that a winding up would be just and equitable if there were no other remedies available, but that if the petitioner can so establish, then the legal burden of proof shifts to the respondent to prove that the petitioner has unreasonably failed to pursue some other available remedy rather than seeking a winding up.

189. Absent an alternative remedy, the question is one of considering whether it is *"just and equitable"* that the company should be wound up.

190. As emphasised by Dillon J in *Re St Piran Ltd* [1981] 1 WLR 1300 at 1307: *"The words "just and equitable" are wide general words to be construed generally and taken at their face value. Whether in any case a winding up order should be made would depend on a full investigation of the facts of the particular case … The concept of justice and equity is a very wide concept …"*

191. In *Re Westbourne Galleries* [1973] AC 360 at 374H-375, Lord Wilberforce, having rejected the notion that the expression *"just and equitable"* required to be construed so as only to include matters ejusdem generis the preceding clauses to the then Section 222(f) of the Companies Act 1948, stated that: *"… there has been a tendency to create categories or headings under which cases must be brought if the* [just and equitable] *clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances…"*

192. Further, subsequently at 379B, Lord Wilberforce said: *"The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force*".

193. In *Lau v Chu* (supra), Lady Arden JSC approved this approach, saying at [101]:

> *"Lord Wilberforce clearly held the phrase "just and equitable" was general and should "not be reduced to the sum of particular instances' '(pp 374-375). He also held that the courts may have been too timorous in the past in just and equitable winding up and that it was impossible or undesirable to define the circumstances in which equitable considerations could arise (p 379)."*

194. The jurisdiction is most often invoked in circumstances where the company is in substance a partnership, but it is clear that the jurisdiction is not so limited, and: *"may be invoked whenever justice and equity require" – Re Ringtower Holdings plc* (1989) 5 BCC 82, at 91F, per Peter Gibson J.

195. Whilst recognising that the categories or headings under which a just and equitable winding up petition might be brought ought not to be regarded as limited or reduced to the sum of particular instances, recognised grounds for seeking a winding up on the just

and equitable ground include a loss of substratum, and a breakdown of trust and confidence within a quasi partnership.

196. However, as Mr Lightman QC has correctly identified, other instances include:

i) Where the petitioner has been removed as a director in breach of an implied agreement or understanding that he was entitled to a seat on the board – see *Tay Bok Choon v Tahanasan Sdn Bhd* [1987] 1 WLR 413, at 417H-418A, per Lord Bridge (giving the judgment of the Privy Council); and

ii) Where the respondents have entered into an agreement or understanding with the petitioners that the company will be wound up: *Re Perfectair Holdings Ltd* (1989) 5 B.C.C. 837.

197. In *Lau v Chu* (supra), Lord Briggs JSC, at [39(a)] and [43], made clear that:

> *"There is no rule that a just and equitable application for winding up must be justified solely by reference to the position as at the date of the filing of the application… The court has to ask itself, at the time of the hearing, whether it is just and equitable that a liquidator should be appointed… the court should consider all relevant matters as at the date of the hearing. Secondly this is entirely in accordance with the court's ordinary practice when considering whether to grant discretionary relief of an equitable nature"*

198. It is apparent from the extract from the judgment of Lord Briggs in *Lau v Chu* (supra) referred to in the last paragraph that the court is required to consider all relevant matters pertaining at the date of the hearing that might bear upon the question as to whether it is just and equitable that the company be wound up, a question that is liable to involve an element of discretion with regard to whether the relief sought ought to be granted.

199. Apart from the question of alternative remedies, those discretionary matters might potentially include considerations such as the wishes of other members of the company, the financial consequences to the company of making a winding up order, and the conduct of the petitioner.

Loss of Substratum

ED's and FS's case

200. The essence of ED's and FS's case on loss of substratum is as follows.

201. It is submitted that three principal questions arise, namely:

i) What is the purpose of the Company?

ii) Can the Company pursue this purpose following the sale of its business and assets in January 2019?

iii) Will the Company in fact pursue this purpose, or has the purpose been abandoned?

202. If the Company cannot practically pursue this purpose following the sale of its business and assets in January 2019, or if the Company will not in fact pursue this purpose, or has abandoned it, then it is submitted that the Company ought, in accordance with the authorities, to be wound-up as having lost it substratum or purpose.

203. As to the Company's purpose, Mr Lightman QC, on behalf of ED and FS, articulates three alternatives, namely:

    i) Firstly, what Mr Lightman contends was the purpose disclosed by the Offering Circular, namely, to use the simulation or cloning technology to train people to use IT applications like SAP when they were rolled out on a large scale, and also to assist with all aspects of a rollout of enterprise IT applications like SAP on a large scale. Mr Lightman QC submits that MB, under cross examination, accepted that this was the purpose of the Company at the time of the Offering Circular. Further, Mr Lightman QC submits that this is consistent with the name of the Company, *"Assima"*, which captured the purpose based on the use of simulation technology.

    ii) Secondly, in the event that the Company's purpose is to be regarded as having gone beyond the exploitation of the original cloning technology, the purpose as set out in the 2002 Shareholder Agreement, namely: *"to design, develop and market software solutions for the training industry"* ... encompassing ... *"Software publishing, consulting and assistance activities, carried out with [the Company's] own resources or with partners."* It is submitted that this is to be read as set out at paragraph 22 of the Petition, which represents ED's and FS's pleaded case as to the Company's purpose.

    iii) Thirdly, the purpose as indicated by the description of *"principal activity"* given in the Company's accounts for the year ended 31 December 2018, as signed by MB, where it is stated that: *"The principal activity of the group in the year was to develop and distribute productivity software for training, support and translation of or on ERP applications such as Oracle or SAP, and to deliver related consultancy services."*

204. As to the material by reference to which the Company's purpose is to be ascertained, it is common ground between the parties that the Company's Memorandum of Association is the starting point, but that the court is entitled to look beyond that to other evidence. Mr Lightman QC submits that the materials must, however, have been reasonably available to all members before they invested, and thus that it is inappropriate to look beyond the terms of the Offering Circular to material that became available to members thereafter such as annual accounts, which, so far as necessary, MB/Klimt Invest rely upon as demonstrating a change in or development of the primary purpose of the Company to that of an investment holding company.

205. It is submitted on behalf of ED and FS that, following the sale of the Company's business and assets pursuant to the P1C Purchase Agreement, it has become impossible, or at least practically impossible for the Company to pursue its purpose. As to the appropriate test, it is submitted that the test is one of practical possibility or impossibility, rather than absolute impossibility. As to this, it is said that following the completion of the P1C Purchase Agreement, in particular bearing in mind inclusion therein of restrictions on the use of intellectual property belonging to the Company, it

would not be practically possible, or indeed possible at all, for the Company to now carry on business pursuant to its purpose, and that this is so even if the Company's purpose were found to be the widest of the purposes referred to in paragraph 203 above.

206. However, it is further submitted that even if it were technically still possible for the Company to carry on the business that it previously did, the reality is that the Company does not intend to pursue that purpose, and has abandoned it, and that what the Company, under MB's sole direction and control, intends to do is to invest in what MB considers to be promising technology companies, MB having effectively turned the Company into a private investment vehicle, rather than carrying on, through its subsidiaries, the business that the Company carried on prior to the sale of its business and assets in January 2019.

207. Reliance is placed, amongst other things, upon the evidence of Mr Vigne to the effect that the new intended purpose is a *"new and different story"*. In similar vein, the evidence of Mr Andre was that he would have voted against the relevant resolution as to the Company's future direction: *"because it would be completely changing the Company. It looks like [MB] wants to behave like a business angel."* Further, reference might also be made to the evidence of Mr Augustin, who bought his shares on Euronext, and whose evidence is to the effect that he makes his own investments directly into start-ups, such as the Company, that he wishes to invest in, and that he does not want to invest in an investment fund with heavy management costs that makes investment decisions on his behalf as to which private companies to invest in. On this basis, he voted in favour of the resolution to enter into members' voluntary liquidation *"because I believe the money in the Company should be returned to shareholders and this should happen straightaway."*

MB's/Klimt Invest's case

208. As I have said, it is common ground that the Company's Memorandum of Association is the starting point to ascertaining the Company's purpose for the purpose of considering whether there has been a loss of substratum or purpose, but that it is permissible and appropriate to look at other materials.

209. In essence, it is MB's/Klimt Invest's case that whilst the Company's purpose was essentially founded upon the cloning technology that had been developed, and the exploitation thereof for training purposes, the Company's purposes broadened considerably as time went on as evidenced by a more detailed analysis of the Offering Circular, including in particular the extracts therefrom referred to in paragraph 81 above, and the Company's accounts, which it is submitted that the court is entitled to have regard to bearing in mind that the Company's annual accounts were publicly available to investors/shareholders. Particular reliance is placed upon the fact that the purpose behind the Offering Circular was to raise capital in order to make acquisitions of other companies, and to fund R&D and the development of the technologies employed by the Company and its subsidiaries, as evidenced by, for example, the development of *"Assist"*, as referred to in MB's Investment Memorandum dated 29 November 2018 as being a *"brand-new solution"*.

210. Particular reliance is placed by Mr Newington-Bridges on behalf of MB/Klimt Invest on the way that the Company's assets were described in its accounts, with the most

significant asset being its *"investments"* in its subsidiary companies through which the income was earned.

211. It is thus submitted that well prior to the entry into the P1C Purchase Contract, the purpose of the Company had become that of an investment holding company, and in any event that the more limited purpose suggested by Mr Lightman QC on behalf of ED and FS is too restrictive and does not reflect what the Company said to prospective investors in the Offering Circular, let alone what it said in subsequent reports and accounts. Mr Newington-Bridges submitted that the *"ultimate proof"* that the Company had become a company *"that held investments and fundamentally traded assets"* is provided by *"the fact that it traded all of its assets in a deal with Partner One Capital."*

212. Given this wider purpose, so it is submitted, there can be no question but that the Company can, and indeed intends without abandoning anything, to pursue its purpose notwithstanding the entry into the P1C Purchase Agreement in January 2019, and would be pursuing that purpose through MB's intended objective of using the Company's cash balance to invest in promising technology companies.

213. On this basis, it is submitted on behalf of MB and Klimt Invest, that a case of loss of substratum or purpose is not made out.

Authorities on loss of substratum

214. In *Cotman v Brougham* [1918] AC 514 at 520, Lord Parker of Waddington explained that the question whether or not a company can be wound up for failure of substratum is a question of equity between a company and its shareholders. Thus at 521, Lord Parker highlighted the difference between considering the terms of a company's Memorandum of Association for the purposes of deciding whether its acts were ultra vires, and giving consideration to whether the Company's substratum had gone, suggesting that, in the latter case, it may be necessary to distinguish between power and object and to determine what is the main or paramount object of the company, something which might well mean looking beyond the terms of the Memorandum of Association itself.

215. On this basis, I agree with the position adopted by the parties that it is appropriate to look beyond the terms of the Memorandum of Association in order to ascertain the main or paramount object. However, I agree with Mr Lightman QC that the material to be looked at must generally be material that was available to all those who have invested in the Company, at least unless the latter can be seen to have agreed to or acquiesced in some change in or development of the main or paramount corporate purpose.

216. Thus, for example, in *Re Crown Bank* [1890] Ch 634, in considering the company's purpose in order to determine whether its substratum had gone, North J had regard to a prospectus, a circular circulated to shareholders, and the company's name. In *Re International Cable Company* (1890) 2 Meg 183, the court had regard to the terms of a prospectus used for the purposes of raising capital.

217. It is clear, as Mr Newington-Bridges submits by reference to *Galbraith v Merito Shipping Co* 1947 SC 446, per Lord Justice-Clerk Moncrieff at 456, that a loss or failure of substratum *"is not evidenced by mere discontinuance of business activities even for a lengthy period by a company..."* However, Lord Moncrieff continued: *"... So long as*

this does not evidence a final and conclusive abandonment of the business and so long as the resources of the company as regards management and money have been conserved so as to admit of its re-entry on its interrupted activities when this shall be judged expedient". He later added that: *"... the most recent pronouncements have uniformly insisted on the demonstrated and concluded finality of such an event by requiring that, before the substratum should be found to have been withdrawn, business within the objects of incorporation should have been, at least in a practical sense impossible."*

218. As to the requirement for impossibility, Mr Newington-Bridges further relies upon *Re German Date Coffee Co*. (1882) 20 Ch D 169, in which Bagallay LJ had spoken in terms of a requirement that it be *"utterly impossible to carry on business"*, and *Tower Taxi Technology LLP v Marsden* [2005] EWCA Civ 1503 which applied the latter case.

219. In *Re Kitson & Co Ltd* [1946] 1 All E.R. 435, Lord Greene MR commented that a company's substratum cannot: *"exist at one moment and cease to exist a moment later, or vice versa simply through a change of intention of the board or of the shareholders"* (439). Tucker LJ, on the other hand, stated that *"... if, at the time of the making of the winding up order it is beyond dispute that it is the intention of the company to carry on a business which is within the principal object of its memorandum of association, it is impossible to say that the substratum of that company has gone"* (444A), and Morton LJ allowed the appeal on the basis that it did not seem to him that *"the allegation that the substratum of this company has gone has been borne out by the evidence on this petition"* (443B).

220. The facts of *Re Kitson & Co Ltd* (supra) were that a company that carried on a long-established engineering business sold that business, and its directors passed a resolution to use the proceeds to purchase shares in a group of companies more or less insolvent. On that basis, it was decided at first instance that the company should be wound up. However, the judge at first instance had not taken into account evidence of a change in composition of the board, and an affidavit from one of the present directors stating that it was the intention of the company to continue with the engineering business and to acquire the assets and undertaking of a subsidiary that have been requisitioned to the Admiralty (441A-E). On the basis of this latter evidence, the appeal to the Court of Appeal was allowed and the decision that the company be wound up was reversed. I agree with Mr Lightman QC, that Lord Greene's comments referred to above are required to read in this context.

221. However, it was a feature of the latter case that the disposal of the long-standing engineering business did not mean that the substratum had been lost because the purpose was held to be not limited to that particular business, the paramount intention being held to be that of the general engineering business, which the company did intend to continue through the acquisition of the business of the subsidiary.

222. In *Re Perfectair Holdings Ltd* (1989) 5 BCC 837, Scott J at 848H distinguished *Re Kitson & Co Ltd* (supra) in a situation where the business and assets of the company had been sold, and the majority had agreed that on the sale of the business and assets, the company should be liquidated.

223. There is authority for the proposition that an agreement or understanding between the members as to the purpose of the company can be taken into account in determining its

paramount purpose – see *Re Abbey Leisure Ltd* (1989) 5 B.C.C. 183, at 186 (Hoffmann J); on appeal, [1990] B.C.C. 60, at 67E-F and 68E (per Balcombe LJ) and at 68H-69A (per Sir George Waller). Whilst this was a quasi-partnership case, there is at least Australian authority to the effect that a like approach is appropriate in the case of a publicly listed company, at least where it could be said that there is a general intention and common understanding with regard to its purpose. In *Re Johnson Corporation Ltd* (1980) ACLR 227, Needham J (sitting in the Supreme Court of New South Wales, Equity Division), at 235, said this in the case of a publicly listed company:

> *"… there is adequate ground for a submission that loss of substratum can be established "where the general intention and common understanding of the members, with respect to the independent objects, rather than those objects themselves, cannot be realized": Callaway, The Just and Equitable Ground, p 13."*

224. *Re Abbey Leisure Ltd* (supra) concerned an application to strike out a petition brought by a contributory for a winding up on the just and equitable ground, alleging unfair prejudice as an alternative. The strike out application was decided on the assumed basis that there was an initial agreement between the shareholders that the business of the company should be limited to one particular venture. Hoffmann J and the Court of Appeal held that the continuation of the business after the determination of that one venture might properly form the basis of a petition on the just and equitable ground.

225. In *Re Crown Bank* (supra) a company was incorporated as the Mid-Northamptonshire Bank Ltd, as a country bank in Northamptonshire with an office in London. It issued a prospectus and a circular to shareholders that led to the issue of shares on the basis that this was to be its business. It subsequently changed its name to Crown Bank Ltd, gave up its bank in Northamptonshire, and carried on from London a business that could not be described as a banking business. North J identified the company's main purpose by reference to a prospectus, a circular circulated to shareholders, and the company's name, and held that the company should be wound up. However, it must be noted that the judgment included a finding that the company's actions were ultra vires, as well as departing from the main purpose as so identified.

226. In seeking to reconcile the various authorities identified above, it is necessary, in my judgment, to focus upon why loss of substratum ought to provide a basis for a contributory to seek to wind up a company. As to this, it is important to bear firmly in mind Lord Parker's observation in *Cotham v Brougham* (supra) at 520 that the question is fundamentally one of equity between the company and its shareholders.

227. I consider that particular insight in the circumstances of the present case is provided by the reasoning as to why loss of substratum or purpose might prove a basis for winding up on the just and equitable ground as explained by Jenkins J (later Lord Jenkins) in *Re Eastern Telegraph Co., Ltd.* [1947] 2 All ER 104. At 109F, he quoted with approval the first paragraph of the headnote to the report of the judgment of the Court of Appeal in *Re Haven Gold Mining Company* (1882), 20 Ch.D. 151, namely:

> *"Where the court is satisfied that the subject-matter of the business for which a company was formed has substantially ceased to exist, it will make an order for winding up the company, although the large majority of the shareholders desire to continue to carry on the company.*

Jenkins J then continued:

> *"That, I take it, means that, if a shareholder has invested his money in the shares of the company on the footing that it is going to carry out some particular object, he cannot be forced against his will by the votes of his fellow shareholders to continue to adventure his money on some quite different project or speculation."*

228. This, in my judgment, amply supports the proposition that, on appropriate facts, it may be just and equitable to wind up a company if its directors cause it to embark upon acts which are outside and different from what can fairly be regarded as having been within the general intention and common understanding of the members when they became members, even though the company could still pursue its original objects as set out in its memorandum of association, a conclusion supported by the decision of Menhennitt J in the Australian case of *Re Tivoli Freeholds Ltd* [1972] VR 445, at 469 (Supreme Court of Victoria).

Is the case on loss of substratum made out?

229. I agree that the first step is to identify the Company's main or paramount object or purpose.

230. Particularly in the case of a public listed company, I further agree that the identification of the Company's main or paramount object or purpose can only generally be done by reference to material available to all investors on the basis that one is essentially concerned with seeking to identify some general intention and common understanding as to the company's primary purpose. Prima facie, the materials available for this purpose will be the materials available to investors prior to investing, but I can see that if there is some change or development that is widely known to investors that does not fundamentally change the main or paramount object or purpose, it might be permissible to consider that material as well, and there may be circumstances in which by reference to materials subsequently produced one can conclude that those who have invested have agreed to a more fundamental change in the main or paramount object or purpose, or are to be taken to have acquiesced therein.

231. In the present case, I consider that the starting point, after the Company's Memorandum of Association must be the Offering Circular, rather than the 2002 Shareholder Agreement, bearing in mind that the latter was merely an agreement as between ED and Klimt Invest.

232. On behalf of ED and FS, it is, as I have said, submitted that the purpose disclosed by the Offering Circular was the use of simulation or cloning technology for training people to use IT applications like SAP when they were rolled out on a large scale, and also to assist with all aspects of a rollout of enterprise IT applications like SAP on a large scale. However, I consider this to be an over restrictive interpretation of the Company's principal or main purpose as disclosed by the Offering Circular in that, as Mr Newington-Bridges points out by reference to the extracts from the Offering Circular that I have referred to in paragraph 81 above, the Company's business involved, and was to continue to involve, the acquisition of new, albeit complementary businesses, conducted through subsidiaries, with money specifically being raised pursuant to the Offering Circular in order to fund such acquisitions, as well as to fund

R&D in respect of new offerings. Thus, I consider that the Offering Circular clearly envisaged the development of new, albeit complementary products.

233. However, I am satisfied that the Company's main or paramount object or purpose remained, after the listing in 2006, broadly consistent with that represented by the Offering Circular until the entry into the P1C Purchase Agreement in January 2019. The acquisition of further subsidiaries, and the development of new offerings that took place following the offering circular was, as I see it, entirely consistent with what had been said in the Offering Circular.

234. However, the Information Memorandum prepared by MB on 29 November 2018 does, in my judgment, provide an insight into the effect thereof on the Company's overall purpose. It was submitted by Mr Newington-Bridges on behalf of MB/Klimt Invest that this document was prepared in something of a hurry. However, I gained the clear impression from his evidence that MB was a careful man, with a keen eye or detail, who would not have set out in a document such as this anything that he did not intend to say.

235. A number of features do, as I see it, particularly stand out from this Information Memorandum:

i) Firstly, although the Company did operate through a significant number of subsidiaries, through which the income of the group was earned, MB did not therein seek to distinguish between the Company and the subsidiaries, referring to *"Assima"* as a software company, incorporated in the UK in 2002, and as operating in 12 countries, employing 155 employees etc.. This does, as I see it, recognise the reality of the position that the Company was a company trading through subsidiary companies that it controlled, and not simply some form of investment vehicle.

ii) As referred to above, this Information Memorandum identified that *"Assima"* operated through the sale of "*Train & Assist"*, explaining that *"Train"* was the cloud version of the legacy software still based on Assima's *"unique and patented cloning technology"*, and that *"Assist"* was *"a brand-new solution which enlarges the original company value proposition"* as explained. However, as further referred to above, when asked whether the latter had any connection at all with the original cloning technology, MB's answer was, in effect, *"yes and no"*, suggesting that there was some link at least in the overall *"architecture"*.

236. On this basis, I am satisfied that, as late as November 2018, shortly prior to the P1C Purchase Agreement, the Company's main or paramount object or purpose had not fundamentally changed, with a significant part thereof still being based upon the original cloning technology, and the other significant part thereof having at least some connection therewith, and being a complimentary development of the Company's business, as operated through subsidiary companies that it controlled.

237. Overall, given that I consider that the main or paramount object or purpose as disclosed by the Offering Circular was more widely expressed than contended for by Mr Lightman QC, the paramount or main object of the Company as disclosed thereby is, I consider, perhaps better expressed in the description of the Company's group's

"principal activity" recorded in the accounts for the year ended 31 December 2018, namely: *"to develop and distribute productivity software for training, support and translation of or on ERP applications such as Oracle or SAP, and to deliver related consultancy services."*

238. Whilst I accept that the Company's accounts had, for many years, described the Company's interest in its subsidiaries as *"investments"*, and while such interests were certainly investments, it is in my judgment quite wrong to regard the Company simply as an investment holding company. Rather, as recognised in MB's Information Memorandum dated 29 November 2019, it is, I consider, incorrect on the present facts to distinguish the activities of the Company from those of the subsidiaries within its group in this way. This is further reflected in the way that matters were expressed in the Offering Circular in the context of what it said about acquisitions and proposed acquisitions. Thus, in the extract from the Offering Circular referred to in paragraph 81 above, the latter spoke in terms of the Company's main priorities as being to leverage the acquisitions of DACG and System Link to significantly increase sales of software licenses and related services, and to strengthening the Company's presence in important markets through targeted acquisitions.

239. Further, I do not accept Mr Newington-Bridges' submission that the *"ultimate proof"* that the Company was simply an investment holding company is provided by the fact that it was able to sell off all its subsidiaries pursuant to the P1C Purchase Agreement. As we have seen, but for the question of timing and P1C's desire not to delay the transaction, the sale might well have been a sale of the shares in the Company itself rather than its assets, and it is not insignificant that a draft share sale agreement prepared as part of the process and dated 3 December 2018 contained a recital to the effect that the Company was *"a software publisher, specialising in training technologies and services for computer applications"*, i.e., that it was not simply a company holding investments in subsidiaries.

240. The Company can no longer carry on the business that it was carrying on through its subsidiaries prior to the P1C Purchase Agreement founded upon the legacy cloning software and its use for training, and consultancy connected therewith, because that business has been sold through the sale of the Company's interest in its subsidiaries. It is now the Company's intention, at MB's direction, to use the funds that it has received from the sale to P1C to invest in *"promising technology companies"*, in effect operating as a private investment fund at MB's discretion.

241. In my judgment this does engage the principle explained by Jenkins J in *Re Eastern Telegraph Co., Ltd* (supra): *"... that if a shareholder has invested his money in the shares of the company on the footing that it's going to carry out some particular object, he cannot be forced against his will by the votes of his fellow shareholders to continue to adventure his money on some quite different project and speculation."*

242. I regard it as significant that witnesses who have no direct connection with ED or FS, namely Messrs Vasseur, Vigne, Andre and Augustin support a liquidation, because, essentially, they do not trust or wish MB to make investments on their behalf, and Mr Vigne, in particular, identifies, as I see it quite accurately, that what the Company now proposes represents: *"a new and different story"*. These might only be small shareholders, but the approach that they take, as well as vindicating the position taken by ED and FS, serves to illustrate the point from an objective point of view.

243. On the other hand, I give limited weight to the attitude taken by Mr Pol, Mr Santini or Mr Delcaire given that they are, for reasons that I have explained above, more closely connected with MB, and, in the case of Mr Delcaire, as I have explained, his evidence should carry little weight bearing in mind his failure to attend trial for cross-examination.

244. In the above circumstances, I consider the loss of substratum ground for seeking to wind up the Company on the just and equitable ground to be made out, subject to questions of alternative remedy and discretion that I consider below.

245. I reach this conclusion for a number of reasons:

i) Firstly, I consider that it can properly be said that it is now impossible, or at least practically impossible, for the Company to pursue its main or paramount object or purpose as identified above given the sale of the Company's assets and the particular nature of the business of the Company, even if the main or paramount purpose is best expressed in the terms of the *"principal activities"* referred to in the accounts for the year ended 31 December 2018. As matters stand, having regard to the nature of the business and the fact of the sale, let alone ED's exclusion and MB's control of the Company, it would be practically impossible to recreate a like business so as to pursue the main or paramount object or purpose previously pursued.

ii) Secondly, even if that is not right, and the pursuit of the Company's main or paramount object or purpose is still practically possible, the sale of the assets of the Company to P1C taken together with what is now proposed with regard to investing in promising technology companies, given the very different nature of the venture that is now proposed, represents, as I see it, a clear abandonment of the pre-existing main or paramount object or purpose of the Company such that it is just and equitable that the Company be wound up.

iii) Thirdly, even if the above analysis is incorrect, I consider that the difference between the Company actively carrying on its own business through subsidiaries that it controls, with the main or paramount object or purpose referred to above, and what is now proposed by way of a company under MB's direction making investments at his discretion in promising technology companies, represents the carrying on of such a fundamentally different activity to that carried on prior to the sale in January 2019, that one can only but conclude that the Company proposes to embark upon a course of conduct so fundamentally outside or different from what can fairly be regarded as having been within the general intention or common understanding of the members of the Company when they became members, that, subject to the existence of any alternative remedy and other discretionary considerations, it would be unjust and inequitable to require them, against their will, to continue to invest in the quite different and speculative venture that is proposed, and therefore just and equitable that the Company be wound up.

246. I would add that my conclusion on this first ground for maintaining that it is just and equitable that the Company be wound-up is, I consider, supported by the conclusions that I have reached below regarding ED's case as to assurances made to him by MB

prior to the P1C Purchase Agreement for the reasons that I set out in paragraphs 254 and 255 below.

Assurances alleged to have been given by MB

247. It is ED's case that he is entitled to expect a return of his investment in the Company in the light of assurances alleged to have been given to him by MB, prior to the sale of the Company's assets and business, that the Company would be wound up, and that this provides a basis for him to petition for the winding up of the Company on the just and equitable ground.

248. However, I do not consider that the evidence goes so far as to establish that MB did, prior to the entry into the P1C Purchase Agreement, set out to assure ED or FS that the sale would be followed by the liquidation of the Company and a distribution of the proceeds of sale to shareholders, in particular so as to induce them to go along with the sale. I bear in mind that MB was positively against the proposed share sale at a price of approximately £8 million, and somewhat reluctantly agreed to an asset sale at such price, but only once the possibility of other options had disappeared and against the Company's cash flow difficulties.

249. Nevertheless, what I consider to be clear is that there was, and continued to be an underlying assumption, evidenced by the various emails referring to liquidation and/or dissolution and/or a distribution to shareholders, that, following the asset sale there would ultimately, once the difficulty created by having to retain monies to support warranties given to P1C had been overcome, be a distribution of the proceeds of sale to shareholders. Of particular note are MB's emails of 12 September 2018, 17 September 2018, 28 November 2018, 7 December 2018, 8 December 2018, 18 December 2018, 24 December 2018 and 26 December 2018 referred to above.

250. Further, liquidation or some other process leading to a distribution of the proceeds of sale to shareholders was, as I see it, the premise behind the minutes of the EGM held on 27 December 2018 in saying, and thereby representing, that there were ongoing discussions concerning the warranty provisions *"and their affect (sic) upon the Company's ability to distribute its assets to shareholders"*. I am satisfied that it is on the basis of this premise, encouraged by MB's emails, that ED, if not FS, went along with the proposed sale rather than pursuing some alternative course, which might ultimately have involved seeking to remove MB as a director.

251. Further, I am satisfied that MB initially went along with the underlying assumption, and indeed encouraged it by his emails and other conduct. However, I consider that there came a point by late December 2018 at the latest, as reflected in MB's letter to HSBC of 20 December 2018, when he decided that he might well, if circumstances permitted, seek to use the Company as an investment vehicle rather than going along with any liquidation of it, if necessary by seeking to squeeze out other shareholders if the opportunity arose. I am satisfied that MB concealed this intention from ED (and other shareholders) prior to the EGM on 27 December 2018 and the subsequent entry into the P1C Purchase Contract, and that he misled ED during the course of the conversation at the Board Meeting on 25 January 2019 in saying that he was *"fine"* with a *"declaration of intent"* whilst at the same time referring to the need for a general meeting when he must have known that as the holder of more than 25% of the voting

shares he would be in a position to block the entry of the Company into members' voluntary liquidation.

252. On the other hand, I consider the fact that ED sought the assurances that he did at the Board Meeting on 25 January 2019 was a reflection of the fact that he did not trust MB, and wanted to try to tie him down. This accords with ED's own evidence that whilst he was somewhat reassured by MB's responses at the Board Meeting, he recalled that MB had *"reneged on several of our past agreements."*

253. Apart from any difficulty arising from the fact that the assurances relied upon were not made to all shareholders, I do not consider that this ground is made out as a separate basis for seeking to wind up the Company in that, as I have found, I do not consider that MB set out to assure ED or FS that a sale would be followed by the liquidation of the Company and a distribution of the proceeds of sale to shareholders.

254. However, I do consider that the fact that there was an underlying assumption, as reflected in the minutes of the EGM on 27 December 2018, that the proceeds of sale would ultimately to be distributed to shareholders reinforces my finding that the sale of the Company's assets pursuant to the P1C Purchase Agreement did result in the purpose, or substratum, of the Company coming to an end, and my finding that with the sale of the Company's assets and what has followed, there really has been an abandonment of the Company's original purpose, and that the Company is, at MB's sole direction now seeking to embark upon some very different endeavour that as a matter of equity between the Company and its shareholders, those shareholders who do not wish to join on that journey should not be obliged to do so.

255. There are, as I see it, analogies between the existence of that common assumption and the situation where the majority agree that on sale the company should be liquidated (see *Re Perfectair Holdings Ltd* (supra)), and where the parties agree that the main or paramount purpose should be limited to a particular venture (See *Re Abbey Leisure Ltd* (supra)).

Removal of ED from the Board in breach of agreement or understanding

Introduction

256. In view of my finding in respect of the loss of purpose or substratum ground for winding up the Company, and my further findings below with regard to alternative remedy and discretion, it is strictly unnecessary for me to consider ED's and FS's further grounds for seeking to wind up the Company on the just and equitable ground. As my overall decision does not depend upon them, I shall deal with these further grounds more briefly than I otherwise would.

257. I consider that the better view is that Article 86 of the Company's Articles of Association did not result in ED retiring by rotation at the AGM of the Company held on 24 May 2021 for the reasons considered above. On that basis, I consider that his re-election as director was unnecessary, and that he would have remained as a director until removed. However, bearing in mind that ED has been excluded from acting as a director since the AGM on 24 May 2021 and that it is open to MB, with his effective ability to control the majority, to remove ED as a director, this ground for seeking to wind up the Company remains moot.

ED's and FS's case

258. ED's and FS's case is, in short, as follows:

i) There was an implicit understanding and/or agreement between ED and MB, dating back to the incorporation of the Company, that each would be entitled to be and to act as directors of the Company.

ii) To the extent that such an understanding and/or agreement could not be discerned from the more general nature of the relationship between them, such understanding and/or agreement followed from what was agreed pursuant to the 2010 Shareholder Agreement with regard to the respective roles of ED and MB, and failing that the recognition in the documents signed by MB and ED on 20 February 2018 that ED would, in any event, even if terminating his employment, remains a director of the Company.

iii) Such understanding and/or agreement gave rise to equitable considerations, i.e., *"considerations, that is, of a personal character arising between one individual and another, which may make it unjust or inequitable, to insist on legal rights, or to exercise them in a particular way" – Re Westbourne Galleries* (supra) at 379 per Lord Wilberforce.

iv) If the court finds that MB and ED had an agreement or understanding, giving rise to equitable considerations, that ED would be entitled to serve on the Company's Board, ED's exclusion from the Board alone is reason enough for the Court to wind up the Company on the just and equitable ground, reliance being placed upon *Bok Choon v Tahanasan Sdn Bhd* (supra) at 417H-418A.

MB's/Klimt Invest's case

259. On this issue it is, in essence, MB's/Klimt Invest's case that:

i) As a matter of law, equitable considerations of the kind referred above cannot arise in the context of a public listed company;

ii) In any event, equitable considerations of the kind referred to above cannot, or are at least unlikely to arise as between two or more, but not all shareholders of a company;

iii) On the facts, there is not, in any event, any proper basis for finding that there was an agreement or understanding of the kind alleged, and/or one giving rise to equitable considerations given, amongst other things, that the relationship between ED and MB was comprehensively covered by written agreements between and had from the inception of their business dealings, and, particularly against this background, neither the 2010 Shareholder Agreement, nor the correspondence of February 2018, can properly be construed as giving rise to an agreement or understanding of the kind alleged.

Findings on the removal from the Board issue

260. As to the proposition that there is no scope for finding that a public listed company can be subject to equitable considerations of the kind sought to be relied upon by ED and

FS, Mr Newington-Bridges, on behalf of MB/Klimt Invest, refers to the decision of Jonathan Parker J in *Re Astec (BSR) Plc* [1999] BCC 60. Jonathan Parker J dealt with the issue at 87A-E. He referred to the observations of Vinelott J in *Re Blue Arrow Plc* (1987) 3 BCC 618 at 623, where, in the context of a public listed company, Vinelott J had observed that outside investors were entitled to assume that the whole of the constitution was as contained in the company's articles of association read together with the Companies Acts, and that in those circumstances there was no room for any legitimate expectation founded on some agreement or arrangement made between directors and kept up their sleeves, that was not disclosed to those placing the shares with the public. He also referred to the observations to similar effect of Rattee J in *Re Leeds United Holdings Plc* [1997] BCC 131.

261. On the basis thereof, Jonathan Parker J concluded that the concept of *"legitimate expectation"*, which I consider ought now correctly to be considered in terms of equitable considerations of the kind considered above[1], have no place in the context of public listed companies on the basis that if the market in the company's shares is to have any credibility, members of the public dealing in that market must be entitled to proceed on the footing that the constitution of the company is as it appears on the company's public documents, unaffected by any extraneous equitable considerations and constraints.

262. Mr Lightman QC argues on behalf of ED and FS that a different approach is appropriate in the present case, notwithstanding that the Company is a public listed company, given that MB (via Klimt Invest), Mr Pol (via Tosca Invest), ED, and FS together hold over 99% of the issued shares, with only some 0.5% being free float. His position is that, in these circumstances, there is scope for the existence of equitable considerations as between shareholders, not least because ED and MB could, as between themselves, as holders of more than 75% of the issued share capital, have resolved to place the Company into members' voluntary liquidation. On this basis, the existence of equitable considerations as between ED and MB would not impinge on the position of other shareholders in the way contemplated in *Re Astec* (supra) if giving effect to those equitable considerations meant that the court was simply ordering that which could be achieved between ED and MB acting in concert in any event.

263. Mr Lightman QC also submits that *Re Astec (BSR) Plc* should not be regarded as the last word on the question as to whether equitable considerations might arise in the context of a public listed company. He refers to the fact that *Re Saul D Harrison and Sons Plc* [1994] BCC 475 concerned a company which had been re-registered as a public limited company (see 483E), although there is no suggestion that it was a listed company. Mr Lightman QC also refers to *In Re Leeds United Holdings Plc* [1996] 2 B.C.L.C. 545, at 559, where Rattee J noted that "*It may be that in certain cases the court can find a relevant legitimate expectation outside the company's constitution that can be relied on for s. 459 purposes even in the case of a public company*", albeit that he added that "*such circumstances must, it seems to me, be rare*."

264. Mr Lightman submits that in *Re Tottenham Hotspur plc* [1994] 1 BCLC 655, Sir Donald Nicholls V-C recognised the possibility, in principle, of equitable considerations arising in a listed public company, although Sir Donald Nicolls VC noted that: *"Tottenham is a very special type of company. Its shareholders were attracted, not by commercial*

[1] See *O'Neill v Phillips* [1999] 1 WLR 1092 at 1102C-F, per Lord Hoffmann.

considerations, but by the wish to become more closely linked with and involved in the affairs of the club they support, often passionately. They are football enthusiasts.". Further, the Vice-Chancellor held that: *"nothing was disclosed which would suggest to anybody that Mr Venables's rights in relation to his appointment as chief executive were regulated by anything other than the company's constitution and the formal legal documents. There was nothing to suggest that the board of directors did not have the normal right to 'hire and fire' the company's chief executive, or that there was an agreement or understanding that, if Mr Sugar and Mr Venables should fall out, they were nevertheless bound to continue to support each other indefinitely."* On this basis, interlocutory relief was declined.

265. Mr Lightman QC also referred me to the recent decision of the Court of Appeal in *Re The Hut Group Ltd* [2021] BCC 970, a case that involved an unfair prejudice petition under Section 994 of the 2006 Act involving a public listed company. Mr Lightman QC submits that the Court of Appeal: *"declined to suggest that there was any rule against equitable considerations arising in a listed public company, even though the company was a corporate titan whose shares were listed on the London Stock Exchange with a market capitalisation of £6 billion."*. In fact, the relevant finding in the judgment of David Richards LJ at [10] was that: *"The circumstances of the present case do not call for the application of the equitable considerations discussed by Lord Wilberforce. The relationship between the parties has at all times been entirely commercial, as evidenced by the detailed and complex provisions, including those for the protection of members' interests, contained in the company's articles and in the shareholders' agreement to which Zedra acceded when it became a shareholder."*

266. I do not detect that the Court of Appeal deliberately *"declined to suggest"* that there was any rule against equitable considerations arising in a listed public company. It is unclear from the report whether *Re Astec (BSR) Plc* (supra) was cited in argument, and it is not mentioned in the judgment of David Richards LJ. It would thus appear that the issue was simply not addressed because it was clear on the evidence, in any event, that the relationship between the parties was *"purely commercial"*, and that in itself excluded the existence of equitable considerations.

267. Mr Lightman QC further referred to a decision of the Court of Appeal in New Zealand in *Latimer Holdings v SEA Holdings NZ Ltd* [2005] NZLR 328, where, at [109], Hammond J said:

> *"... even in a listed company, a corporate constitution and the related nexus of agreements may not address all pertinent issues. There may be considerations that give rise to reasonable expectations that are not reflected in strict legal documentation. However, clearly the forensic burden on an applicant will be considerably more difficult in the case of a listed company."*

268. Mr Lightman QC submits that this should be adopted as an accurate statement of the law, and that I should decline to follow *Re Astec (BSR) Plc*.

269. For the reasons that follow, and on the facts of the present case, I do not consider it necessary to determine whether or not *Re Astec (BSR) Plc* was, or is not, correctly decided. I would venture to suggest that on appropriate facts, equitable considerations might arise as between shareholders in a public listed company, but that this would be a rare event given that the parties would, in almost all cases, have submitted themselves

to acting on a purely commercial footing. I can see that there might, conceivably, be circumstances where the existence of those equitable considerations might found the basis for some limited form of relief under Section 996 of the 2006 Act provided that the various considerations identified with regard to a public listed company and referred to in paragraphs 260 and 261 above were not impinged upon. However, it would, as I see it, be even more difficult to sustain a case to wind a publicly listed company up on the just and equitable ground based upon the existence of such equitable considerations.

270. Ultimately, I consider that the difficulty facing ED and FS in the circumstances of the present case is, whether or not *Re Astec (BSR) Plc* was correctly decided, the fact that MB and ED, in 2006, chose to turn the Company into a public listed company in order to use it as a corporate vehicle to raise funds on the back of the Offering Circular, and at the same time entered into the 2006 Shareholders' Agreement, being a shareholders' agreement in different terms to the 2002 Shareholder Agreement to reflect the fact that their corporate vehicle was to be a public company listed on a recognised exchange. I consider that they were thereby accepting and agreeing that their affairs should be regulated by a regime which would, ordinarily at least, exclude the existence of equitable considerations as between themselves. Further, whilst the 2010 Shareholder Agreement and the document signed on 20 February 2018 might have reflected an understanding between MB and ED that they should remain as directors of the Company, I do not read those documents as conferring a contractual entitlement on ED to remain as a director of the Company indefinitely even if the Company resolved to remove him, and nor do I consider that any such understanding can, in the context, have given rise to equitable considerations.

271. So far as the existence of equitable considerations is concerned, Mr Lightman QC, on behalf of ED and FS, places reliance upon the circumstances in which MB, ED and FS first began to carry on business together prior to the incorporation of CATS Development S.a.r.l. in 1995. He suggests that there must then have been some form of partnership agreement between them, which such partnership then formed the basis of the latter company. He submits that the Company represented a continuation, or development, of the original joint venture, albeit only involving MB and ED, and that it is properly to be regarded as having had the hallmarks of a quasi partnership, or company in the nature of a partnership of the kind considered in *Re Westbourne Galleries* (supra) at 379E-G per Lord Wilberforce, i.e.:

> *"… (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."*

272. However, it is a significant feature of the present case that MB was assiduous in ensuring that the relationship between himself (or Klimt Invest) and other shareholders was fully documented in formal agreements, dating back to the 1994 CATS Agreement, which prescriptively regulated the relationship between MB, ED and FS even before CATS Development S.a.r.l. had been incorporated. In respect of this latter agreement, it is significant that ED accepted under cross examination that everything that had been

discussed and agreed between the parties at the time had been dealt with thereby. I also consider it significant and important that not only was the relationship between the shareholders regulated by a series of shareholder agreements, but ED was employed pursuant to the terms of formal contracts of employment.

273. The operative agreement at the time that the Company became a listed company was the 2006 Shareholders' Agreement. This was expressed by its recitals to replace and supersede all previous agreements and to define the rights and obligations of the parties in the context of a contemplated listing on the Alternext Exchange. It contained the entire agreement clause and the other agreement clause that I have referred to above. Whilst it did contain certain pre-emption, lock-up and tag-along provisions, I see no scope for the existence of equitable considerations going beyond the terms agreed, and I find it difficult to conclude that the relationship between MB and ED was anything but a commercial relationship, certainly once the Company had become a public listed company, and the 2006 Shareholders' Agreement had been entered into.

274. Additionally it is to be noted that whilst the position may now be that over 99% of the shares are held by the parties that I have identified above, at the time when the equitable considerations are said to have arisen, the share capital of the Company was more diversely held, with, following the public offering in 2006 until comparatively recently, significant numbers of shares being held by the institutional investors referred to above including Innovacom, X-Ange, IVS and Truffle. Further, there remain 19 shareholders registered in the Company's share register apart from the parties that I have identified above.

275. The decision in *Bok Choon v Tahanasan Sdn Bhd* (supra), upon which Mr Lightman QC places great reliance, was premised on the basis that equitable considerations had arisen between the four shareholders in that company, which underpinned the understanding between the shareholders that the petitioner would be entitled to remain as director so long as he held shares in the company. If there is no basis for finding that equitable considerations of this kind arose in the circumstances of the present case, then the decision in *Bok Choon v Tahanasan Sdn Bhd* (supra) provides no assistance to ED.

276. There is the further question as to whether, in any event, equitable considerations can arise where there are other shareholders who are not parties to the agreement or understanding that is relied upon to support the existence of the equitable considerations. In *Estera Trust Ltd v Singh* [2018] EWHC 1715 (Ch), [2019] 1 BCLC 171, Fancourt J at [130] said, obiter, that he considered that it was *"very doubtful"* that equitable considerations could arise in this situation: *"except perhaps in a case where the shareholders that are not party to the equitable considerations are either a very small minority or are closely connected to the quasi-partners … Such that the established quasi partnership character of the company does not change."*

277. In the subsequent case of *Waldron v Waldron* [2019] EWHC 115 (Ch), [2019] Bus LR 1351, HHJ Eyre QC (as he then was) preferred the somewhat wider view as the circumstances in which equitable considerations might arise in the case of a company with shareholders who were not party to the relevant agreement or understanding said to give rise to equitable considerations, expressed by the Hong Kong Court of Appeal in *Luck Continent Ltd v Cheng Chee Tock Theodore & Ors* [2013] HJLRD 181. HHJ Eyre QC expressed the view at [42] that Lam JA had been correct in the latter case at [133] to say that: *"the crucial question is whether there are any equitable*

considerations arising from the dealings between the shareholders which call for restraints over the exercise of strict legal rights on the particular facts of the case."

278. HHJ Eyre QC went on to say in *Waldron v Waldron* at [42] that:

> *The existence of third-party rights and of third-party involvement in and membership of a company can be very significant in deciding whether such equitable considerations are present and also in deciding whether constraints which were formerly present have passed away. They may, as the Hong Kong Court of Appeal said, at para 131, "present real and insurmountable difficulties" to the grant of relief in particular circumstances. They are not, however, conclusive or without more determinative of those questions. Where such constraints are found to exist then the existence of such third-party rights will again be relevant to the question of the appropriate relief."*

279. Even if the correct question to ask is that suggested by Lam JA in *Luck Continent Ltd v Cheng Chee Tock Theodore* (supra), on the present facts, for the reasons explained above, I do not consider that any equitable considerations did arise from the dealings between the shareholders which call for (equitable) restraints over the exercise of strict legal rights.

280. Consequently, I do not find this ground for seeking to wind up the Company, based on ED's exclusion as a director of the Company, to be made out.

Company founded on the basis of a personal relationship of trust and confidence between ED and MB which has broken down

281. This particular basis for arguing that the Company ought to be wound up on the just and equitable ground is necessarily dependent upon establishing that the Company was a quasi partnership company or company in the nature of a partnership, or at the very least that equitable considerations had arisen as between MB (or other Klimt Invest) and ED which the Court ought to give effect to.

282. However, for the reasons set out above in dealing with the previous basis for seeking to argue that the Company ought to be wound up on the just and equitable ground, I have found that, on the present facts, there is no proper scope for the existence of the equitable considerations that necessarily have to be established in order for ED and FS to succeed under this particular head.

283. Consequently, I conclude that this particular basis for alleging that the Company ought to be wound-up on the just and equitable ground is also not made out.

Loss of confidence in the management of the Company

284. Under this head, ED's and FS's case is that ED has justifiably lost confidence in the management of the Company, which it is alleged has become dysfunctional.

285. Mr Lightman QC accepted in closing that this basis for seeking the winding up of the Company is not pleaded, essentially because *"the penny has only just dropped"* that it might exist as a distinct ground for winding up the Company.

286. The essence of the case advanced is that the evidence discloses that:

i) MB secretly acquired control of the Company at shareholder level without making an offer under Rule 9 of the Takeover Code by colluding with Mr Pol, and then lying to the TOP which, when it previously investigated the matter, did not have access to the documents that have been disclosed in the present proceedings relating to the events leading up to the acquisition by Mr Pol of the shares held by X-Ange and IVS in the circumstances that I have considered in detail above.

ii) MB was also able to gain control of the Company at board level, recruiting and paying what Mr Lightman QC described as the *"shadow board"* with the Company's money to further his personal interests, and excluding ED for personal and vindictive reasons in breach of the Articles of Association of the Company, in particular the misapplication of Article 86 that I have referred to above.

287. It is then submitted that if the Company is not wound up, then it will be left in control of MB who, himself and through his acolytes, has no inclination to have regard to or protect the interests of the Company's minority shareholders or fulfil his duties under Section 172 of the 2006 Act, as evidenced, it is said, by the correspondence, in particular with Mr Anderson, leading up to Mr Pol's purchase of his shares (through Tosca Invest) in late 2019 and early 2020.

288. Although I was not taken to any authorities on lack of confidence in a company's management as a ground for seeking a just and equitable winding up, I note that the authorities suggest that mere lack of confidence on the part of the petitioner in those who have conducted the company's management is not itself a ground for relief, at least unless the petitioner can demonstrate a lack of confidence which stems from a lack of probity on the part of the directors.

289. It is apparent from my findings in respect of the credibility of MB and Mr Pol as witnesses, that I do consider that the opportunity to purchase the shares of X-Ange and IVS was introduced to Mr Pol by MB in order that he could cement his majority control over the Company after June 2021 when ED's shares acquired from Innovacom obtained double voting rights again, and that Mr Pol did act in concert with MB in acquiring the shares, doing so through Tosca Invest either as MB's nominee, or at least as somebody upon whom MB could rely to support him, thereby enabling MB to secure majority control without having to make a Rule 9 offer to other shareholders.

290. However, bearing in mind that this particular ground was not pleaded, and given in particular that for ED to succeed thereon probably depends upon a finding of want of probity, I do not consider it appropriate to make any finding that this provides a further or alternative basis for ordering that the Company be wound up on the just and equitable ground.

291. Nevertheless, the fact that MB has gained majority control in the way that he has and the disfunction in the Company occasioned thereby is, I consider, a factor that I am entitled to take into account once the loss of substratum ground has been made out, as weighing in the balance, as a matter of discretion, in making a winding up order. In doing so, I do however take into account that in acting in the way that he did, MB was, at least in part, acting in reaction to the purchase by ED of the shares that he purchased

from Innovacom in June 2019, and my decision does not turn on weighting this factor in the balance.

Section 125(2) and Alternative Remedy

292. As referred to above, *Lau v Chu* (supra) at [20]-[21] provides Privy Council authority that the effect of Section 125(2) of 1986 Act is that the legal burden of proof is on the petitioner to establish his or her entitlement to relief and, if so, that a winding up would be just and equitable if there were no other remedies available, but that if the petitioner can so establish, then the legal burden of proof shifts to the respondent to prove that the petitioner has unreasonably failed to pursue some other available remedy rather than seeking a winding up.

293. However, Lord Briggs JSC further stated in *Lau v Chu* at [20] that:

> *"It is well established that winding up is a shareholders' remedy of last resort. But this does not mean that winding up is unavailable to members if they have any other remedy. The member retains a significant element of choice in the remedy to be sought, even though the court has the last word."*

294. In the present case, it has not been suggested that ED or FS have an alternative remedy under Sections 994-996 of the 2006 Ac. Rather, it is said that ED's remedy is to accept the offer said to have been made by MB's email dated 4 November 2020 which, so it is said, provides a suitable alternative remedy to seeking to wind up the Company.

295. As referred to above, the email dated 4 November 2020 that is relied upon suggests that the Company may be allowed to purchase ED's shares, and proposes that the *"market value"* of ED's shares be ascertained by reference to an independent valuer.

296. However, I consider there to be a number of difficulties with this supposed offer, in particular:

i) It does not make clear that the value of ED's shares is not to be discounted to reflect his status as a minority shareholder. Reference is made in the email dated 4 November 2020 to a *"market valuation"* but given that ED is a minority shareholder unable to control the Company, any sale in the market is liable to attract a discount to reflect his minority status. In this respect, it is relevant that in the correspondence with Mr Anderson leading up to the purchase by Mr Pol (through Tosca Invest) of his shares, MB's calculation was that, as a minority shareholder, ED could be forced to sell its shares at a considerable discount upon a valuation of his shares on a pro rata basis by reference to the reserves held by the Company following the sale of its assets. In opening, it was suggested that this offer did not seek to achieve a discount for ED's minority status, and MB gave evidence to like effect. However, that is not how I read the email dated 4 November 2020, and it is not how ED read this email at the time that it was received.

ii) Further, the offer is put forward on an apparently conditional basis dependant upon the Company being in a position to purchase ED's shares. However, it has not been demonstrated that the Company is in a position to purchase ED's

shares, and no offer has been made by either MB or Klimt Invest to purchase the same.

297. In short, therefore, I do not consider that the email dated 4 November 2020 offers ED a suitable alternative remedy which he has unreasonably failed to pursue, and I consider that MB/Klimt Invest has failed to discharge the burden of demonstrating that ED has unreasonably failed to pursue some other remedy instead of pursuing the Petition.

Discretionary considerations

Clean hands

298. The first matter to be considered is whether ED ought to be refused relief because he has not come to court with clean hands. MB/Klimt Invest contend that ED ought to be deprived of his remedy as a result of his involvement in the transaction to purchase shares in Innovacom in June 2019, the key complaints against him being that he:

i) Was involved in insider dealing by disclosing information to Innovacom that was not publicly available, including information obtained from the Company's auditors obtained during the Company's closed period;

ii) Sought to manipulate the share price by placing a purchase order for five shares at a price of only €0.15; and

iii) Acted in breach of Rule 9 of the Takeover Code by failing to make a mandatory offer to other shareholders as provided for thereby.

299. MB is particularly aggrieved that by purchasing the shares that he did from Innovacom at the price that he did, acting as above, ED has manged to place himself in a position where on the liquidation of the Company, and a pro rata distribution of the reserves held by the Company, ED is likely to make a profit of considerably in excess of £1 million. It is submitted that the court should not allow him to profit in this way by forcing the winding up of the Company.

300. I have already dealt with the substance of the complaints made as to ED's conduct when considering the credibility and reliability of the witnesses above, and in considering the background to the Petition.

301. As referred to above, I do not feel able to make any finding that ED has been guilty of insider dealing because no clearly articulated case has been advanced by reference to the relevant statutory provisions relating to insider dealing in Section 52 et seq of the Criminal Justice Act 1993. As to this:

i) Mr Lightman QC makes the point that inside information has to be *"price sensitive"*, and he submits that the information that ED supplied to Innovacom was not price sensitive because the Company did not really have a market.

ii) Mr Lightman QC has, further, referred me to the defences available under Section 53(1) of the Criminal Justice Act 1993, which include:

a) Not at the relevant time expecting the dealing to result in a profit attributable to the fact that the information in question was price sensitive information in relation to the securities;

b) Believing on reasonable grounds that the information had been disclosed widely enough to ensure that none of those taking part in the dealing would be prejudiced by not having the information.

iii) Mr Lightman QC makes the point that the basis on which ED was cross examined was that he and Innovacom were trading on the same information because the emails that were put to him were emails that he sent to Innovacom setting out the risks facing the Company. It was not put that ED was dealing on the basis of information that was not disclosed to Innovacom.

iv) On the basis of the above, Mr Lightman QC submitted that the elements of the offence of insider dealing did not follow from the material that was put to ED, and thus that the allegation cannot properly be advanced.

v) Mr Lightman QC makes the further point that it is unsatisfactory for MB to be levelling the allegations that he does at ED when most of the information that ED referred to in his emails to Innovacom had already been provided to Innovacom, and other institutional investors, in an email dated 19 January 2019.

302. I agree that on the materials available to me, it is simply not open to me to make a finding that ED has been guilty of insider dealing.

303. So far as the alleged manipulation of the Company's share price is concerned, I have again dealt with this above, and concluded that despite the oddities concerning ED placing five shares for sale on behalf of his SIPP, there is simply not the evidence to support the contention that he deliberately manipulated the share price. Rather, contemporaneous emails suggest that he, himself, had concerns at the time, that others were manipulating the share price.

304. So far as the question of breach of Rule 9 of the Takeover Code is concerned, it cannot be denied that ED acted in breach thereof. However, on the basis explained above, and consistent with the approach taken by the TOP after its own investigation of the matter, I have reached the view that this was an accidental breach on the part of ED, and not a deliberate breach of Rule 9 from which he intended to profit.

305. In any event, I consider that ED's conduct requires to be considered in the context of MB's own conduct. He, himself, purchased 10,000 shares during the relevant closed period, and was himself seeking to purchase shares from Innovacom and Truffle, and subsequently X-Ange and IVS, in an attempt to secure his own control over the Company. In these circumstances, and given that the relationship between MB and ED was, as I have found, purely commercial and not subject to equitable considerations of trust and confidence, it is difficult to see how MB can properly complain that ED was, himself, seeking to obtain more by way of control or influence over the affairs of the Company.

306. I do not therefore consider that ED has been guilty of conduct which ought to deprive him of the remedy that he seeks, namely the winding up of the Company on the just and equitable ground.

Value of the listing

307. The point is made on behalf of MB/Klimpt Invest that that the Company's listing has, itself, intrinsic value given the potential ability to use the same as a vehicle in order to raise capital, or to profit from a reverse takeover.

308. I can see that this might well be the case, but there is no clear evidence in respect thereof, or as to the likely value of the listing. It is touched on in Mr Delcaire's witness statement, but for the reasons explained above, I can only give limited weight thereto given that Mr Delcaire failed to attend for cross-examination.

309. In the circumstances, I do not consider that the possibility that there might be some value in the listing that would be lost on the liquidation of the Company is a factor that significantly weighs against making a winding up order.

Outstanding litigation

310. The further point is made on behalf of the MB/Klimt Invest that there is outstanding litigation, including a significant claim brought by a former employee, Mr Ludwig. However, I see no good reason why that litigation could not perfectly adequately be dealt with in the course of what will be a solvent liquidation.

Views of other shareholders

311. In addition to ED and FS, the petition is supported by Messrs Vasseur, Vigne, Andre, Augustin and Schub. These shareholders have no obvious tie to, or connection with ED or FS, and their views ought, I consider, to carry not insignificant weight.

312. On the other hand, there is good reason to question the true independence of the views of those who oppose the petition, namely Messrs Pol, Santini and Delcaire for reasons that I have explained above. In these circumstances, I consider that their views should be given limited weight. Certainly, I do not consider that the views of these opponents to the Petition outweigh the injustice of requiring shareholders who wish to have no involvement with MB's new venture to remain so involved as shareholders against their wishes.

Overall Conclusion

313. Although I do not find the alternative grounds for seeking to wind up the Company on the just and equitable ground to have been made out, I am satisfied that ED and FS have made out the ground for winding up based upon loss of substratum or purpose. Further, having concluded that ED has not unreasonably refused to pursue some alternative remedy, and having considered the various discretionary considerations that arise, including the allegation that ED has not come to court with clean hands, I am satisfied that I ought to make an order that the Company be wound up.

314. Subject to further submissions on the point from ED and FS, I would in principle, if MB/Klimt Invest so requested, be minded to stay the winding up order to enable MB

and/or Klimt Invest to make an offer to purchase the shares of those who support the Petition, or would wish to be bought out, whether that requires to be made pursuant to a formal Rule 9 or otherwise, provided that the offer is made in such terms as provides for the purchase of the shares held by these shareholders at a price that is not discounted for minority status.