Neutral Citation Number: [2021] EWHC 3448 (QB)

Case No: QB-2018-000996

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2021

Before :

MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

MARKUS PEDRIKS	**Claimant**
- and -	
SERGE GRIMAUX	**Defendant**

- -
- -

Matthew Bradley (instructed by Ronald Fletcher Baker) for the **Claimant**
Donald Lilly & Daniel Kessler (instructed by CANDEY) for the **Defendant**

Hearing dates: 26 – 29 October 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 21 December 2021 at 10:30am

Mrs Justice Heather Williams:

Introduction

1. In these proceedings Mr Pedriks alleges that Mr Grimaux is in breach of a Mediation Settlement Agreement ("**MSA**") entered into in January 2015, the terms of an oral agreement made in September 2016 concerning the sale of the business of Ticketpro Limited ("**TL**" and "**the 2016 Agreement**") and fiduciary duties. As well as damages for breach of contract, he seeks the taking of accounts and inquiries in relation to the alleged misappropriation of company funds. Mr Grimaux denies that a binding agreement was reached in September 2016 and denies all alleged breaches of contract and duties. The matter came before me for trial of certain preliminary issues. Before setting out those issues I will explain a little more about the dispute and its context.

The events and contentions in outline

2. The Ticketpro business was founded by Mr Grimaux in 1992. The core of the business is selling tickets for live entertainment events. It initially operated in Czechoslovakia (subsequently the Czech Republic) and over time its activities expanded to 17 countries, via a number of subsidiaries and associated companies. The main subsidiary companies that I am concerned with are Ticketpro a.s and Ticketpro Technologies a.s, both based in the Czech Republic. In 2004 Mr Pedriks invested USD $1 million in return for an agreed 10% share in the business. Following this a re-structuring took place and on 11 August 2005 the holding company, TL was incorporated under the laws of the Republic of Cyprus. Subsequently, Mr Grimaux was registered as holding 90% of TL's share capital and Mr Pedriks as holding the other 10%. Both Mr Pedriks and Mr Grimaux were directors of TL along with three nominee directors who were based in Cyprus. On 17 October 2010 Mr Grimaux acknowledged that Mr Pedriks' share in TL would increase to 25%.

3. Mr Pedriks made additional payments to Mr Grimaux / TL. He regarded these as loans and particularly from 2011 onwards, he sought repayment. Mr Grimaux countered that they were investments in the business. Mr Pedriks also expressed concerns that Mr Grimaux was withdrawing large sums of money from the Ticketpro businesses for his own personal benefit or for the benefit of other companies he owned and controlled, including Intellitix, a group of companies the Defendant had founded in 2010 which provided Radio Frequency Identification technology for live entertainment events. Disagreements over these and related matters led to a mediation held on 5 January 2015 ("**the Mediation**"). Negotiations resulted in a plan to sell TL and for specified sums to be repaid to Mr Pedriks, plus interest, as set out in the MSA. The Claimant contends that express and implied terms of the MSA were breached.

4. On 29 February 2016 Heads of Terms were agreed with Live Nation Luxembourg Holdco 2 SARL ("**Live Nation**") for the sale of the parties' shares in TL. Ultimately, the transaction proceeded as a sale of TL's assets via Aquapath Limited ("**Aquapath**"), a special purpose vehicle wholly owned by TL. The initial payment made upon completion on 9 February 2017 was €5,425,000, with a further €949,000 paid by way of a net assets adjustment in August 2017. In April 2017 TL changed its name to Azurelink Limited ("**Azurelink**").

5. During the sale process Mr Grimaux sought to rely on a promissory note dated 1 January 2006 from TL, indicating he was owed USD $4,435,500 ("**the Promissory Note**"). Mr Pedriks contended that this was not a genuine debt and that it was being used by Mr Grimaux to obtain priority over payment of sums due to him. He also said that it conflicted with what Mr Grimaux had said at the Mediation, namely that there were no loans owed by TL other than the monies that were owed to him. Over a series of communications in August and September 2016, Mr Pedriks declined to sign the Incumbency Certificate that was required for the Live Nation sale to proceed, unless Mr Grimaux provided an assurance that the Promissory Note would not be used to secure priority of payment over the monies owed to him.

6. Matters came to a head on 13 September 2016. Mr Pedriks' case is that the 2016 Agreement was reached on the telephone with Mr Grimaux that: (i) he would receive €3,738,000 from the proceeds of sale of TL; (ii) any excess cash and/or working capital would be divided equally between them; (iii) he would be responsible for paying the bills of Andrew Fielding (TL's accountant in the sale process) and White & Case (TL's lawyers in the sale process); and (iv) Mr Grimaux would provide him with an equity interest equal to 10% of his shareholding in Intellitix. Mr Grimaux denies that any binding agreement was reached either on 13 September 2016 or subsequently. He says that versions of a written agreement that he subsequently provided were simply drafts and that nothing was finalised.

7. On 13 February 2017 Mr Grimaux transferred the equivalent of USD $2,050,000 to Mr Pedriks. Previously he had been paid USD $300,000 by TL. No further payments were made. Mr Grimaux's position is that he made the payments due under clause 5 of the MSA and that nothing more is owed. Mr Pedriks contends that clauses 1, 2, 5 and 10 of the MSA were not complied with and that the balance of the €3,738,000 sum agreed in 2016 is owing to him, along with 50% of the excess cash / working capital of TL and an equity interest equal to 10% of Mr Grimaux's shareholding in Intellitix.

The Preliminary Issues

8. By Order of Master Gidden sealed on 4 February 2021 ("**the February 2021 Order**") the issues to be determined at a Preliminary Trial were set out in an agreed appendix ("**the Preliminary Issues**"). The recitals indicated that non-inclusion of an issue in the appendix did not of itself imply that a party could not adduce evidence in relation to it. In the event, the evidence adduced by both parties ranged more widely than the Preliminary Issues and it was agreed that I should consider the same in so far as it bore on credibility and context.

9. The agreed Preliminary Issues are as follows:

i) "*The construction of the Mediation Settlement Agreement dated 5 January 2015, including (for the avoidance of doubt) the existence and scope of implied terms.*" Cross references were given to paras 13A – 13G, Amended Particulars of Claim ("**APOC**"); paras 11A – 11D and 22.3, Amended Defence ("**ADef**"); and paras 19D and 36, Amended Reply[1] ("**AReply**")[2];

ii) "*Whether the Defendant owes the Claimant fiduciary duties as a result of entering into the 2015 Mediation Agreement in the context of the factual background, and if so, what duties he owes.*" Cross references were given to paras 13E – 13F, APOC; paras 11E – 11F, ADef; and para 19F, AReply;

iii) "*The 2015 Representation: whether, at the mediation a representation was made that there were no loans owed (other than the loan monies owed to the Claimant), giving rise to an estoppel by representation or implied representation precluding reliance on the Promissory Note or a waiver of rights under the same.*" The cross references were to paras 15A -15D, APOC; and para 13A, ADef;

iv) "*The existence of the alleged agreement between the Claimant and the Defendant as pleaded in paragraphs 18 – 20 of the*" APOC. This was a reference to the events of 13 September 2016. Paras 18, 19 and 21C APOC; paras 16 – 19, ADef; and paras 24 – 28, A Reply were referred to in this context;

v) "*Whether the Defendant made a representation on or around 13 September 2016 which gave rise to an estoppel with the consequences alleged.*" Cross references were to paras 20 – 21B, APOC; paras 18 – 19 ADef; and paras 27A – 28 AReply. As confirmed by the parties at the outset of the trial, this issue only arose if the Court decided that there was no binding contract made in September 2016;

vi) "*Whether by his emails and/or other actions subsequently to 13th September 2016, the Defendant is estopped by representation and/or convention from asserting that the 2016 Agreement is not legally binding upon him.*" Cross references were to paras 21A- 21B, APOC; paras 16, 18.3 and 19, ADef; and paras 24 – 28 AReply. The parties also confirmed that this issue only arose if the Court found that there was no binding agreement made in September 2016;

vii) "*Whether the Defendant owes the Claimant fiduciary duties as a result of entering into the 2016 Agreement in the context of its factual background, and if so, what duties he owes.*" Cross references were to paras 21D-21E, APOC; and para 19A, ADef;

viii) "*Whether the Defendant is in breach:- (a) of the 2015 Mediation Agreement and (b) the fiduciary duties pleaded in APOC 13E*." Cross references were to para 26, APOC; and para 24 ADef; and

ix) "*Pleaded instances amounting to breach of fiduciary duty (as set out in the Order of Master Gidden dated 2 July 2020).*" The parties confirmed that this

[1] With the qualification that expert evidence on Cypriot law was not required.
[2] Recital (9) to the Order stated that paragraph references to the pleadings were provided to explain the parties' respective positions on the Preliminary Issues and did not add to the list of issues.

was a reference to recital (3) of the July 2020 Order, which said that the breaches of fiduciary duty to be determined by reference to para 24, APOC comprised "*those in relation to LPU and Holman Fenwick occurring on or after 5 January 2015*". **LPU** is an abbreviation I will use too for Les Productions Unique Ltd, a Quebec company owned by Mr Grimaux. Holman Fenwick Willan ("**HFW**") are an English firm of solicitors. The appendix contained cross references to para 24, APOC; para 22 ADef; and para 37 AReply.

10. Recital (6) to the February 2021 Order recorded that if it was determined at the Preliminary Trial that there was a concluded and binding agreement between the parties in 2016 or that Mr Grimaux was estopped from denying this and that "*payment by the Defendant to the Claimant of €3,738,000 less €2,208,040*[3] *following the acquisition of Aquapath was an enforceable term of the binding agreement*" then "*the Claimant would be entitled to an interim judgment in the sum of approximately €1,529,960 without any further trial on quantum and the Judge may award damages based upon that partial admission, with the balance of the Claimant's claim for damages to be determined following the Preliminary Trial*". Recital (7) recorded that if the Claimant succeeded in establishing the existence of the 2016 Agreement in the terms alleged, the Defendant was in breach of that agreement as alleged in paras 27.1 – 27.3, APOC.

11. Recital (8) indicated that all other issues between the parties not included in the appendix were to be resolved at a subsequent trial after the Preliminary Trial, if such further trial was necessary, and this included issues as to: the authenticity of the Promissory Note; the application of the Limitation Act 1980 to the Promissory Note; subject to recital (6), causation and loss arising out of any breach of obligation by the Defendant; and any matters arising out of the Defendant's account of TL's activities, if such an account is ordered.

The Preliminary Trial

12. Mr Pedriks relied upon his witness statements dated 5 July 2019 and 14 September 2021; and a statement dated 10 September 2021 from Andrew Shaw, an in-house lawyer at Resolver, who attended the Mediation with him. Mr Grimaux relied upon his witness statements dated 10 July 2019 and 14 September 2021; and a statement dated 14 September 2021 from Věra Kunrátková, the Managing Director of Ticketpro Technologies a.s. from 2010 to 2019. I also heard oral evidence from each of these witnesses. By agreement, Ms Kunrátková gave her evidence remotely from the Czech Republic. Documentation was contained in an agreed bundle comprising 2,460 pages (with some further additions during the trial). Much of the material comprised contemporary emails and text messages passing between the parties. Whilst it is not feasible to refer to every single document or to detail the entire contents of the documents that I do refer to, I have considered all of the material that the parties relied upon in arriving at my conclusions. I was also assisted by the daily transcript of the proceedings, which the parties helpfully shared as an expense.

13. The parties agreed that evidence about the discussions at the Mediation was admissible. An initial objection to Mr Pedriks referring to an email from Mr Grimaux sent on 5 September 2016 that was marked "without prejudice" was not pursued.

[3] The agreed value in Euros of the sums already paid to Mr Pedriks.

14. At the outset of the hearing, I granted permission to re-amend the APOC. The amendment deleted reference to Aquapath in para 18.1 of the pleading, which set out the terms of the alleged 2016 Agreement, as it was not in existence at that time. The application was unopposed and there was no consequential prejudice to Mr Grimaux. Indeed, he relied upon this amendment as undermining Mr Pedriks account of the 13 September 2016 discussions. For ease of cross referencing with the appendix to the February 2021 Order, I will continue to refer to the Claimant's pleading as the APOC.

The MSA

15. Before turning to the parties' pleaded cases, it is convenient to refer to the contents of the MSA. The document was signed by both parties. Mr Grimaux was referred to as "Party A" and Mr Pedriks as "Party B". The recital noted that a dispute had arisen "*concerning the business affairs of the parties in connection with companies known as Ticketpro Ltd and Intellitix Ltd, their subsidiaries and associated companies*" and that the parties "*have agreed to settle "the Dispute" which has been the subject of a CEDR mediation*".

16. The principal terms were as follows:

"*Party A shall endeavour to provide Party B with (i) a summary of Ticketpro Ltd.'s 2014 financial activities by the first week of February 2015 and (ii) Ticketpro's 2014 draft financial statements as soon as they will become available*" ("**Clause 1**");

"*Ticketpro Ltd to pay a dividend to its shareholders by the end of March 2015 in respect of the previous year's trading, in such sum as the Company shall determine to be the maximum available for distribution*" ("**Clause 2**");

"*The aggregate loan capital owed to Party B is USD $1.8 million plus $250,000 of accrued interest, totalling $2,050,000, of which $500,000 is owed by Party A and $1,500,000 is owed by Ticketpro Ltd*" ("**Clause 3**");

"*Interest shall accrue on a daily basis at the rate of 10% per annum, on the balance remaining of the loan capital of $2,050,000 from the date of this agreement until repayment in full*" ("**Clause 4**")

"*Ticketpro Ltd shall make repayments of Euro 20,000 per month of loan capital if the Company can sustain it, commencing seven days from the date of this agreement*" ("**Clause 5**");

"*Ticketpro Ltd to be prepared for sale during the first quarter of 2015, with a targeted agreement for a completion of sale to take place by 30 June 2015. The balance of remaining loan capital, owed by Party A and Ticketpro Ltd to be repaid out of the proceeds of any sale*" ("**Clause 6**");

"*The sale of Ticketpro Ltd to be conducted by a third party appointed by the Company and approved in writing by the Parties, both Parties to be fully informed / involved at all stages in the sale process of the Company*" ("**Clause 7**");

"*Party A's private residence, at 25 Rybna, Prague 1, 11000, Czech Republic, to be purchased by Party A from Ticketpro Czech Republic for the original purchase price*

paid for it by Ticketpro Czech Republic and such proceeds of sale to form part of the assets of the Company" ("**Clause 8**");

"*Party B to resign forthwith of all Directorships of Intellitix group of companies and to be given a full indemnity by Party A in respect of any and all liabilities in respect of the same, in return for which Party B shall forfeit his shareholding in Intellitix as at this date*" ("**Clause 9**");

"*Party A to find a formula to recognise Party B's assistance in the creation of Intellitix. It is anticipated that this could come in the form of share options within four months of the signing of this Agreement*" ("**Clause 10**");

"*This Agreement is in full and final settlement of any causes of action, which the Parties have against each other arising from, or relating to, all matters raised in the Mediation*" ("**Clause 11**");

"*This Agreement supersedes and takes precedence over all previous agreements between the parties, whether in writing or orally, in respect of matters the subject of the Mediation*" ("**Clause 12**").

17. Clause 13 recorded that in the first instance the parties would attempt to settle any dispute arising out of the MSA by a further mediation. In the event, an unsuccessful, second attempt at mediation did take place before the institution of these proceedings. Consistent with the confidentiality that usually attaches, the parties have not referred to anything that occurred at the second mediation. Clause 15 provided that the MSA was to be governed by, construed, and take effect in accordance with the law of England and Wales.

The pleaded cases

18. Para 10, APOC referred to Mr Pedriks' objectives for the Mediation. It said he wished to agree a sale of TL, have his loan monies repaid and receive a return on his equity investment. The text continued: "*the Claimant had become concerned by the Defendant withdrawing large sums of money from Ticketpro*[4] *and taking financial benefits for himself without declaring any dividends for the benefit of all shareholders. For example, the Defendant personally acquired two adjoining apartments in the centre of Prague which he amalgamated for the sole use of himself and his family, using over €1,800,000 of Ticketpro's funds to acquire, renovate and pay for the mortgages and upkeep of the property ("the Real Estate")*". It was said that clear evidence of Mr Grimaux's misappropriation of TL's funds only became apparent once he had put detailed material into the data room, during the subsequent sale to Live Nation. In response, para 9B, ADef denied any misuse of TL's assets in respect of the purchase of the Real Estate and averred that in any event their acquisition was covered by clause 8 of the MSA. More generally, the Defence took issue with the relevance of para 10, APOC, asserting that any claims Mr Pedriks may have had in relation to the subject matter of the MSA were fully and finally settled by its terms.

[4] In the Claimant's pleadings "Ticketpro" refers to the holding company, TL.

The terms of the MSA

19. Para 13A, APOC alleged that on its proper construction, Clause 2 "*obliged the Defendant to cause or to procure Ticketpro to declare and pay a dividend to its shareholders including the Claimant in the maximum sum available for lawful distribution to its shareholders*". Para 11A, ADef denied this; the agreed wording did not impose an obligation on Mr Grimaux to declare or pay a dividend or to cause TL to declare or pay a dividend; the decision to declare a dividend was a matter for the board of directors of TL, exercising their independent judgment.

20. Para 13B, APOC alleged that on their proper construction, Clauses 1 and 2 obliged Mr Grimaux "*to provide (or to procure Ticketpro to provide) an account of Ticketpro's financial activities for 2014 and thereafter up to the sale of Ticketpro's business and an account into what were the sums available for distribution by way of dividend to the shareholders and to ensure payment to the Claimant of all sums that should have been paid to the Claimant by way of dividend*". Para 11B, ADef denied this allegation; contending that the Defendant was only required to provide the material that was specified in Clause 1.

21. Para 13C, APOC relied on an implied term of the MSA, said to be necessary to give the contract business efficacy and /or it was so obvious as to go without saying, that "*the Defendant was obliged to cause or to procure Ticketpro to declare and pay a dividend to its shareholders including the Claimant in the maximum sum available for lawful distribution to its shareholders*". Para 11C, ADef denied the existence of this term and asserted it was inconsistent with the express terms of the contract.

22. Para 11D, ADef admitted the implied term alleged at para 13D, APOC that "*the Defendant would not act in a manner that would: (1) prevent Ticketpro from declaring and paying a dividend in the maximum sum available for lawful distribution; (2) cause or procure Ticketpro to declare and pay a dividend in a sum less than the maximum sum available for lawful distribution; and/or (3) cause or procure Ticketpro to act in such a way that the maximum sum available for lawful distribution was artificially reduced*".

Fiduciary duties

23. Para 13E, APOC pleaded that special circumstances and/or a special factual relationship existed between the parties, such that Mr Grimaux "*was and has since remained in a fiduciary relationship with the Claimant in respect of*" the MSA. The supporting factors identified were: the factual background to the disputes settled by the MSA; the nature of Mr Grimaux's obligations under the MSA; the fiduciary duties Mr Grimaux owed to TL; Mr Grimaux's control of TL's ability to determine the maximum amount available for distribution under Clause 2; Mr Grimaux's control of information without which Mr Pedriks could not validate the 2014 financial information required under Clause 1 or the maximum amount available for distribution under Clause 2; and/or the co-incidence between Mr Pedriks' interest as a shareholder and under Clause 2 "*and the Defendant's only lawful right to participate in the profits*" of TL.

24. Para 13F, APOC alleged that the fiduciary relationship imposed duties on Mr Grimaux when providing financial information to Mr Pedriks and/or in calculating or causing to be calculated the maximum amount for distribution and/or in causing or procuring

distribution thereof, to: act in good faith; not to make a secret profit out of his position; not to put himself in a position where his interests conflicted with those of the Claimant; not to act for his own benefit / the benefit of a third person without the informed consent of the Claimant; to take account of all genuine assets and only genuine liabilities and to disregard any liabilities that were not real liabilities of TL; to replenish / cause to be replenished the assets of TL in respect of any transaction to which he or his associates had been party, the effect of which was to deplete the assets of TL; and to account to Mr Pedriks for his rateable share of any improper transaction which artificially reduced the maximum amount available for distribution.

25. Para 11E, ADef denied paras 13E and 13F, APOC, asserting that no fiduciary relationship arose in the circumstances. Equivalent allegations as to the existence and breach of fiduciary duties were pleaded at paras 21D – 21E, APOC in respect of the 2016 Agreement. These were denied at para 19A, ADef.

The 2015 Representation

26. Para 15A, APOC alleged that at the Mediation, Mr Grimaux represented to Mr Pedriks that "*there were no loans owed by Ticketpro and its connected companies other than those owed to the Claimant*" ("**the 2015 Representation**"). Further, that he "*intended for the Claimant to rely upon the 2015 Representation and the Claimant did in fact rely upon the same and/or acted to his detriment*" by entering into the MSA. The pleading contended that in consequence Mr Grimaux was "*estopped by representation from denying that there were no loans owed by Ticketpro and its connected companies other than those owed to the Claimant by the date of the mediation. As a corollary of the estoppel referred to in the previous sentence, the Defendant is estopped from asserting that the Promissory Note is a debt owed by Ticketpro or its connected companies*". Para 15C pleaded in the alternative, that it was incumbent on Mr Grimaux to raise the Promissory Note at the Mediation if (which was denied) it represented a genuine debt and/or he intended to rely on it, so that his failure to do so amounted to a waiver of any right he might otherwise have had pursuant to it. Para 15D, APOC pleaded that further or alternatively, Mr Grimaux's failure to raise the Promissory Note at the Mediation amounts to an implied representation by him that no sums were due to him from TL; and that Mr Pedriks had relied upon this implied representation in entering into the MSA, so that Mr Grimaux was estopped from relying upon the Promissory Note.

27. In response, para 13A ADef denied that Mr Grimaux made the 2015 Representation or that Mr Pedriks relied on the same. The ADef also contended that he was not obliged to bring the existence of the Promissory Note to Mr Pedriks' attention and that he was already aware of it, or Mr Grimaux could have reasonably assumed that this was the case.

The 2016 Agreement

28. I have already set out the terms that Mr Pedriks pleaded were agreed between the parties on 13 September 2016 (para 6 above). Para 20, APOC alleged in the alternative that in his email sent at 2.42 hours on 14 September 2016, Mr Grimaux represented that there was a legally binding agreement, which he intended Mr Pedriks to rely upon ("**the 2016 Representation**"). Para 21, APOC pleaded that in consideration of the 2016 Agreement and in reliance upon the 2016 Representation, Mr Pedriks signed the Incumbency Certificate. Para 21A, APOC asserted that further or alternatively, from the date of the

2016 Representation until at least March 2017, the parties had acted under an agreed assumption that the 2016 Agreement was legally binding upon them; and that in reliance upon this assumption Mr Pedriks acted to his detriment by allowing the purchase of TL to complete without taking any further steps in relation to the Promissory Note. Para 21B pleaded that in the circumstances Mr Grimaux was estopped by representation and/or convention from asserting that the 2016 Agreement was not legally binding upon him.

29. Paras 16.2, 16.4 and 17, ADef denied that any binding oral contract was agreed on 13 September 2016. It was admitted that the parties discussed "*in principle, that a contract could be entered between them on terms*", the gist of which were set out in para 18, APOC, but said that they also discussed the need to enter into a formal written contract before any terms were binding upon each other; and that the acquisition of TL by Live Nation was likely to be effected by a sale of their shares and that the proceeds of the sale should be placed in an escrow account to be administered by Mr Jiri Vrba (one of Ticketpro's then lawyers). Para 16.4 pleaded that although a draft agreement was provided to Mr Pedriks on 25 September 2016, ultimately the terms were not agreed, and the draft agreement was not executed. Further, that as at 13 September 2016, the specifics of the sale of TL to Live Nation had yet to be agreed and there was insufficient certainty as to whether Mr Grimaux would be in a position to fulfil obligations that might be imposed upon him by the terms the parties had discussed; that essential terms were not discussed, let alone agreed; and that even if the terms were capable of amounting to a final and binding oral contract, there was an express / implied term that the obligations under the contract would only arise and be enforceable if the sale of TL to Live Nation was effected by way of a direct sale of the share capital in TL, something that did not take place[5].

30. Further or alternatively, para 18.3, ADef denied: that Mr Grimaux had represented to Mr Pedriks in his 14 September 2016 email that the parties had made a legally binding agreement; that Mr Pedriks was able to rely on the 2016 Representation to form an independent cause of action against him; and that he intended Mr Pedriks to rely on his email in this fashion. Further, the terms of the oral discussion were such that it was incapable of forming a legally binding agreement.

31. Para 24, AReply specifically denied that the discussions between the parties on 13 September 2016 only led to an "in principle" arrangement. Various emails were identified as indicating Mr Grimaux's contemporaneous confirmation that a binding agreement had been reached. Whilst Mr Vrba was asked to "*further record the terms reached in a more formal document, but such request did not negate the fact that the terms had already been agreed and were binding upon the parties*". It was accepted at para 25, AReply that Mr Vrba's draft memorandum of agreement was not executed, but it was said that this was not inconsistent with a binding oral agreement already having been reached. Paras 26 – 27, AReply contended that it was irrelevant whether the sale to Live Nation proceeded as a share sale or asset sale; there was no express term that the obligations in the 2016 Agreement would only arise in the event of there being a share sale; and there was no basis upon which to imply a term to that effect.

[5] There was a net assets sale via Aquapath, as I have indicated earlier.

Breaches of contractual and fiduciary duties

32. Para 24 APOC pleaded that documentation made available via the data room set up as part of the proposed sale to Live Nation, indicated "*that the Defendant had, over time, withdrawn large sums of money from Ticketpro, primarily through the Company's subsidiaries, and the Defendant had received improper financial benefits, via such subsidiaries, to his own financial advantage, or to third party companies in which he had a significant personal interest, without declaring any dividend for the benefit of all the shareholders in breach of Clause 2*". Four examples were then given, albeit it was subsequently accepted that two of the examples pre-dated the MSA and therefore were not relied upon as constituting a breach of that agreement or a breach of the fiduciary duties said to arise from it. The two remaining allegations were: (i) that LPU had invoiced Ticketpro companies in the period 2014 – 2016 for services that it did not provide, including alleged provision of out-of-hours help desk services in Montreal for Ticketpro's software in Prague. Reference was made to Mr Grimaux being the only employee of LPU and him not having provided such services to Ticketpro; and (ii) Mr Grimaux used Ticketpro funds to pay £2,000 to HFW who represented him personally in the subsequent 2017 mediation.

33. Para 26, APOC alleged that Mr Grimaux had breached the MSA in the following respects:

    i) He "*failed to provide information in a timely manner*" pursuant to Clause 1 by "*failing to provide details of Ticketpro's financial activities by the first week of February 2015 and Ticketpro's 2014 draft financial statements"* (para 26.1);

    ii) He "*failed to cause any dividend to be paid to the shareholders by the end of March 2015 in respect of the previous year's trading; but instead paid notional dividends and/or benefits via subsidiary companies of Ticketpro and other associated companies to himself, or to entities he controlled",* contrary to Clause 2 (para 26.2);

    iii) He "*failed to cause Ticketpro to repay the aggregate loan capital due to the Claimant by instalments of €20,000 per month and interest thereon*", commencing seven days from the date of the MSA, in breach of Clauses 3, 4 and 5 (para 26.3); and

    iv) "*Whilst he did subsequently agree, in the 2016 Agreement, to recognise the Claimant's assistance in the creation of Intellitix by agreeing to provide the Claimant with an equity interest of 10% of his shareholding in Intellitix, being approximately 4.5%, he has failed to implement it*" (para 26.4).

34. Paras 26.5 – 26.9, APOC alleged breaches of the fiduciary duties said to arise from the MSA. Paras 27.4 – 27.8 pleaded the equivalent breaches of fiduciary duties alleged to arise from the 2016 Agreement.

35. Paras 27.1 – 27.3, APOC detailed the alleged breaches of the 2016 Agreement. As I have already noted, the February 2021 Order recorded the parties' agreement that these breaches were established if the Court accepted Mr Pedriks' case as to the 2016 Agreement. They were:

i) Failure to pay Mr Pedriks the total sum of €3,738,000 from the sale of TL, having only paid him €2,208,040;

ii) Failure to pay Mr Pedriks 50% of the excess cash / working capital of TL following the sale of its business via Aquapath "*including that portion attributed to the Real Estate*";

iii) Failure to provide Mr Pedriks with "*an equity interest of 10% of his shareholding in Intellitix*".

36. Para 21.3(b), ADef pleaded that all payments due to Mr Pedriks under the MSA had been paid. Para 21.3(c) denied that any payments were due under the 2016 Agreement, as no such agreement was made. Para 21.3(d) asserted that Clause 10 was non-binding for want of certainty and in any event did not contain an enforceable obligation, but merely a non-binding declaration of a future possible contract. Para 22, ADef denied the allegations in para 24 APOC. It was also said that Mr Pedriks was himself a director and shareholder of TL and was aware of and approved how and for what purposes assets held by TL were applied by that company. Para 24. ADef denied the breaches alleged at para 26, APOC. Points about the construction of the MSA were repeated. It was averred that Clause 1 was complied with in that Mr Pedriks was provided with financial statements for his approval as soon as they were available to Mr Grimaux; that Clause 2 did not place any obligation on Mr Grimaux; and that Clause 5 placed the obligation to pay on TL, as opposed to Mr Grimaux, and that monthly payments were only required if TL could "*sustain*" them, which it could not until the sale to Live Nation had been effected. Breaches of fiduciary duties were also denied.

Loss and damage

37. In addition to payment of the outstanding balance on the €3,738,000 figure; para 28, APOC sought 50% of the net assets adjustment arising from the sale of TL's business, namely €474,500; and a sum equivalent to 25% of the original purchase price of €1,200,000 of the Real Estate. Further, para 29, APOC alleged that as Mr Grimaux has depleted the assets of TL available for distribution to Mr Pedriks pursuant to the MSA and/or for payment as excess cash / working capital under the 2016 Agreement, such "*loss and damage will be quantified through the process of disclosure and forensic accounting upon the taking of proper accounts and inquiries in these court proceedings*". Para 30, APOC claimed damages for breach of contract arising from the failure to transfer an equity interest of 10% of Mr Grimaux's shareholding in Intellitix. to Mr Pedriks. By way of relief, the APOC sought accounts, inquiries, and directions relation to TL's financial activities for 2014 and thereafter up to the sale of the business to Live Nation and in relation to Mr Grimaux's alleged misappropriation of monies and/or receipt of benefits from TL and/or its subsidiaries and/or associated companies. Save as I have already indicated, all remedies claimed by Mr Pedriks are denied.

The factual circumstances

38. Much of what occurred is not in dispute, albeit the inferences I should draw and the significance I should attach to certain events is in issue. Key factual disputes include whether the 2015 Representation was made by Mr Grimaux; and what was said and agreed on 13 September 2016. Where I have had to determine matters of disputed fact

I have done so on a balance of probabilities. I have confined my factual findings to those matters necessary to resolve the Preliminary Issues.

39. There is a substantial amount of contemporaneous documentation. I note with interest Leggatt J's (as he then was) discussion of evidence that is based on memory and the significance of documentary evidence from the time of the events in *Blue v Ashley* [2017] EWHC 1928 (Comm) at paras 65 – 69. In this case, the contemporaneous material is often illuminating. However, I have also been assisted by the impressions I have formed of the parties' credibility, having listened to and assessed their oral evidence, as I will go on to detail.

The parties

40. Mr Pedriks is a Canadian businessman with an Estonian background. He has been involved in telecommunications, media and technology ("**TMT**") industries since 1984. In the mid-1990s he joined Baring Communications Equity ("**BCE**") becoming the Managing Partner of a new private equity fund investing in TMT businesses in central and Eastern Europe. In 1997 Mr Pedriks set up an office in Prague and thereafter he got to know Mr Grimaux, who had already established a concert promotion and ticketing business in the region. BCE did not invest in Ticketpro, but Mr Pedriks decided to invest some of his personal funds. Until 2008 he was relatively well off, although after this point he was under financial pressures. Mr Pedriks accepted that by the time he invested in Ticketpro he had 20 years' experience in the TMT sector and that he understood company finance matters. He agreed that he was familiar with financial due diligence and valuations but said that when he made his own investments (where he did not owe fiduciary duties to others) he had not followed the equivalent protocols; he likened it to a lawyer representing themselves in litigation.

41. Mr Grimaux is a businessman and entrepreneur who has spent over 50 years in the music and live entertainment business. He is originally from Quebec, Canada but moved to Czechoslovakia in 1991. I have already referred to the founding of Ticketpro in 1992. Mr Grimaux was the majority shareholder until the business was sold in 2017.

Events prior to the Mediation

42. In Autumn 2004 the parties agreed that Mr Pedriks would invest USD $1 million in return for 10% of the Ticketpro business. This was paid in three instalments. At that stage there was no holding company. Mr Grimaux owned the various Ticketpro entities through different corporate vehicles in different jurisdictions. Nothing was documented between the parties at this stage; the agreement being made on the basis of a handshake.

43. As I have already mentioned, TL, the Cypriot holding company, was created on 11 August 2005. There were 1,000 shares registered, which were initially granted to Montrago Limited, a Cypriot corporate services firm. Both Mr Pedriks and Mr Grimaux were appointed to the board of directors, along with the Cypriot nominee directors, Iliana Hadjisavva, Andri Papodopoulou and Maria Phylactou. Mr Grimaux agreed with Mr Bradley that the nominee directors had no true involvement in the business. Norman Lloyd, a Certified Public Accountant and tax lawyer, who advised Mr Grimaux, assisted with the restructuring. On 1 January 2008 the TL shares were registered to Mr Pedriks and Mr Grimaux in a 10 / 90 ratio.

44. TL, as the holding company did not trade in its own right. Mr Grimaux agreed that he was a director of most of its operating subsidiaries, including the Czech Republic companies that I mentioned earlier. Mr Pedriks was only a director of TL. Mr Grimaux also agreed that he "*had full control*" of the operating subsidiaries; that he was in charge of the day-to-day dealings of TL; and that it was within his power to ensure that Mr Pedriks received information he requested in relation to the operating companies.

45. In 2006 a number of promissory notes were issued by TL. One dated 1 January 2006 was in Mr Pedriks' name for the amount of USD $1 million. His case is that this reflected his initial investment in the Ticketpro business and it was superseded by the grant of shares to him in 2008. Three further promissory notes were issued in the respective sums of USD $4,500,000; USD $64,500 and USD $4,435,000. The first two were dated 1 January 2006 and issued to Mr Grimaux. However, it is the third of these documents (which I have referred to as "the Promissory Note") which became significant in the events of 2015 – 2017. It was dated 1 April 2006 and issued to a company called 2908026 Canada Inc. On 30 June 2006, Canada Inc transferred the Promissory Note to LPU; and then on 1 July 2006 LPU transferred it to Mr Grimaux.

46. The 2006 year end accounts for TL, signed off by the board of directors on 30 January 2009, designated the Promissory Note under the heading "*Trade and other payables*". This remained the case in each of the year end accounts until the 2015 accounts, signed off by the board of directors on 11 August 2016, where the Promissory Note was shown under "*Related Party balances and transactions*" as "*loan from shareholder*" with the description: "*The loan from shareholder represents a promissory note entered into during the year 2006. The loan has no specified repayment terms and carries no interest*." The other 2006 promissory notes did not appear in the TL accounts at any stage.

47. In emails sent on 17 October 2010 Mr Grimaux agreed to increase Mr Pedriks' shareholding in TL to 25% and to prepare a document to that effect. This was eventually formalised by Board resolution on 26 January 2015.

48. By 2011 relations between the parties had deteriorated. Mr Pedriks had provided further funds to TL and to other entities owned or controlled by Mr Grimaux. He was increasingly concerned at the absence of formalised documentation. On 10 October 2011 at his behest, Mr Grimaux signed a document confirming that Mr Pedriks owned 25% of TL and that he was "*a 25% participant in my shares of Intellitix*". The document also referred to accrued debts of USD $1,820,000.

49. Intellitix Inc was a company incorporated by Mr Grimaux and a Mr Martin Enault under the laws of the Province of Quebec. Intellitix Holdings Limited was a company incorporated by Mr Grimaux and Mr Enault under the laws of the Republic of Cyprus. Credo Ventures ("**Credo**") invested in both of these Intellitix companies in exchange for equity in the business. The investment was made via a special purpose vehicle named Credostage 1 Limited ("**Credostage**"), a Cyprus company incorporated on 11 October 2010. Mr Pedriks was the chairman of Credo. Under the agreement, Credostage 1 received 450 shares in Intellitix Inc and 225 Preferred Shares in Intellitix Holdings, representing a 15% share in those entities. Mr Pedriks was a director of Intellitix Inc. By a trust agreement between Mr Pedriks, Credostage and Cotswold Insurance (Barbados) Limited ("**Cotswold**"), Credostage held the shares in Intellitix as a nominee for Cotswold. In turn, Mr Pedriks was a beneficiary of Cotswold. Although the causes

are disputed, by 2012 / 2013 relations between Credo and Intellitix had started to break down.

50. Relations between the parties did not significantly improve after 2011. In emails sent during 2013 and 2014, Mr Pedriks repeatedly expressed frustration that there were no plans in place to repay him the monies he had loaned; examples include his emails sent on 8 May 2013, 11 May 2014, and 2 October 2014. In October 2014 mediation was agreed by the parties as a potential way forward.

The Mediation

51. Mr Pedriks prepared a Position Paper in advance of the Mediation. Therein he said that between 2004 and 2011 he had provided Mr Grimaux and the companies he controlled with USD $1.1 million in equity and loans of approximately $2.1 million. He complained that he had been requesting repayment of his loans for over two years without success. He commented that any other loans or encumbrances in the businesses were not known to him (save for specific instances he then referred to). Mr Pedriks said that everything with Mr Grimaux was "*co-mingled as though it was all one pocket*". He complained that Mr Grimaux had channelled significant funds out of TL, with the consequence that dividends were not paid to the shareholders. Mr Pedriks concluded the document by setting out a series of objectives, namely: to regularise the operation of the companies and to put proper documentation in place to record each of the parties' equity share, corporate debt and personal debt; to assess the future viability of the companies and put in place measures to sell shares / assets; to agree a strategy for monies owed to him to be repaid; to review if dividends or pseudo dividends had been paid out and ensure he obtained his rightful share; and to review how to treat Mr Grimaux's residence in Prague. Mr Grimaux did not prepare a Position Paper.

52. The Mediation was held at a London hotel on 5 January 2015 facilitated by a CEDR Mediator, Kate Jackson. As the afternoon progressed, the parties were under some time pressure because Mr Grimaux had an international flight to catch. Mr Shaw drafted the opening recitals and what he described in his evidence as the "*boiler plate*" clauses from 11 onwards; whereas the substance of Clauses 1 – 10 was discussed between the parties, with Ms Jackson typing a draft of the clauses as agreement was reached. Following the Mediation, Mr Grimaux emailed a signed copy of the MSA to Mr Pedriks on 12 January 2015. I have already set out its terms.

53. As I have foreshadowed, there is a dispute of fact over whether Mr Grimaux made the 2015 Representation during the Mediation, to the effect that there were no loans owed by TL and its connected companies other than those owed to Mr Pedriks. I conclude that this representation was made. I have taken into account all of the points made by Mr Lilly, including, most notably, that the representation was not included in the MSA document. The reasons for my conclusion are set out in the paragraphs that follow.

54. Both Mr Pedriks and Mr Shaw gave evidence in support of the 2015 Representation having been made. Neither were cross-examined on the basis that they were lying. Mr Lilly made clear in his closing submissions that he suggested their accounts were unreliable, given the passage of time and some discrepancies, rather than untruthful. Initially, Mr Grimaux's account in cross-examination was that he did not *believe* he was asked about other monies owed. He then said that more definitively that he was *not* asked this at the Mediation. I reject this. In my judgment it is much more likely that

this issue was raised with him, as Mr Pedriks and Mr Shaw recalled, given it was plainly something that was a concern to Mr Pedriks, as expressed in his Position Paper. I bear in mind that there were some inconsistencies between Mr Pedriks' and Mr Shaw's recollections; but the essential gist was common to both, namely that this was a real concern and that reassurance was sought and provided.

55. When Mr Pedriks referred to this representation having been made at the Mediation in numerous subsequent emails, Mr Grimaux did not refute this. For example, in an email sent on 23 September 2015 Mr Pedriks said: "*Serge i asked you several times last year and even before that and then during the mediation – what other debts does the company….you have always forgotten to mention there is 3.2 million owed to you on the balance sheet - which is clearly a fiction*". Mr Grimaux did not respond to that email. In an email sent on 25 September 2015 Mr Pedriks said: "*when i asked you several times before – who do we owe money to – you never once mentioned this 'promissory note'*". Mr Grimaux's response did not take issue with this proposition. Further, in an email sent on 2 September 2016 to Mr Grimaux and Ms Kunrátková concerning the request to sign the Incumbency Certificate, Mr Pedriks said that the Promissory Note was "*pure fiction and not disclosed at out mediation – when serge was asked on more than one occasion if the company had any other debts*". Mr Grimaux's response sent on 5 September 2016 did not dispute this proposition. In an email sent on 9 September 2016, Mr Pedriks reiterated that at the time of the settlement "*we had a discussion about what debts the company had and you made it clear there were no other debts in the company*". Mr Grimaux accepted during his cross-examination that he had not contradicted these allegations, but he did not advance any explanation as to why he had not done so.

General observations regarding credibility

56. Whilst I have assessed each disputed issue of fact individually, my consideration is also informed by my more general impressions of the respective credibility of the parties. In short, I have considerable reservations about the credibility of Mr Grimaux's account where it is disputed. Inevitably this is based on my overall impression of him as a witness, but it is particularly influenced by the factors I will go on to identify. I emphasise that I have made allowance for the fact that English is not his first language, albeit he is a largely fluent English speaker (and someone who, rightly, indicated when he needed a little more time to formulate his answer when he was being cross-examined.) I have also borne in mind that emails and texts are generally informal means of communication, often written in relative haste and without the precision and reflection that a more formal document would likely entail. Nonetheless, the factors that particularly influenced me are as follows:

    i) Under questioning from Mr Bradley, Mr Grimaux repeatedly said that all of the sums advanced by Mr Pedriks were cash investments in return for equity, rather than loans. This was not a credible position for him to take. He maintained this position in the face of contradictory materials, including the October 2011 document acknowledging a USD $1.8 million debt, which he had signed; and the terms of the MSA. He said his reference to a *"$150K loan*" in the title of his email to Mr Pedriks sent on 7 June 2010 was "*a mistake*", as this payment was an advance. Mr Grimaux also accepted that he had not disputed references to loans having been made in Mr Pedriks' various emails to him, for example those sent on 11 May 2011 and 21 May 2014;

ii) I accept Mr Bradley's proposition that Mr Grimaux's contemporary communications showed a pattern of offering false reassurance to Mr Pedriks in order to deflect his concerns. Most notably, he said in an email sent to Mr Pedriks on 28 September 2015:

> "That you think I would try using this Promissory Note for depraving[6] you of any money is scary. This only proves me how much you believe I am a different person that I am. Of course this Promissory Note was always only intended to be for my sole usage, if it ever comes to that. I can't believe that you think of the scenario you are describing below[7].
>
> For the avoidance of a doubt, in my mind the money that would be generated by the sale of Ticketpro would be used in that order:
>
> 1. To pay back the amount of money we came to as per the January settlement; and
>
> 2. For you to receive 25% of the money left once your January settlement would have been repaid.
>
> 3. Any amount of money left should be mine.
>
> Plus you should receive 25% of all amount of money paid as a mortgage for the flat, knowing that I would become the sole owner of the flat at Closing.
>
> I would make sure that all amount of money owed by Intellitix or me to Ticketpro are paid back by me at Closing."

Mr Pedriks' emailed reply of the next day, suggests he was at least partially reassured ("*your last email was somewhat help with respect to the promissory notes – and i appreciate that*"). In the event, as I have already touched on, the only sums that Mr Pedriks received were repayment of loan capital and interest pursuant to the MSA; the remaining monies from the sale were paid to Mr Grimaux in reliance on the Promissory Note. When questioned about the falsity of the assurance he had purportedly given in this email, Mr Grimaux was evasive, eventually falling back on the suggestion that "*I didn't express myself correctly*". Other examples of his false reassurances, coupled with feigned indignation at what was being suggested of him, included Mr Grimaux's email to Mr Pedriks sent on 7 June 2016 and his two emails sent on 5 September 2016, which I will detail when I come to those parts of the chronology.

iii) In a similar vein, Mr Grimaux offered misleading reassurance to Mr Pedriks in relation to the latter's concerns that Ticketpro monies were being used for other purposes. For the avoidance of doubt, I am not making findings at this juncture as to the propriety or impropriety of the payments, rather I am explaining my conclusion that Mr Grimaux was deliberately less than frank with Mr Pedriks

[6] The parties are agreed that Mr Grimaux meant "depriving" here.
[7] A scenario where Mr Grimaux used the Promissory Note to obtain payment from the proceeds of the sale to Live Nation in priority to payment of sums owed to Mr Pedriks.

over something that the latter had repeatedly expressed concerns about. In an email sent on 9 June 2016 Mr Grimaux said: "*Since 2011 I have not used money for anything else then*[8] *Intellitix which I did everything I could to keep afloat*". Mr Bradley reminded Mr Grimaux of these words just after he had confirmed that monies from the Ticketpro companies were used for "*exhibitions, projects*" as well as for Intellitix. Further, Mr Bradley took Mr Grimaux to a budget prepared in relation to Ticketpro Technologies a.s. for 2015 where as Ms Kunrátková described in her email sent on 2 June 2015 to Andrew Fielding "*Costs related to Serge are documented in Department 4*". (These items were recorded separately in order to identify non-recurrent Ticketpro expenditure for the purposes of the pending sale transaction with Live Nation.) Mr Grimaux was somewhat evasive when asked what, for example, "*Wage, Salaries, Benefits*" related to in the Department 4 section, or what the "*Other*" figure of 200,000Kč per month concerned. When Mr Bradley inquired: "*So am I right in taking your answers to mean that Department 4 monies might well have been used for non-Ticketpro business as well?"*, Mr Grimaux replied "*In other – yes, that's what it would be.*" Mr Bradley also took Mr Grimaux to an email sent to him from Petr Weidner, the CFO of Ticketpro a.s. in which the sender asked: "*please can this mail conversation between us strictly confidential ? Let's say that I'm only processing the data which you have available already from the past*" and which attached "*the first summary of payment between Ticketpro and you*". Mr Grimaux agreed that the summary showed payments of Ticketpro monies made for his benefit. By way of example, it included payment made in relation to his Amex card and his wedding, albeit Mr Grimaux said the latter would have been reimbursed at some stage.

iv) Rather than trying to assist the Court as best he could as to his recall of the events, Mr Grimaux tried to avoid the substance of some difficult questions by relying on stock answers; for example when he was being asked about communications that bore on the existence or terms of the 2016 Agreement, he replied that there was still an ongoing discussion or a continuing discussion between the parties, without engaging with the particular wording that was being put to him or its potential inconsistency with that proposition.

57. As I have already indicated, Mr Lilly did not challenge Mr Pedriks' honesty in relation to the 2015 Representation. However, this is a convenient point at which to refer to my impressions of his evidence too. I did not find Mr Pedriks to be an entirely satisfactory witness. There were times when he adopted a rather defensive approach, failing to engage with the questions he was being asked by Mr Lilly. However, on balance, I consider this was the product of his deep seated feelings about the matters giving rise to this litigation, rather than deliberate evasiveness on his part. I will give one example. On the morning of the second day of the trial, whilst he was still giving evidence, Mr Pedriks volunteered that he had reflected further overnight and he now recalled that there were two telephone conversations between the parties on 13 September 2016, rather than one. Mr Lilly then questioned him on the basis that this was a departure from his earlier accounts and evidence (with a view to showing that his memory was less reliable than he asserted). Rather than simply acknowledging this, Mr Pedriks gave some lengthy and defensive answers. Subsequently Mr Grimaux agreed that there were

[8] Clearly the writer meant "than".

indeed two telephone conversations that day. Accordingly, Mr Pedriks' manner of giving evidence on this topic was not indicative of any untruthfulness on his part. In general, I found him to be a significantly more straightforward witness than Mr Grimaux.

Events February – December 2015

58. TL's year-end financial statements for 2013 were approved by the board of directors on 20 January 2015. The profit and loss account showed an operating loss of €2,990,893. The largest element giving rise to this loss was in the sum of €3,174,914 described as "*impairment charge – investments in subsidiaries*". From the notes, it was occasioned by a write-down in the value of the subsidiary companies. It did not appear in the previous year's accounts. Mr Pedriks attended the meeting by teleconference. The directors unanimously resolved not to pay a dividend. This decision was ratified by the shareholders' meeting on 10 February 2015, for which Mr Pedriks submitted a signed proxy voting form dated 3 February 2015. In an email sent to Mr Grimaux on 4 February 2015 Mr Pedriks had said he did not understand "*what the euro 3 million impairment is in our accounts – basically making ticketpro bankrupt in 2013*"; but he accepted Mr Lilly's point that he had approved the accounts. Mr Lilly then put to him that in the circumstances the board could not have declared a dividend. Mr Pedriks' response was that these accounts only gave the position regarding TL and that consolidated accounts, showing the position in relation to the Ticketpro operating subsidiaries might have given a different picture.

59. At a directors' meeting on 15 July 2015, the year-end accounts for TL for 2014 were approved and again a decision was taken not to declare a dividend. This was endorsed by the shareholders (Mr Grimaux and Mr Pedriks) at an extraordinary general meeting on 21 September 2015. The 2014 accounts showed a figure of €2,778,400 in accumulated losses. Mr Pedriks repeated his answer concerning the 2013 figures, when Mr Lilly put to him that TL could not have declared a dividend. I return to this topic when I consider the alleged breaches of the MSA below.

60. It is not clear precisely when Mr Pedriks was given the draft financial statements for TL for the year-end 2013 and 2014, but he plainly had the material before the directors' meetings I have referred to at which the statements were approved. Mr Pedriks agreed in his evidence that he was provided with the 2011 – 2013 figures for TL's three main operating subsidiaries by an email sent on 27 January 2015 by Mr Grimaux. By email sent on 5 February 2015, Mr Grimaux provided him with the 2014 figures for Ticketpro a.s. along with some forwarded comments from Mr Weidner. Mr Pedriks also accepted that he was emailed by Mr Grimaux on 11 February 2015, putting him directly in touch with Mr Weidner so that "*he can guide you in what is needed regarding the consolidated figures you will be preparing in the coming weeks pertaining to all Ticketpro entities*". Mr Pedriks agreed that he had subsequently liaised with Mr Weidner and that he had sent an email on 16 February 2015 which referred to having had a "*good chat*" with him. On 16 May 2015 Mr Weidner sent further information to Mr Pedriks after he received the consolidated figures for the Ticketpro operating subsidiaries. Mr Pedriks agreed that as the proposed sale plans progressed, Andrew Fielding had liaised with Mr Weidner and relayed information to him. Mr Pedriks said that he did not accept that all of the requisite information was provided in a timely manner, in particular the consolidated numbers did not come until about halfway

through the year[9]. I return to this topic when I consider the alleged breaches of the MSA below.

61. During 2015, Mr Pedriks repeatedly emailed Mr Grimaux over the absence of monthly repayments which he considered were due to him under Clause 5. The first such message was sent on 16 February 2015 ("*you said that cash would hit my account by the end of last week*"). On 1 April 2015 Mr Pedriks said: "*we came to an agreement in january after two years of trying to get to an agreement and since achieving that agreement – not one of the things documented has actually been completed*". He complained that Mr Grimaux had not corrected the outdated numbers that he had been working from at the Mediation and that Mr Grimaux was now €60,000 behind in payments in circumstances where loans made to Mr Pedriks were being called in and he had needed to borrow money from his brother to make a mortgage payment. In a series of numbered points, he said (amongst other things) that the numbers provided had yet to be consolidated and that a new share deal for Intellitix had not yet been proposed. Mr Grimaux replied on the same day with a general, emollient response: "*I understand you are getting very tired and I would too. To tell you I am sorry for this is surely not enough. To tell you that I am trying to fix this situation is certainly not enough. Working everyday towards solutions for fixing this is what I am doing. This is not bad faith – sorry you think it is though I can certainly understand why you think that way*…". Mr Pedriks replied pointing out that Mr Grimaux's email had not addressed the specific points he had raised. The correspondence continued in a similar vein on 3 April 2015.

62. In an email sent to Mr Grimaux on 27 August 2015, Mr Pedriks said, "*not one penny has moved in my direction and i am dying here – you need to do something asap*". He continued: "*you have not sent the proposal on how to deal with my interest in intellitix – which you were supposed to deal with months ago*". In an email of 23 September 2015, he noted that he had yet to receive "*one penny*" and "*you have not dealt with my interest in intellitix*".

63. In late 2015 Mr Grimaux procured Credo's shares in Intellitix to be repurchased.

64. I referred to the way the Promissory Note appeared in TL's accounts at para 46 above. Mr Pedriks was questioned as to his awareness that the balance sheet in the 2013 accounts showed that the company had very substantial debts, specifically the "*trade and other payables*" figure of €3,395,136. He said that this document was only made available to him later in January 2015 after the Mediation and that he did not consider the balance sheet aspect at that stage (albeit he accepted he was aware of the impairment in the profit and loss account, that I have already referred to).

65. On 2 June 2015 Mr Pedriks emailed Norman Lloyd saying he was in Prague with Mr Grimaux and Mr Fielding and "*we are struggling to remember the 3+million that was put as debt on the books in cyprus back at the beginning and how we deal with this now. was there any paperwork -that you might have about this*". A reply from Mr Lloyd sent the same day refers to the promissory note in the sum of USD $1,000,000 issued to Mr Pedriks, rather than the document he was asking about.

[9] This appeared to be a reference to the material provided on 16 May 2015.

66. I quoted part of an email that Mr Pedriks sent to Mr Grimaux on 23 September 2015, when I considered whether the 2015 Representation was made (para 55 above). In a further email sent later the same day Mr Pedriks said he wanted to understand how the 3.2 million showing as owing to Mr Grimaux on the balance sheet was going to be used when the business was sold (a reference to the Promissory Note). He said: "*i have been shafted for years based on what i am now seeing in the accounts and it looks like i am about to get the biggest shaft of my life*". In a further email sent to Mr Grimaux on 25 September 2015 Mr Pedriks said that he needed to review the balance sheet "*and really understand a number of things including this promissory note*". He referred to his concerns over Mr Grimaux mis-using Ticketpro monies, contended that the Promissory Note was a fiction, and expressed the fear that it "*could put the final nail in the coffin and leave me with nothing*". Mr Grimaux's email of 28 September 2015 (which I have already set out in full) was written in response.

Events January – July 2016

67. In January 2016 TL paid Mr Pedriks USD $100,000, representing 5 instalments of payments under Clause 5. (The interest was subsequently paid in February 2017.)

68. Although the MSA had anticipated a sale of TL by 30 June 2015, matters progressed more slowly. On 29 February 2016 Heads of Terms were agreed with Live Nation for the sale of Mr Pedriks' and Mr Grimaux's shares in TL. These were reflected in a 'subject to contract' letter of that date. The contemplated sale price was €6,000,000 by way of an initial consideration. As set out in para 4, the valuation was stated to be calculated on the basis of a zero level of net assets; and the initial figure would be reduced or increased following a determination of the Net Assets Adjustment. The sellers were described as Mr Grimaux and Mr Pedriks and the document recorded that the Initial Consideration and any amount of Net Asset Adjustment would be paid to them pro-rata according to their shareholding. Once the sale process started it was principally led by Mr Pedriks, working with Mr Fielding, corporate lawyers White & Case and the investment bank, Goetz Partners ("**Goetz**"). During the course of negotiations, a virtual data room was established to enable the purchaser to carry out due diligence on TL.

69. Mr Pedriks emailed Mr Grimaux on 16 January 2016 saying that once they had clarification of certain points, he would build a "waterfall" showing how the proceeds of sale would flow to each of them. Mr Pedriks said that he understood this would cover his original capital investment; repayment of his loans plus interest as per the MSA; 25% of the value of the property in Prague; and 25% of funds that had been moved from the business, which he said were "*1.67m on the books of 2011 – 2015*".

70. On 20 March 2016 Mr Pedriks sent his first waterfall to Mr Grimaux. This indicated that monies due to Mr Pedriks totalled €3,921,969, representing repayment of the loan monies plus interest under the MSA and 25% of the remaining net equity in TL. The document also identified a number of issues that were said to be outstanding, including what was to happen in relation to Mr Grimaux recognising Mr Pedriks' assistance in the formation of Intellitix, as per the MSA. The same day Mr Grimaux replied saying he would "*get my homework done and get back to you*".

71. On 5 May 2016 Mr Pedriks emailed Mr Grimaux a second waterfall, reflecting "*a couple of small corrections*". In the body of the email, he asked Mr Grimaux to revert

to him on these matters. He also said: "*intellitix – i only gave up my 25% of your share – if you recognised me in the way we discussed – but i have still not heard a thing about this*". On 28 May 2016 Mr Pedriks chased for a response to his waterfall. On 7 June 2016 Mr Grimaux emailed saying he was looking forward to their meeting the next day and: "*I am fine with everything you are mentioning in that document except with what you have identified as the 'Intellitix Return of Funds 2011 – 2016'*".

72. Mr Pedriks replied saying: "*Please send me something concrete to review in advance of our meeting…so I at least have the courtesy of a few hours to reflect on something you had for months to reflect on*". He suggested the position was similar to the Mediation, where he was the only one to provide detailed material in advance, despite there being an agreement to do so. Mr Grimaux replied later the same day saying, "*I do not understand why you are so aggressive with me all the time*". He continued: "*And the recently telling me I had tried to shaft you and I was trying 'shaft you even more' based on your sole interpretation of a document prepared by Norman years before (that you had forgotten about) for a very specific other purposes…should I continue in the insult department?"*. I referred to this email when describing Mr Grimaux's tendency towards false reassurance and feigned indignation when confronted with concerns that he would use the Promissory Note to take precedence over the sums Mr Pedriks was seeking (para 56 ii)above). I also note that here Mr Grimaux appears to accept that Mr Pedriks had forgotten about the Promissory Note.

73. On 13 June 2016 Mr Pedriks emailed Mr Grimaux with some further suggested adjustments to the waterfall. He said that the position in relation to Intellitix, which had been outstanding for 18 months, could be resolved by a simple piece of paper stating that Mr Grimaux was holding 10% of his shares in the Intellitix holding company on his behalf. He attached a draft declaration of trust document to that effect.

74. On 22 June 2016 Ms Kunrátková emailed Mr Pedriks and Mr Grimaux attaching a draft Incumbency Certificate. This was part of the due diligence process being conducted by Live Nation in relation to the TL sale. The email asked that they read and confirm it and, where appropriate, provide the documents. Mr Pedriks replied the same day saying, "*I am ok with this*". The only point he raised was a minor one about his correct address. It was suggested to Mr Pedriks in cross-examination that if he was genuinely concerned about the Promissory Note (as opposed to using the need to sign the Incumbency Certificate as leverage), he would have raised this concern at the outset. However, it subsequently emerged that the Promissory Note was not mentioned in this early draft of the Certificate and that reference to it was added in a later iteration. An email exchange with Norman Lloyd on 18 July 2016 indicates that he recommended it should be included in the due diligence disclosure.

Events August – 12 September 2016

75. On 18 August 2016 Mr Pedriks emailed Ms Kunrátková and various others, copying in Mr Grimaux, saying he had noticed that the Incumbency Certificate mentioned the Promissory Note for USD $4.4 million. Ms Kunrátková replied that it was "*as per the agreement*". Mr Pedriks queried what she was referring to, asked to be sent this agreement and said that he did not think he could sign the Incumbency Certificate in the circumstances unless there was a side agreement in his favour. He repeated a similar concern in his emails sent to Mr Grimaux on 24 and on 26 August 2016; and in his emails to Mr Grimaux and Ms Kunrátková sent on 30 August and 2 September 2016.

He said that the Promissory Note was pure fiction and that he needed confirmation that this sum would only be paid "*after I receive everything that is due to me*". Mr Pedriks repeated this position in a text message sent on 2 September 2016 to Mr Grimaux and in a further email sent on 4 September 2016.

76. In his first substantive response to these communications sent on 5 September 2016, Mr Grimaux said: "*It is very unfortunate and upsetting that you are trying to paint me in front of people…as someone whom would be orchestrating something with fictitious documents*". He continued that the purpose of the transaction as Norman Lloyd could explain "*was to accommodate you at the time*". As regards the complaint that the Promissory Note was not referred to at the Mediation, Mr Grimaux said: "*how can you point a finger at me when you could also, being a signee of these documents, bring them up during that process?*" In this response, Mr Grimaux appeared to be eliding the concerns expressed in Mr Pedriks' emails about the use that would be made of the Promissory Note, with the other promissory note for USD $1 million issued in Mr Pedriks' favour (para 45 above).

77. On the same day Mr Grimaux sent a longer email to Mr Pedriks in which he again purported to express surprise and hurt at the concerns raised. A flavour is as follows: "*In retrospect I realise you have made clear per your actions of the last two years that you do not trust me anymore, none whatsoever. This is now more then [sic] being confirmed with your reaction in front of the Incumbency Certificate…I cannot trust anymore that you want me to have my fair share of the sale*". Mr Grimaux went on to say that he was attaching "*what I consider to be the Final Version of the Waterfall document*" and that their settlement would be nothing more than what was in that document. Mr Grimaux's figures showed Mr Pedriks receiving a total of €3,148,659, comprising €993,500 from the TL net proceeds of sale and €299,159 from the Real Estate, in addition to payment of the MSA sums. No reference was made to the Promissory Note taking priority over or depleting these sums.

78. On the 6 September 2016 further emails passed between the parties, asserting and denying that the Promissory Note was a fiction. Mr Pedriks reiterated that: "*Until I have the appropriate documents signed from you – I will not be executing anything…*" On 9 September 2016 Mr Pedriks sent a revised waterfall, with a covering email responding to a number of points raised by Mr Grimaux. In short, he claimed a total entitlement of €4,061,631. Mr Pedriks said: "*I will not sign the incumbency certificate until such time as these matters* are clarified to my satisfaction". Mr Pedriks reiterated this message in an email sent on 12 September 2016.

79. On 12 September 2016 Dr Wunderle, a managing partner at Goetz emailed Mr Pedriks and Mr Grimaux saying he understood that there was still disagreement regarding the division of the proceeds which was preventing the signing of the Incumbency Certificate. He referred to the sale as a one-time opportunity so that "*we cannot continue to be silent regarding the shareholder disagreements which are currently jeopardizing the transaction.* ***If no agreement has been reached in the next 24 hours***[10] *we will have to communicate to TM*[11] *that due to shareholder disagreements the transaction has to*

[10] Emphasis in the original email.
[11] An abbreviation for Ticketmaster; synonymous with Live Nation for present purposes.

be shelved…If we hear nothing or no solution is agreed on in the next 24 hours, we will inform TM by email."

Events of 13 and 14 September 2016

80. Because the participants were in a variety of time zones, the precise timing of certain events is unclear / ambiguous. However, during the oral evidence, it emerged that there was broad agreement as to the *sequence* in which the material events occurred and indeed, as to much of their content. Mr Pedriks was in the United Kingdom and Mr Grimaux was in Ontario, Canada, a time zone which was five hours behind.

81. In the early morning Mr Pedriks received an email from Ms Kunrátková indicating she had seen the Incumbency Certificate signed by Mr Grimaux and asking, "*when can I expect to receive the Incumbency Certificate signed by you*?". Mr Pedriks replied emphasising that his concerns remained as before and that he was waiting to hear from Mr Grimaux. Mr Pedriks then called Mr Vrba and reiterated his position that he would not sign the Incumbency Certificate as matters stood, even if it meant the sale fell through. He then sent an email to Mr Vrba headed "*follow up to our discussion*" in which he stated that to resolve matters he needed a letter from Mr Grimaux and from the Canadian company[12] confirming that their loans were subordinate to money owed to him; and that "*we finalise the waterfall agreement*". He said that if matters were not finalised that day "*then TM will walk away from this any credibility that serge has in this industry will go at the same time*…". Mr Grimaux agreed that Mr Vrba relayed to him the gist of these communications with Mr Pedriks.

82. A telephone call then took place between Mr Pedriks and Mr Grimaux. It was shortly before 13.00 hours for Mr Pedriks and Mr Grimaux was walking to an early morning Intellitix board meeting. The call lasted around 20 – 25 minutes. Both parties agreed that the discussion involved some toing and froing over the waterfall numbers, Intellitix was also discussed as was an arrangement whereby Mr Pedriks would pay the fees of Andrew Fielding and White & Case and Mr Grimaux would meet the other expenses related to the sale. In his evidence, Mr Grimaux accepted it was likely that his starting point was his waterfall figure of c.€3.1 million; that Mr Pedriks' starting point was his waterfall figure of c.€4.1 million; and that there were exchanges between them about interim figures. The net assets adjustment was discussed, and Mr Pedriks proposed that in return for reducing his figure, he should receive 50%, rather than 25% of that. The call ended with Mr Pedriks indicating he needed to check the level of a reduced figure that would still work for him. In his evidence Mr Grimaux accepted that Mr Pedriks proposed he received 10% of Mr Grimaux's interest in Intellitix. Mr Grimaux said that he listened to this proposal, but he did not indicate his agreement to it.

83. After working through his figures, Mr Pedriks tried to call Mr Grimaux. As he could not speak to him, he sent a text. This indicated that in Euros: "*the number I need to break even and cover the cost of Andrew and white and case is exactly 3.78m – unfortunately under that I don't recover my capital and all of my costs – but I have come down from the 4.1 to there and cover WC and Andrew if you cover the rest – please have your guy draft this and the Intellitix bit and I will release my signatures immediately on your confirmation of this.*"

[12] A reference to Canada Inc.

84. Mr Grimaux tried to call Mr Pedriks after receiving this message. He left a voicemail ("**VM**"). The contents of the VM are not available, but it appears from the subsequent communications that Mr Grimaux sought clarification, rather than raised objections. He also texted Mr Pedriks saying he would call him at 17.00 hours. Mr Pedriks sent a text indicating he had heard the VM and "*just to be clear I am prepared to accept 3.78m euro and pay for Andrew and WC out of my share – that is my break even number. If we have excess working capital, we should split that 50/50 as I am only at break even at 3.783m and we should have I hope around 350K of net working capital. Hope that is clear now – please confirm this and the intellitix 10% and I will immediately instruct Adelin*[13] *to release the documents*".

85. Mr Grimaux telephoned Mr Pedriks, as per his text message. This call was much shorter than the earlier one, lasting about three minutes. Mr Pedriks' case is that an agreement was reached relatively swiftly on the basis of his revised proposal, which Mr Grimaux had already had the opportunity to consider. In his second witness statement he indicated that he recalled saying "*now we have agreed I will release the Incumbency Certificate*" (or words to that effect) and Mr Grimaux replying "*good*". He said when questioned by Mr Lilly that they had "*a short discussion at the end, at which point we reached our agreement*"; that this call was "*a confirmational discussion where we settled on the four matters*[14] *and said, 'Let's get on with this*.'" Mr Pedriks said that the parties discussed a written document being prepared to formalise this agreement and to set up an escrow arrangement for holding the proceeds of sale, which Mr Grimaux was keen on. He said that there was insufficient time to prepare a written agreement that day (because of the Incumbency Certificate deadline): "*I thought maybe he could draft something quickly. It transpires that obviously that wasn't possible. We had the call at 5 o'clock and we came to an agreement. And we agreed simply that we would memorialise that, because his focus was – had always been on having an escrow account that managed the money. I was not fussed about the escrow account, it didn't really bother me one way or the other*".

86. It is common ground that the parties did not use the specific phrase "*subject to contract*". In his oral evidence and at paras 51 – 52 of his second witness statement, Mr Grimaux said he did not reach agreement during the telephone call, nor indicate this; he did not agree with Mr Pedriks' waterfall calculations; he did not agree to a 50/50 split of excess cash; and he did not indicate agreement to the Intellitix 10% proposal. In para 53 of his second statement, he said he wanted more time to think about Mr Pedriks' offer, that there were many significant issues that had not been discussed, let alone agreed and the 'in principle' understanding reached on the telephone would need to be formalised by way of a written contract. At paras 56 of this statement Mr Grimaux said: "*The one point we did agree on was that Mr Vrba would be instructed to draft the agreement*".

87. After the telephone conversation, Mr Pedriks emailed Goetz at 17.16 hours his time to "*Please go ahead and release all the documents*". He also emailed Mr Grimaux at 17.27 hours as follows:

> "thanks for the call

[13] A reference to Adelin Trusculescu of Goetz.
[14] A reference to the four numbered items in the email he subsequently sent that day.

> this is to confirm our discussion
>
> 1. from the sale proceeds of Ticketpro i will receive euro 3.738 million
>
> 2. in the event of any excess cash / working capital this will be split 50/50 between
>
> 3. i will be responsible for paying the bills of andrew fielding and white and case
>
> 4. you will provide me an equity interest of 10% of your shareholding in intellitix
>
> your lawyer will now draft this into a formal agreement – but i would appreciate it if you could confirm that this is also your understanding.
>
> i have instructed Goetz to release the incumbency certificate and i will send by fedex tomorrow all my original documentation to cyprus"

88. At 1.04 hours on 14 September, Mr Pedriks emailed Mr Grimaux again chasing for his confirmation. Mr Grimaux replied: "*I hereby confirm that what you list below is our understanding. I will have Jiri [*Vrba*] drafting something which shall be in your hands as quickly as possible*".

89. I address the legal significance of these events in my conclusions below. However, I will set out my findings of fact as to what was said at this stage. I accept Mr Pedriks' account as to the content of the telephone discussions, including that Mr Grimaux told him during the second call that the proposal he had set out in the texts (and which was subsequently reflected in the email sent at 17.27 hours) was agreed. I reject the proposition that the parties discussed and agreed the need to enter into a formal written contract before any terms were binding upon each other. My reasons for doing so are as follows:

    i) In the preceding weeks Mr Pedriks had made it clear time and again that he would not sign the Incumbency Certificate without an agreement that he would receive the sums he regarded as due to him from the sale. Even allowing for the time pressure that existed by then and the general desirability of the sale proceeding, I consider it very unlikely that he would have indicated a willingness to sign the Certificate shortly after the 17.00 hours call, unless Mr Grimaux had informed him during their discussion that the four matters he subsequently set out in the email were agreed. Similarly, it is very unlikely that Mr Pedriks would have agreed to sign the Certificate if the only agreement the parties had reached at that stage was that Mr Vrba would draw up an agreement (as Mr Grimaux claims);

    ii) Mr Pedriks' account is consistent with the two text messages that I have quoted and with the post-call emails of 13 and 14 September 2016 passing between the parties. Mr Grimaux's account is not. Mr Pedriks' communications clearly show

that he wanted nothing less than confirmation of an agreed waterfall figure. By contrast, Mr Grimaux's 14 September 2016 email would be expected to dispute that any agreement, or even understanding, was arrived at in relation to the split of excess cash / working capital and in relation to his Intellitix shareholding if his second witness statement and his oral evidence on these matters were correct. Furthermore, his 14 September 2016 email does not suggest that he needed more time to consider things, as his witness statement asserts. When questioned by Mr Bradley, Mr Grimaux could not account for why he had not corrected Mr Pedriks' 13 September email, if it was inaccurate in these respects. At the time, far from correcting it, he confirmed his assent and did so in unusually formal language ("*I hereby confirm*");

iii) As my summary of the earlier communications indicates, Mr Pedriks had repeatedly raised the absence of a post-Mediation proposal from Mr Grimaux in relation to his Intellitix shares. When questioned by Mr Bradley, Mr Grimaux said he "*listened*" to Mr Pedriks' proposals in this respect during the telephone conversations, but that nothing was agreed. I consider it highly unlikely that Mr Pedriks would have been content to proceed on that basis; and again, the contemporaneous communications support his account;

iv) When Mr Bradley put to Mr Grimaux that he confirmed the aspects of the deal that were summarised in Mr Pedriks' preceding text messages during the second call, he said that he could not recall the content of the conversation. He gave a similar answer when it was put to him that during the call Mr Pedriks said that now they were agreed he would release the Incumbency Certificate. I do not find it credible that Mr Grimaux had no recollection of these matters, which, on any view, occurred at a very crucial stage of the events. Earlier in his evidence, he was able to give quite a detailed description of the morning call that took place when he was on his way to his Intellitix meeting. As regards the second call, he said he was clear that everything was to be put in writing. It is curious that he was able to recall that one single element. Having assessed his evidence carefully, I consider that Mr Grimaux's professed lack of recall was his way of trying to side-step awkward questions about the detail of what he contended was said and its potential inconsistency with the contemporaneous communications. There was also inconsistency between the lack of recall Mr Grimaux described in cross-examination and the assertions in paras 51 – 53 and 55 – 56 of his witness statement (which I have already referred to). Furthermore, there was inconsistency between Mr Grimaux's evidence that nothing was explicitly agreed on the telephone and his case that an 'in principle' agreement was arrived at;

v) Para 16.2, ADef contends that during the call the parties discussed "*the need to enter into a formal agreement before any terms were binding upon each other*". This assertion goes further than Mr Grimaux did in either his witness statements or in his oral evidence. For the reasons I have already discussed, it is very unlikely that Mr Pedriks would have agreed to sign the Incumbency Certificate if this had been the nature of the discussion;

vi) It is unlikely that the second 'phone call would have been as short as it was if Mr Grimaux had not indicated agreement to Mr Pedriks' proposals. Based on

his approach up to that point, Mr Pedriks would have tried to keep negotiating if agreement had not been forthcoming at that stage;

vii) My general impression of Mr Grimaux's credibility, which I referred to when addressing what was said at the Mediation (para 56 above). Additionally, and more specifically, as my findings in relation to the 2015 Representation show, it is not unknown for Mr Grimaux to deny his earlier oral statements; and

viii) The contents of the subsequent communications, which I will come on to detail, coupled with Mr Grimaux's inability to account for the apparent inconsistencies between their contents and his case in these proceedings. To the contrary, they are consistent with Mr Grimaux expressing agreement to Mr Pedriks' proposals during the second call: see in particular my references below to the following emails from Mr Grimaux: the two he sent on 25 September 2016; and those sent on 3 October 2016, 25 November 2016, and 13 February 2017.

90. In arriving at this conclusion, I have borne in mind the points made on behalf of Mr Grimaux, albeit the majority of them relate to whether a binding contract was made on 13 September (which I address in my conclusions, below), rather than to whether Mr Grimaux orally indicated his agreement to Mr Pedriks' revised proposals. The fact that no written agreement was drawn up on 13 September is explicable by the time pressure resulting from the need to sign the Incumbency Certificate that day and is not in itself an indicator that agreement was not verbally expressed at that stage. The thrust of Mr Lilly's challenge in cross-examination of Mr Pedriks on this issue was that he was overconfident in / had exaggerated the quality of his recollection of these events, rather than that he was lying. There were some issues with Mr Pedriks' memory, most notably in him forgetting that there were two telephone conversations with Mr Grimaux that day until he was part way through giving his evidence. Similarly, I have already noted that his pleadings wrongly asserted that Aquapath was part of the discussion at this stage. However, in light of the many factors that support Mr Pedriks' description of what occurred and/or undermine Mr Grimaux's position, these lapses in memory do not cause me to doubt that the matter of fundamental importance to him, namely agreement on what he was to be paid, was reached over the telephone.

The rest of 2016

91. On 19 September 2016 Mr Pedriks emailed Mr Grimaux saying that he "*expected after our call last week*" that Mr Vrba "*could have completed what should be a very simple one page document between us*". He asked when this would be done. Mr Grimaux replied to him the same day saying: "*Jiri is drafting. I expect something very soon. I am following this closely*." Mr Grimaux did not express surprise or disagreement with Mr Pedriks' stated expectation or seek clarification, as would be likely if he thought no agreement had yet been reached. In response to a further chasing email from Mr Pedriks sent on 21 September, Mr Grimaux replied on 22 September 2016: "*I spoke to Jiri and I should have something tomorrow*".

92. On 25 September 2016 Mr Grimaux emailed Mr Pedriks what he described as "*the first draft of the Document which we discussed about*". The document was headed "Common Approach Agreement" ("**CAA**"). Recital (D) referred to the parties' joint intention to sell the shares representing the registered capital in TL. Recital (F) said: "*Whereas the Parties are interested in agreeing on the rules of a common approach*

when negotiating with the Prospective Buyer and especially in agreeing on the way to divide the funds that they receive from the sale of the shares in the Company". The parties' terms of agreement were then set out. Under the heading "I. Method of Distribution of Funds" the following draft clauses were set out:

> "1. The Parties shall do their utmost to ensure that the negotiations with the Prospective Buyer are successful and lead to the Prospective Buyer purchasing all of the shares constituting 100% of the registered capital of the Company for at least EUR 6,000,000…For the purposes hereof, it is deemed that all financial amounts that the Parties or entities related to them receive as the purchase price for the Company shares or as payment for the transfer of other rights or asset values as the part of the transaction executed with the Prospective Buyer, reduced, naturally, by the amount that will be required to transfer the real property specified in point 5 of this Article 1 to Mr Serge Grimaux's ownership, constitute the financial consideration ("the **Financial Consideration**[15]")
>
> "2. The Parties have agreed that if they receive the Financial Consideration at least in the amount of EUR 6,000,000…(The "**Minimum Price**"), they shall divide it among themselves as follows…
>
> a) Mr Markus Pedriks shall receive the amount of EUR 3,738,000.00…from the Financial Consideration and 25%...of the amount by which the Financial Consideration exceeds the Minimum Price; and
>
> b) Mr Serge Grimaux shall receive the amount of EUR 2,262,000.00…from the Financial Consideration and 75%...of the amount by which the Financial Consideration exceeds the Minimum Price.
>
> 3. Should the Financial Consideration be higher or less than the Minimum Price, it shall be divided up between… [the Parties] in the same proportion as the fixed amounts to be received by the Parties under letters a) and b) of the previous paragraph
>
> 4. …
>
> 5. The Parties have expressly agreed that the transaction will be construed in such a way that the Prospective Buyer shall receive a 100% share in the Company and, along with such share, control overall of the companies that, along with the Company, constitute the Holding. Naturally, however, all real property owned by TICKETPRO, a.s….and by Ticketpro Polska Sp. Z o.o…shall be transferred into the exclusive ownership of Mr Serge Grimaux still prior to or during the transaction…"

[15] Bolded text was in the original document.

93. Clause 6 provided that the Parties had agreed that by the division of the Financial Consideration in the manner set out "*all deposits, loans, credit or other transfers of funds that the Parties, either directly or through the legal entities they control…shall be settled in full*". Mr Grimaux accepted that this wording contemplated that the Promissory Note would not take priority over the distribution of funds set out in the CAA. Draft clause 1 a) under Section II "Payment of Certain Expenditures" provided that Mr Pedriks would pay the costs of White & Case and Andrew Fielding from the funds that he received; and that Mr Grimaux would pay the other costs pertaining to the transaction. Section III "Blocked Account" provided that the Financial Consideration was to be remitted to a special deposit account maintained by Mr Vrba.

94. Mr Pedriks responded by email saying, "*Can you please have jiri read the below agreement again and then adjust his draft accordingly*." He said he had highlighted areas that were "*wrong or missing*". The "*below agreement*" was a reference to the email Mr Pedriks had sent on 13 September 2016 after the second call. He highlighted the items numbered 1, 2 and 4 therein. The same day Mr Grimaux replied asking if he had correctly understood that independently of the amount TL was sold for, the amount of €3,738 million was to be paid to Mr Pedriks ("**the first query**"); and that Mr Pedriks wanted to receive 50% of whatever amount exceeded €6 million and 50% of any working capital ("**the second query**"). I interpret this as Mr Grimaux trying to stall in raising these queries in relation to matters which he had already agreed; if I am wrong about that, it was, at best, a request for clarity. Mr Grimaux continued that: "*Regarding the Intellitix part of the equation, I do not want to have this written in a Ticketpro Settlement. I mentioned that you will be receiving 10% of what I would be receiving whenever there would be a sale of the company or a liquidity event, such as money generated eventually via an IPO (example I used during our phone conversation). I can draft a document stating this…but this cannot be made otherwise as I would then have to offer these shares first to the existing partners and so on. If my word and that document is not enough for you about this…then I do not know how to better proceed*".

95. Thus, in this email Mr Grimaux accepted he had told Mr Pedriks during their discussions that he would be receiving 10% of his interest in Intellitix. He also queried why his "*word*" to that effect was not sufficient. This was plainly a reference to the oral indication he had given on 13 September 2016; and this email contradicted his evidence in cross-examination that during the call he simply listened to Mr Pedriks' proposals regarding Intellitix without responding.

96. Mr Pedriks replied to Mr Grimaux's 25 September email by putting his own comments in capital letters alongside the various points raised. (Where I have quoted from his email, I have reproduced the text without those capitals.) In relation to the first query, Mr Pedriks' reply referred to a scenario where the initial sale consideration was 5.5 million Euros, rather than 6 million (a situation he explained was possible), without going on to address the implications for his payment. In relation to the second query, he said this had been discussed on the call and in the email: "*but just to be clear it is only 50% of any excess working capital / cash at closing / completion – this was in exchange for me going down to 3.738M which is my breakeven number*". In relation to Mr Grimaux's observation regarding Intellitix, Mr Pedriks said: "*this can be very easily done in a document that is a declaration of trust – it is one page and I have attached something to this effect for your perusal*". A draft Declaration of Trust document was attached in which Mr Grimaux's name had been written in and a Mr Graham Pollard's

name deleted. The text provided that Mr Grimaux held 10% of his shares in Intellitix Ltd as nominee for Mr Pedriks or Ansomar Holdings Ltd ("**Ansomar**"); and that he was to account to them for all dividends and profits which may be paid to him from time to time upon the shares.

97. On 3 October 2016 Mr Grimaux sent an amended version of the CAA to Mr Pedriks. The draft reflected the points that the latter had raised. A new draft clause 2c) was added to Section I, stating that if the Financial Consideration was less than €6,000,000 Mr Pedriks was still to receive the amount of €3,738,000. Further, clause 3 in the same Section was amended to provide that: "*Any excess of working capital at the closing of the transaction, if any, shall be divided equally between*" the parties. Mr Grimaux's email did not suggest that he regarded these amendments as controversial.

98. Mr Pedriks replied the next day saying, "*this looks ok in principle*". He provided his birth date to be added to the draft CAA and asked about Mr Grimaux's position on the Declaration of Trust, bserving that if he was ok with it "*then I guess we are there*".

99. On 25 November 2016 Mr Grimaux sent Mr Pedriks a lengthy email. From its contents, it appears they had spoken by telephone the previous day. By this stage it had been agreed with Live Nation that the initial sale consideration would be €5.5 million, rather than €6 million. Mr Grimaux said he had seen his "*share of the transaction melting like snow under the sun*" but he understood that if he did not sign the deal, he would end up being sued by Mr Pedriks for more than USD $4 million. He said the money which Mr Pedriks complained he had channelled for himself was used for Intellitix and "*this is one of the reasons why I told you, after we have made the $3.7M / $2.3M deal, that I was agreeing to provide you with my 10% of what I own in Intellitix*." He observed that if he sold, he would end up with "*basically no liquidity*" and that if he did not sell, he would get sued by Mr Pedriks. He went on to say that: "*The transaction was to generate €6M, then it became €5.5M, which means it became roughly €1.3M for me*" and he made reference to the expenses that would come out of his share. Thus, this email was also written on the basis that a "deal" had already been made with Mr Pedriks. Furthermore, the figures he referred to that he said left him with €1.3M less expenses, were those which Mr Pedriks says were agreed on 13 September 2016. Mr Pedriks replied on 25 November 2016 providing some reassurance as to what the net assets calculation was likely to be.

100. On 27 November 2016 Mr Pedriks transferred his 25% shareholding in TL to Ansomar, a company incorporated in Cyprus whose shares were wholly owned by him. It is agreed that on around 21 December 2016 TL transferred USD $300,000 in part payment of the outstanding sums under the MSA.

101. On 5 December 2016 Mr Pedriks emailed Mr Grimaux about the tax implications of the sale. He added: "*i then need to have our agreements finalized but until I see petr's* [Weidner] *response to the net asset question that is difficult*." Later the same day Mr Grimaux emailed Mr Pedriks asking where the cash (from the Live Nation deal) would "*sit*". He asked: "*are you telling me that the money will now be paid in an account that I do not control?*". During December various emails were sent discussing the new transaction structure and the plan for Aquapath (the intended special purpose vehicle, wholly owned by TL), which had been incorporated on 10 November 2016.

102. In early December 2016 Mr Vrba ceased acting for Mr Grimaux. The CAA was not signed, and the escrow account was not set up.

Events in 2017

103. By email sent on 10 January 2017, Mr Grimaux said that the initial completion payment had been confirmed by "Chris" (Edmonds, the Chairman of Live Nation) as €5.5 million. In an email sent to Mr Grimaux on 24 January 2017, Mr Pedriks referred to it looking: "*like we have 845,000 in the net asset calculation to split 50/50".* On 29 January 2017 Mr Pedriks emailed Mr Grimaux chasing various matters including *"agreement on 10% of intellitix [your shares]*". Mr Grimaux replied: "*Your document stating you will be rewarded for Intellitix will come when we close this transaction if we ever do*".

104. On 9 February 2017 the sale was concluded via a Share Purchase Agreement entered into between TL and Live Nation for the purchase of Aquapath. The share capital in Aquapath was sold to Live Nation for an initial consideration of €5,425,000 and a subsequent net assets adjustment in August 2017 of €949,000 (making an overall total purchase price of €6,374,000).

105. On 13 February 2017 Mr Grimaux paid €470,000 to Mr Pedriks and TL paid him €1,455,000. This represented monies due under Clauses 3 – 5 of the MSA. His email also referred to Mr Pedriks making the payments to Mr Fielding and to White & Case. Mr Pedriks replied the same day, saying "*I think you forgot about a few things".* He said that in his waterfalls he had been seeking about €4.2 million but *"we had a discussion late last year and I agreed after some back and forth*" to accept a figure of €3.738 million, plus a 50/50 split of the net assets adjustment. He referred to this being documented by Jiri Vrba. He said he was expecting immediate payment of €3,457,000, plus 50% of the net asset calculation when completed. He said that after receipt of this sum he would pay Andrew Fielding and White & Case. In relation to the latter he said, "*W & C was estimated at around 60K – if it ends up being more than this – then we should have another discussion*".

106. Mr Grimaux replied by email the same day. He said: "*When €500L*[16] *was shaved from the original €6M, I mentioned to you that the terms of our agreement would change whereby, you would get €3M, I would get €2M, the balance of €500K should be used to pay*" for the fees generated by the transaction and "*any money coming from the Net Asset would be used to bring you to the amount you wished to receive…*". The contents of this email therefore contained further recognition that an agreement had been reached to pay Mr Pedriks additional monies after the sale, rather than just the MSA sums that had now been transferred to him, albeit Mr Grimaux asserted that the agreement had been changed subsequently when the initial sale consideration was reduced. Mr Pedriks disputed the latter proposition. I note that a revised agreement to that effect is not reflected in the drafts of the CAA or in the contemporaneous emails. In an email sent to Mr Grimaux on 1 March 2017 Mr Pedriks said: "*You have taken advantage – you are – solely in control of the money – we agreed together some time ago that I would be paid 3.728m you then unilaterally decided I would get 3m and you would get 2m and now I have not even received the 3 and I am the only one at risk…*". (There was a typographical error in this email in that it referred to 3.728 million, rather than 3.738

[16] It is agreed that "L" was a typographical error for "K".

million; an error which was then replicated in some of the communications that followed.)

107. On 2 March 2017 Mr Grimaux replied by way of a lengthy text message, using text he had cut and pasted from an email. He said: "*The figure of 3,728 was agreed upon when the selling price was €6M. You and Adelin* [Trusculescu] *forced me to accept a discount of €500*K…". He continued that in relation to Intellitix "*I am ready to provide you with 10% of my ownership of the company whenever it would be sold*". Mr Grimaux said that he should not be the only one left in a risky position, but he had asked a Czech lawyer to create a settlement agreement "*so you are not left with less then* [sic] *what was agreed*". Again, this message recognised the existence of an earlier agreement. In his texted reply sent on 3 March 2017, Mr Pedriks said that they "*already had an agreement – which was already discounted twice and now again at 3.728m + 50% of the net assets*". He continued that: "*the only thing that should change from this is the loan of $300k and 25% of the 575 reduction which means I should have received 3.303m already instead I received 2.205m*". The reference to "*the 575 reduction*" was to an additional reduction in the initial consideration which Live Nation had negotiated. Mr Pedriks also asserted that they already had an agreement in place in his email to Mr Grimaux of 15 March 2017. He then sent a further email on 17 March 2017 complaining that he had received no response and "*it seems clear that you have no intention of honouring what we have already agreed to – as you can't even bother to respond*".

108. On 17 March 2017, Mr Grimaux's lawyer, Michal Konuch, sent Mr Pedriks a spreadsheet containing a proposed settlement, based on two potential scenarios in respect of the net assets adjustment, one involving no payment from Live Nation and the other a payment of €1.1 million. In the latter instance the proposed figure that Mr Pedriks would receive additional to payments already made was €1,411,555. The figures were calculated on the basis that Mr Pedriks was due a payment of €3.728 million, rather than on his entitlement being limited to the MSA figures.

109. On 23 March 2017 Mr Pedriks emailed Mr Grimaux saying he was really unhappy with how the money had been distributed. It is agreed he did not receive any further sums. Mr Pedriks accepts that he did not pay fees due to Andrew Fielding or to White & Case.

110. As set out at para 4.2(h) ADef, the payments which Mr Grimaux received from the Live Nation sale "*in partial discharge of the amounts outstanding under the Promissory Note (and/or further lending made on the same terms)*" were: €1,500,000 from TL on 10 February 2017 (€200,000 of which Mr Grimaux transferred back to TL on 23 March 2017); €470,000 and €52,101 on 13 February 2017; €57,726.39 on 31 August 2017; and €1,000,000 on 11 September 2017.

111. On 10 April 2017 TL changed its name to Azurelink Limited. In May 2017 Azurelink made the payment to HFW which Mr Pedriks claims was in breach of the fiduciary duties owed to him by Mr Grimaux.

The applicable legal principles

112. The relevant legal principles are not in dispute. I will identify them.

Construction of contracts

113. The parties are agreed that the applicable principles relating to the construction of contracts were set out by Lord Hodge JSC in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, after reviewing the Supreme Court's earlier decisions in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 and *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 ("***Arnold v Britton***"). At paras 10 – 11 Lord Hodge JSC said:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381, 1383H-1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen*) [1976] 1 WLR 989, 997. Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations…
>
> …Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause…; and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold* case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms."

114. At para 13 Lord Hodge continued:

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by

> textual analysis, for example, because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance…"

115. In *FCA v Arch Insurance (UK) Ltd & Ors* [2020] EWHC 2448 (Comm) at para 62, Flaux LJ and Butcher J summarised the construction exercise as follows: "*the court must ascertain what a reasonable person, that is, a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the contracting parties to have meant by the language used…This means disregarding evidence about the subjective intentions of the parties*…". At para 64 they continued: "*as Lord Neuberger said in Arnold v Brittan at [19]–[20], commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an un-wise party, or to penalise an astute party. Where the parties have used unambiguous language, the court should apply it: Rainy Sky at [23]*". In *Arnold* v *Britton* Lord Neuberger encapsulated the latter point at para 20 when he said: "*The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed*".

Implication of terms

116. The principles relevant to the implication of contractual terms were identified by the Supreme Court in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742 ("***BNP Paribas***"), in particular by Lord Neuberger PSC at paras 18 – 19 and 21. In the present case Mr Pedriks relies upon the species of implied term described by Lord Neuberger at para 15 as: "*a term which is implied into a particular contract, in the light of the express terms, the commercial common sense, and the facts known to both parties at the time the contract was made*".

117. Giving the judgment of the Privy Council in *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2; [2017] ICR 531 at para 7, Lord Hughes summarised the requirements for this kind of implied term identified in *BNP Paribas* as follows**:**

> "It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable. Or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, *ex hypothesi*, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and /or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term

> is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

118. In para 21 of his judgment in *BNP Paribas*, Lord Neuberger explained that the implication of a term was not dependent on proof of the parties' actual intentions when negotiating the contract: *"If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting*". He also emphasised that "*a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term*." As regards the necessity test, Lord Neuberger said that absolute necessity was not required and that a more helpful way of putting it was that "*a term can only be implied if, without the term, the contract would lack commercial or practical coherence*". At para 28 Lord Neuberger stressed that it was only after the process of construing the express words used was complete, that the issue of an implied term fell to be considered.

The existence of a binding agreement

119. It is trite law that the basic requirements of a binding contract are that: (i) the parties reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration and (iv) is sufficiently certain and complete to be enforceable: for example, *Blue v Ashley* [2017] EWHC 1928 (Comm) at para 49 ("***Blue v Ashley***").

120. The principles governing whether or not a binding contract was concluded were restated by Lord Clarke JSC in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14; [2010] 1 WLR 753 ("***RTS Flexible Systems***") at para 45:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or which the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement."

121. In the context of an oral contract, evidence of the parties' conduct subsequent to its alleged formation is admissible. In *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37, [2017] 4 WLR 163, Hamblen LJ said at para 28: "*It is well established that when deciding whether a contract has been made during the course of*

negotiations the court will look at the whole course of those negotiations". See also Butcher J in *Rotam Agrochemical Company Limited v Gat Microencapsulation GMBH* [2018] EWHC 2765 (Comm) ("***Rotam Agrochemical***") at para 141. Additionally, evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding: *Blue v Ashley* at para 64.

122. The situation where further terms are to be agreed or further formalities undertaken was addressed in *RTS Flexible Systems* at para 48, where Lord Clarke cited with approval Lloyd LJ's summary of the applicable principles in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 610 ("***Pagnan***"), including:

> "(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case. (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed…(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still be agreed or some further formality to be fulfilled…(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty. (6) It is sometimes said that the parties must agree on the essential terms and it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the court regards as important as opposed to a term which the court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the judge [at p 611] 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."

123. It is clear that the law does not recognise a contract to enter into a contract: *Von-Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284 at 289. In *Walford v Miles* [1992] 2 AC 128 HL at 138C & 138G Lord Ackner explained that: "*The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because*

it lacks the necessary certainty…A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason".

124. The fact that the parties contemplate the execution of a formal document recording their agreement, does not in itself preclude a binding contract from arising until that written document is executed. It is a question of whether, objectively judged, the parties intended to be bound immediately or have the execution of the written document as a condition precedent to the contract. As Males J (as he then was) explained at para 5 in *In Air Studios (Lyndhurst) Limited T/A Air Entertainment Group v Lombard North Central Plc* [2012] EWHC 3162 (QB):

> "In deciding whether the parties have reached agreement, the whole course of the parties' negotiations must be considered and an objective test must be applied…Once the parties have to all outward appearances agreed in the same terms on the same subject matter, usually by a process of offer and acceptance, a contract will have been formed. The subjective reservations of one party do not prevent the formation of a binding contract. Further, it is perfectly possible for the parties to conclude a binding contract, even though it is understood between them that a formal document recording or even adding to the terms agreed will need to be executed subsequently. Whether they do intend to be bound in such circumstances, or only as and when the formal document is executed, depends on an objective appraisal of their words and conduct."

125. Nonetheless, the fact that they wanted a written document may have "*considerable force*" as a matter of evidence when ascertaining the intention of the parties, as Pain J observed in *Donwin Productions Limited v Emi Films Limited* (*Times*, March 9, 1984), cited by Butcher J in *Rotam Agrochemical* at para 143.

126. As is apparent from the passage I have cited from Lloyd LJ's judgment in *Pagnan*, even if the parties intended to enter into legal relations, the terms that were objectively agreed must be sufficiently certain. Rix LJ's summary of the applicable principles in *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] 2 All ER (Comm) at para 69 included the following:

> "(iii) Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence, again on the ground of uncertainty. (iv) However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly whether the parties have acted in the belief that they had a binding contract, the courts are willing to imply terms, where that is possible, to enable the contract to be carried out. (v) Where a contract has once come into existence, even the expression 'to be agreed' in relation to future executory obligations is not necessarily fatal to its continued existence. (vi) Particularly in the case of contracts for future performance over

> a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain…(vii) This is particular the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long-term relationship, or has had to make an investment premised on that agreement."

127. Earlier at para 57, Rix LJ cited Lord Tomlin's observation in *May and Butcher v The King* [1934] 2 KB 17: "*Business men often record important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects…*".

Fiduciary relationships

128. Fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another. As Leggatt LJ (as he then was) said at para 159 in *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm): "*The essential idea is that a person in such a position is not permitted to use their position for their own private advantage but is required to act unselfishly in what they perceive to be the best interests of their principal*."

129. The parties are agreed that absent special circumstances a director does not owe fiduciary duties to a company's shareholders, as opposed to owing fiduciary duties to the company. The special circumstances in which directors may owe fiduciary duties to shareholders were discussed by Mummery LJ in *Peskin v Anderson* [2001] 1 BCLC 372 at paras 33 – 34:

> "The fiduciary duties owed to the company arise from the legal relationship between the directors and the company directed and controlled by them. The fiduciary duties owed to the shareholders do not arise from that legal relationship. They are dependent on establishing a special factual relationship between the directors and the shareholders in the particular case. Events may take place which bring the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations, such as a duty of disclosure of material facts to shareholders, or an obligation to use confidential information and valuable commercial and financial opportunities, which have been acquired by the directors in that office, for the benefit of the shareholders, and not to prefer and promote their own interests at the expense of the shareholders.
>
> These duties may arise in special circumstances which replicate the salient features of well-established categories of fiduciary relationships. Fiduciary relationships, such as agency, involve duties of trust, confidence and loyalty. Those duties are, in

> general, attracted by and attached to a person who undertakes, or who, depending on all the circumstances, is treated as having assumed, responsibility to act on behalf of, or for the benefit of, another person. That other person may have entrusted or, depending on all the circumstances, may be treated as having entrusted, the care of his property, affairs, transactions or interests to him. There are, for example, instances of the directors of a company making direct approaches to, and dealing with, the shareholders in relation to a specific transaction and holding themselves out as agents for them in connection with the acquisition or disposal of shares; or making material representations to them; or failing to make material disclosure to them of insider information in the context of negotiations for a take-over of the company's business; or supplying to them specific information and advice on which they have relied. These events are capable of constituting special circumstances and of generating fiduciary obligations, especially, in those cases in which the directors, for their own benefit, seek to use their position and special inside knowledge acquired by them to take improper or unfair advantage of the shareholders."

130. In *Sharp v Blank* [2017] B.C.C. 187 at para 10 Nugee J reviewed the limited examples cited to him of cases where directors had been held to owe fiduciary duties to shareholders. He then made the following observations (paras 12 – 13):

> "…It seems to me to follow that this special relationship must be something over and above the usual relationship that any director of a company has with its shareholders. It is not enough that the director, as a director, has more knowledge of the company's affairs than the shareholders have: since they direct and control the company's affairs this will almost always be the case. Nor is it enough that the actions of the directors will have the potential to affect the shareholders – again this will always, or almost always, be the case. On the decided cases the sort of relationship that has given rise to a fiduciary duty has been where there has been some personal relationship or particular dealing or transaction between them.
>
> I do not find this surprising. A fiduciary, as explained by Millet LJ in his classic judgment in *Bristol & West Building Society v Mothew* [1998] Ch. 1 at 18A-F, is someone who has undertaken to act for or on behalf of another in circumstances which give rise to a relationship of trust and confidence. That is why the distinguishing obligation of a fiduciary is the obligation of loyalty: someone who has agreed to act in the interests of another has to put the interests of that other first. But the relationship between directors and shareholders is not in general like that…If he is to be held to owe fiduciary duties to the individual shareholders, there must be something unusual in the nature of the relationship which gives rise to it. That no doubt explains

> why the cases where such a duty has been held to exist mostly concern companies which are small and closely held, where there is often a family or other personal relationship between the parties, and where, in almost all cases, there is a particular transaction involved in which directors are dealing with the shareholders, from which the directors often stand to benefit personally. The imposition of a fiduciary duty in such circumstances reflects the fact that directors who have a close family or other personal relationship with the shareholders, and are entering into transactions with them, may be tempted to exploit that relationship to take unfair advantage of the shareholders for their own benefit."

131. Earlier in *In re Goldcorp Exchange Ltd (In receivership)* [1995] 1 AC 74 PC at 98E-F, Lord Mustill had emphasised that the essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself; and that reliance by one party on the other in the context of a commercial relationship was insufficient; "…*high expectations do not necessarily lead to equitable remedies*".

132. In *DeSena & Ors v Joseph Notaro & Ors* [2020] EWHC 1031 (Ch) ("***DeSena***"), HHJ Paul Matthews (sitting as a Judge of the High Court) rejected a claim that a director and shareholder owed fiduciary duties to a fellow director and shareholder during the negotiation of the sale of her shares in the company. He noted that in almost all the cases where a special relationship had been found to exist the claimant was not a fellow director, but simply a fellow shareholder and there was a serious imbalance in power and access to information, whereas in the instant case both parties had the same access to information and, as directors, the same authority in relation to the conduct of the company's business, save that the first defendant was the managing director (para 235). He then observed at para 236 that in any event the first claimant's claim suffered from "*the problem that she was (and she knew she was) in the position of a businesswoman negotiating against another businessman on the terms on which she would surrender her shares in the company. Accordingly, their interests were intrinsically opposed. She cannot possibly have believed that the person with whom she was negotiating on behalf of the company owed a fiduciary duty to her to put her interests first and the company's (or his) interests second. That is just fantasy*."

Estoppel by representation

133. The parties are agreed that the principles relating to estoppel by representation are set out in Spencer Bower: "*Reliance-based Estoppel*" 5th ed at para 1.18:

> "Under the doctrine of estoppel by representation of fact: where one person ('the representor') has made a representation of fact to another person ('the representee') in words or by conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive) and with the result of inducing the representee on the face of such representation to alter his position to his relative detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making any averment substantially at variance

> with his former representation, if the representee objects thereto, save to the extent that the court mitigates that result to avoid injustice, and unless the estoppel would unjustifiably subvert the policy of a rule of law. The following elements must therefore be established in order to constitute a valid estoppel by representation of fact:
>
> (1) the alleged representation of the party sought to be estopped was a representation of fact;
>
> (2) the precise representation relied upon was in fact made;
>
> (3) the case which the party is to be estopped from making contradicts in substance his original representation;
>
> (4) the representation was made with the intention (actual or as reasonably understood) and the result of inducing the estoppel raiser to alter his position on the faith thereof to his detriment;
>
> (5) the representation was made by the party to be estopped or by some person for whose representations he is deemed in law to be responsible, and was made to the estoppel raiser, or to some person in right of whom he claims."

Conclusions

Construction of the MSA

134. As I have identified when setting out the parties' pleaded cases, there is a dispute as to whether Clauses 1 and 2:

i) Included an obligation to provide information on TL's financial activities after 2014, up until the sale of the business;

ii) Required that the information to be provided included "*an account into what were the sums available for distribution by way of dividend*";

iii) Placed Mr Grimaux under an obligation to ensure that Mr Pedriks was paid all sums that he should be paid by way of dividend; and/or

iv) Placed Mr Grimaux under a duty to cause or procure TL to decide to pay a dividend to its shareholders (including Mr Pedriks) in the maximum sum available for lawful distribution.

135. Mr Pedriks' case is that these obligations arose as a matter of construction from the content and context of the MSA. In relation to the first alleged duty, he places particular reliance on the reference in Clause 6 to the understanding that TL was to be prepared for sale and to the stated objectives in his Position Paper of ensuring he received his rightful share of dividends. He submits that the MSA was evidently drafted with the intention of ensuring that he would have visibility as to the state of TL's finances up to the date of sale. As regards Clause 2, Mr Pedriks emphasises that to all intents and

purposes Mr Grimaux had full control of TL, such that it was within his gift to ensure the outcome contemplated by the express wording of the clause, as the parties knew to be the case.

136. As I have explained, I must consider what a reasonable person, having the background knowledge that was reasonably available to the parties at the time, would have understood the parties to have meant by the language used. If the language that was employed is unambiguous, it is not for the Court to re-write the agreement, to improve it or to protect an unwise party.

137. In my judgment, the language used in Clauses 1 and 2, read in the context of the whole of the MSA and the parties' state of knowledge at the time, is clear and unambiguous. Clause 1 specifies particular financial information relating to a particular time period (2014) that Mr Grimaux is to provide. There is no reason why the wording could not have included additional information or a time period that explicitly extended up to the date of TL's sale, if that was the parties' agreement. However, it did not. In his evidence, Mr Pedriks accepted that extending the obligation to subsequent years was not discussed at the Mediation, despite the fact that it was appreciated at that stage that the sale of TL might take longer than mid-2015 to accomplish. In reality, Mr Pedriks' submissions are an invitation to the Court to re-write what would be an improved agreement (from his perspective).

138. Clause 2 reflected the parties' agreement that there was a time-limited obligation on TL to pay the dividend that the company determined to be the maximum available for distribution in relation to that period. There is no explicit obligation placed on Mr Grimaux in this regard, let alone an obligation to ensure payment of an objectively determined maximum sum, rather than the sum assessed by TL's board of directors as available, or an obligation to ensure payment of later dividends. I have already noted Mr Grimaux's acknowledgement in cross-examination that he had day-to-day charge of TL and control of the operating subsidiaries (para 44 above). Whilst this goes some way to negate the contention that the alleged obligation should be rejected as impossible to perform in practice, the fact remains that the parties were aware of this context, in terms of Mr Grimaux's control, when they were negotiating. In my judgment it does not provide a sufficient basis to re-write and substantially extend the clear language that was used.

139. In the alternative, Mr Pedriks relies on the same proposition as constituting an implied term, which is pleaded at para 13C, APOC as Mr Grimaux was "*obliged to cause or to procure Ticketpro to declare and pay a dividend to its shareholders including the Claimant in the maximum sum available for lawful distribution to its shareholders*". Mr Bradley submits that the implied term was necessary for the agreement to work; TL was not a party to the MSA and given his control over it, nothing would be done by TL that Mr Grimaux had not directed.

140. As I noted when setting out the applicable legal principles, a term is not to be implied simply because the Court considers it to be fair or even because Mr Pedriks would have agreed this term was desirable if it had been pointed out to him. The question is whether it is necessary in the sense that the contact would lack commercial or practical coherence without it. I do not consider that this high threshold is met. For the decision as to dividends to rest on the board (of which Mr Pedriks was a member) determining the sum available for distribution in the usual way, does not render the MSA

unworkable or incoherent. Furthermore, in requiring Mr Grimaux to ensure payment of an objectively determined maximum sum, rather than the sum assessed by TL's board of directors as available, the alleged implied term would be inconsistent with Clause 2 of the parties' express agreement and thus, by definition, it cannot meet the test for implication, as Lord Hughes explained in *Ali v Petroleum Company of Trinidad and Tobago*, in the passage I have set out earlier.

Breach of the MSA

Clause 1

141. It is logical to consider the alleged breaches of the MSA next, beginning with Clause 1. Much of the alleged breach is contingent upon the Court adopting the expanded version of the clause, a construction which I have rejected. As regards the second part of the clause, Mr Pedriks did not dispute that the statutory accounts were provided as soon as they became available. Mr Pedriks did contend that the material provided by the first week of February 2015 was insufficient to meet the express requirement to provide a "*summary*" of TL's 2014 financial activities. I do not accept this. Firstly, the obligation on Mr Grimaux was not an absolute one; it was a duty to "*endeavour*" to provide the specified material. I have set out the detail of what was provided when addressing my findings of fact (para 60 above). Mr Pedriks received information regarding the three main operating subsidiaries on 27 January and 5 February 2015. Given that TL was the holding company, providing information about its key operating companies amounted to giving the requisite summary. Mr Pedriks complained in his evidence that he did not receive consolidated information, but Clause 1 did not require that. Furthermore, Mr Pedriks did receive the consolidated figures on 16 May 2015, once the information was available. Accordingly, I conclude that there was no breach of Clause 1.

Clause 2

142. I also conclude that there was no breach of Clause 2. As I have already addressed when setting out the facts, the board of directors, including Mr Pedriks, unanimously resolved not to pay a dividend in circumstances where the 2014 accounts showed €2,778,400 in accumulated losses arising from the impairment and that decision was ratified by the shareholders (para 59 above). The wording of Clause 2 was wide enough to permit a situation where TL determined that there were no distributable profits and thus no dividend was payable. Mr Pedriks did not challenge the impairment at the time or in these proceedings. Mr Pedriks' case on this issue rested on the expanded construction of Clause 2 / the implied term that I have rejected.

Para 13D APOC implied term

143. I turn to the alleged breach of the admitted implied term at para 13D, APOC that Mr Grimaux would not act in a manner that would: (1) prevent TL from declaring and paying a dividend in the maximum sum available for lawful distribution; (2) cause or procure TL to pay a lower dividend; and/or (3) cause or procure TL to act in a way that the sum available for distribution was artificially reduced. It emerged during closing submissions that there was an issue between the parties as to the scope of Mr Pedriks' pleaded case in this regard. During cross-examination, Mr Bradley had explored various allegations of financial impropriety with Mr Grimaux, the central thrust of which was

that he had misappropriated money from the operating companies and in consequence had prevented the holding company from having sufficient money to pay a dividend in 2015 or thereafter. I have already indicated the extent to which I have taken this part of the cross-examination into account when assessing Mr Grimaux's credibility (para 56 iii) above). As I understand it, Mr Lilly did not take issue with the material being considered in that way, but he did object to any expansion of the pleaded case on breach of contract, no application to amend having been made in relation to this. Mr Bradley, for his part, contended that the matters he had raised in his questioning were sufficiently pleaded at para 26.2, APOC.

144. The first part of Para 26.2, APOC concerned an alleged breach of the expanded version of clause 2 / the para 13C implied term (the terms that I have rejected). Although not made as explicit as it might be, given only Clause 2 is referenced directly, the remainder of para 26.2 is capable of being read as including an alleged breach of the implied term at para 13D, in that Mr Grimaux "*paid notional dividends and/or other benefits via subsidiary companies of Ticketpro and other associated companies to himself, or to entities he controlled*". I am prepared to accept this, albeit it appears that when para 13D was added to the pleading by amendment, no corresponding breach was explicitly referenced in the later part of the document, whether by oversight or otherwise. In any event, in so far as the wording of para 26.2 is wide enough to include a breach of the para 13D term, it is entirely unparticularised. In my judgment it has to be read in the context of para 24, APOC as the only part of the pleading that contains specific allegations of this nature. As I have already set out, para 24, APOC alleged that Mr Grimaux had withdrawn large sums of money primarily through TL's subsidiaries and had received improper financial benefits, without declaring a dividend for the benefit of the shareholders. Four instances were cited, but only two are now pursued in the proceedings.

145. In the circumstances, I am in no doubt that Mr Pedriks' case at this stage must be treated as confined to the two live examples in para 24, APOC. The process of amending and re-amending the Particulars of Claim and of the parties agreeing the list of Preliminary Issues (with cross-referencing to the material parts of the pleadings), afforded ample opportunity for the Claimant to set out his case, if in fact he relied upon other instances of misappropriation as constituting a breach of express or implied terms of the MSA. I accept that it would unfairly prejudice Mr Grimaux if Mr Pedriks were permitted to rely upon an expanded, unparticularised case at this late juncture, in circumstances where Mr Grimaux may well have wanted to adduce specific evidence and arguments in response if such matters had been explicitly pleaded and pursued. In his contemporaneous communications Mr Pedriks did make broader allegations of financial misappropriation by Mr Grimaux but these are not reflected in the pleaded breaches of the MSA in the APOC.

146. For the avoidance of doubt, it follows that I do not propose to determine the merits of allegations ventilated in cross-examination concerning Mr Grimaux's "Department 4" expenditure or that he misapplied Ticketpro funds in the purchase of the Prague apartments, in relation to renovation costs and in the payment of the mortgages. In addition to the absence of such matters from paras 24 and 26, APOC, the position with the Prague apartments was pleaded at para 10, APOC as part of the pre-Mediation context and I have already summarised the response in the ADef relying upon Clauses 8 and 12 (para 18 above). No breach of Clause 8 has been alleged in these proceedings

and, on the face of it, the MSA was in full and final settlement of any causes of action which pre-dated the Mediation and related to matters that were raised at that stage.

147. I therefore confine my consideration to the two aspects in para 24, APOC that are also pursued as breaches of Mr Grimaux's alleged fiduciary duties, namely: that LPU invoiced Ticektpro companies for services that it did not provide, including the alleged provision of an out-of-hours help desk service in Montreal; and that Ticketpro funds were used to pay Mr Grimaux's legal costs to HFW for the 2017 mediation.

148. In relation to the former, Mr Grimaux's case is that LPU provided advisory services to the Ticketpro businesses to assist them entering into new marketplaces and territories and exploiting their ticketing software in Asia; and that part of LPU's role was the provision of helpdesk services to maintain this software. On any view, the circumstances relating to LPU were somewhat unusual. As Mr Grimaux described in his evidence, for a significant period of time, rather than payment being made to LPU in response to its invoices, the invoiced sums were offset against amounts that Ticketpro companies had earlier paid to LPU, which the latter had then used in Intellitix.

149. Mr Pedriks accepted in his evidence that it was "*perfectly normal for LPU to enter into an agreement with Mr Grimaux for the provision of assistance in negotiating deals in Malaysia or Hungary or in the Baltic Republic, for example, for the use of the ticket software*". In other words, he accepted that some of the services that LPU invoiced for had genuinely been provided. Nonetheless, he maintained that invoices relating to the purported provision of helpdesk services were bogus. When asked by Mr Lilly to identify the basis for this contention he said that LPU had no employees; that Mr Grimaux himself did not have the IT know-how to provide such services; and the LPU contract that purported to relate to these services contained irrelevant text cut and pasted from an agreement about the licensing of ticket software into new marketplaces. Whilst I understand why suspicions arose, this is a relatively slender evidential foundation and clearly an insufficient one for the Court to make any finding that the payments were for a sham or improper purpose. Mr Grimaux said in his evidence that the helpdesk was organised by LPU but outsourced to operators, so it did not require employees. Ms Kunrátková gave evidence that the out of hours service was provided via a call centre in Quebec; she acknowledged that she did not have personal experience of using it, but that would not be unexpected in her position, and I have no reason to doubt the credibility of her evidence.

150. The amount paid to HFW was relatively small (£2,000), so that even if it was an improper payment, given the scale of accumulated losses shown in TL's 2014 and 2015 accounts, it is impossible to see how it would have materially impacted upon the holding company's decisions not to pay dividends in relation to those years. In any event I do not find that impropriety has been established. The sum was paid for advice provided by HFW. The advice itself was privileged and therefore not disclosed, but after discussions between counsel, it was agreed that the questions upon which the advice was sought (as opposed to the answers), would be shown to the Claimant and to the Court, without being formally disclosed or privilege waived. It will suffice to indicate that the questions asked were sufficiently related to TL's position that the allegation that these were services provided in respect of Mr Grimaux personally is not established.

Clause 5

151. Mr Pedriks alleges a breach of Clause 5 of the MSA in that he did not receive the repayments of aggregate loan capital and interest in the contemplated monthly instalments. He accepts that he eventually received all the sums owed by way of the monies paid to him in February 2017. I have already described Mr Pedriks' repeated emails to Mr Grimaux chasing payment of the instalments, referring to the financial difficulties he was facing and expressing some understandable frustration. Nonetheless, as a matter of construction, Clause 5 referred to making monthly payments "*if the Company can sustain it*". Mr Pedriks has not established that TL could in fact sustain such payments. I have already addressed the holding company's financial position in the 2014 accounts (para 59 above). In the year end 2015 accounts that were also approved by the board of directors, accumulated losses of €2,801,234 were shown. Mr Pedriks was ultimately paid out of the proceeds of the sale to Live Nation. Accordingly, the MSA was not breached in this respect.

152. Mr Bradley submitted that Mr Grimaux admitted that he was in breach of Clause 5 during the course of his evidence. I do not accept that his evidence went that far. To address this point it is necessary to set out the relevant exchanges.

153. In cross-examination it was suggested to Mr Grimaux that given his control over the Ticketpro companies, if payment under Clause 5 was going to happen: "*you had to procure it, didn't you*?". Mr Grimaux asked for clarification of the question and Mr Bradley said: "*how you and Mr Pedriks understood the obligation to operate: namely, you would have to make it happen; yes?*". Mr Grimaux replied: "*Well, yes because the mediation agreement was between me personally and him*." He then went on to say that monthly payments could not be made "*because there was not enough money*". Shortly after this he was asked about his 1 April 2015 email (the "*I understand you are getting very tired and I would too*" communication). Mr Grimaux said at that stage that some of the MSA obligations had not been fulfilled. Mr Bradley then put: "*I think you're accepting that you had not complied with the obligation to make payment of 20,000 euros a month, correct*?" and Mr Grimaux answered "*Yes*". In re-examination Mr Lilly reminded Mr Grimaux of this exchange and asked him to look at para 37 of his second statement. Therein he had said: "*I would never have agreed to an absolute obligation to make payments. Instead whether or not repayments would happen was a factor of whether it* [TL] *had the available resources…As it happens, and as I predicted, TL did not have the spare capital to make these monthly repayments*". Mr Grimaux then said: "*My obligation was to force or enable* [TL] *to make these payments. As I can see here, on April 1 no payments had yet been made by* [TL]. *Doesn't mean that I didn't fulfil my obligations*". He then added that he stood by what he had said at para 37 of his statement.

154. Accordingly, Mr Grimaux did accept that in practice he would have to make it happen in order for payments to be made and that no payments had been made as at 1 April 2015. However, he did not concede that Clause 5 was breached, indeed in both his statement and his oral evidence he relied on the proposition that TL had insufficient monies to make the payments.

Clause 10

155. I also conclude that there was no breach of Clause 10. I do not accept Mr Lilly's submission that it imposed no obligation on Mr Grimaux because it was simply an agreement to negotiate further. However, at most, it imposed an obligation on Mr

Grimaux to find a formula to recognise Mr Pedriks' contribution to Intellitix. It did not require that formula to take any particular form or for it to be one that was acceptable to Mr Pedriks. Moreover, there was no duty on Mr Grimaux to do this by any particular time; the reference to "*four months of signing the Agreement*" was plainly an aspiration, rather than a binding deadline. The difficulties with the Claimant's case on this point are also apparent from the pleaded breach at para 26.4, APOC (para 33 iv) above), which acknowledges agreement of a formula in respect of his interest in Intellitix (in the 2016 Agreement). The real complaint is that the 2016 Agreement was breached, which I consider below. Moreover, I have already found that on 13 September 2016 Mr Grimaux said he agreed to the proposition that Mr Pedriks would be provided with an equity interest of 10% of his shareholding in Intellitix (para 89 above). Accordingly, a formula was found, and Clause 10 required no more than that.

Fiduciary duties as a result of the MSA

156. I do not consider that Mr Grimaux became subject to fiduciary duties towards Mr Pedriks as a result of the MSA. There was no special relationship of the kind identified in the caselaw that I set out earlier. It is clear from those authorities that such a relationship will not arise simply because Mr Grimaux owed fiduciary duties to TL, or from the fact he had more knowledge of the company's affairs than Mr Pedriks or because his actions had the potential to affect the shareholders. Indeed, as in *DeSena*, the contention is weakened by the fact that Mr Pedriks was not only a shareholder, but also a fellow director.

157. Where fiduciary obligations do not arise as a matter of law from the nature of the situation, the parties agree that it is necessary for there to be relationship of trust and confidence between the parties and an assumption of responsibility by the alleged fiduciary to act in the other's interests. This was not the position between Mr Pedriks and Mr Grimaux in January 2015. Irrespective of where the rights and the wrongs of their dispute lay, there was considerable rancour and mistrust between the two men, as shown, for example, by the contents of Mr Pedriks' Position Paper, where he complained about Mr Grimaux's aversion to documentation; the long period for which monies had been owing to him; and that dividends had not been paid because Mr Grimaux had channelled money out of TL. Furthermore, this friction was long-standing, as I will illustrate by reference to a few examples. In his second witness statement, Mr Pedriks said he persuaded Mr Grimaux to sign the document in 2011 acknowledging the money owed to him and his interest in TL because "*I was so fed up with Mr Grimaux avoiding dealing*" with these matters. In 2014 there were various emails from Mr Pedriks expressing frustration with Mr Grimaux and his failure to address his concerns, for example those sent on 21 May and 2 October. In his evidence, Mr Pedriks said of his relationship with Mr Grimaux in 2014 "*it felt like I was dealing with a troubled child in having to help to do things for him or provide him with money*". He observed that Mr Grimaux had done little for him in return. Mr Pedriks also confirmed that he blamed Mr Grimaux for the breakdown of his relationship with Credo (which occurred prior to the MSA).

158. The Mediation was an attempt by the parties to negotiate a compromise solution from the starting points of their diametrically opposed positions. Inevitably, they were considering their own interests during that negotiation; as HHJ Paul Matthews said in *DeSena*, the idea that Mr Pedriks believed that Mr Grimaux had a duty to put his interests first and TL's and his own interests second was "*just fantasy*". Clause 1 of the

MSA was included precisely because Mr Pedriks wanted to check up on the financial position himself and did not trust Mr Grimaux. Similarly, the sale of TL was to be conducted by a third party (Clause 7). The sheer fact that the parties were able to reach an agreement and that Mr Pedriks trusted Mr Grimaux to uphold his side of it does not advance his submission: see my earlier citation from Lord Mustill's judgment in *In re Goldcorp Exchange Ltd* (para 131 above). All the more so, where the agreement was one aimed at bringing an orderly termination to the parties' relationship.

159. As I noted in para 23 above, para 13E, APOC pleaded a number of specific factors in support of the existence of the alleged fiduciary relationship. I will consider them in turn. Firstly, no specifics are given of the "*factual background*" relied upon. As I have already indicated, the context of a protracted, bitter dispute, tends against the imposition of such duties. Secondly, I am unable to detect anything in the nature of Mr Grimaux's obligations under the MSA that assists Mr Pedriks. Thirdly, the sheer fact that Mr Grimaux owed fiduciary duties to TL does not advance matters, as this would apply to any director.

160. The fourth identified factor is really the high point of Mr Pedriks' case on this issue, namely the effective control which Mr Grimaux accepted he had over the operating subsidiaries, which in turn impacted on the financial health of the holding company. However, in my judgment this is insufficient in itself to create a fiduciary obligation in circumstances where the other factors either point heavily in the opposite direction or, at best, are neutral. If this were sufficient then fiduciary relationships between directors and shareholders would arise much more frequently than the authorities I have summarised indicate to be the case. I have already rejected the expanded or implied contractual obligations that Mr Pedriks relies upon. In these circumstances, it would be surprising if similar duties were to arise by way of fiduciary responsibilities. As to the fifth factor, namely Mr Grimaux's control of the financial information; Clause 1 of the MSA was specifically agreed to address this. Lastly, I do not consider that the sixth factor assists Mr Pedriks; shareholders do not owe duties to each other and can exercise their rights in their own interests: *North-West Transportation Company Limited v Beatty* (1887) 12 App. Cas 589 (PC) at 593.

The 2015 Representation

161. I have already found that Mr Grimaux said at the Mediation that there were no loans owed by TL and its connected companies other than the loan monies owed to Mr Pedriks (paras 53 above). I will now consider the other requirements of an estoppel by representation. What was said was undoubtedly a representation of fact and it was made by Mr Grimaux, the party to be estopped. The case that Mr Grimaux seeks to advance in these proceedings does contradict the representation. At para 4.2(h), ADef he relies upon TL's indebtedness to him under the Promissory Note as legitimising the monies totalling €2,879,827 that he received from the sums realised by the TL sale, in preference to anything due to Mr Pedriks over and above loan and interest payments made under the MSA.

162. Furthermore, I accept that the representation was made by Mr Grimaux with the intention (actual or as reasonably understood) and the result of inducing Mr Pedriks to alter his position on the faith of it to his detriment. Given the context, it is clear that the representation was made with the intention of inducing Mr Pedriks to rely on it and thus agree to enter into the MSA. In the run up to the Mediation Mr Pedriks had

expressed concern about not knowing whether the business had other debts (as I summarised at para 51 above). If Mr Grimaux had disclosed his intended reliance on the USD $4,435,500 Promissory Note at that stage, it is likely that Mr Pedriks would have held out for better terms more generally and/or an explicit recognition that all sums due to him would take preference. The MSA did not address what would happen to the parties' respective equity shares when TL was sold. Mr Pedriks did not consider it necessary to do so at that stage. However, if he had been made aware that any payment reflecting his 25% share in TL was likely to be swallowed up by sums paid to Mr Grimaux pursuant to the Promissory Note, I consider he would have insisted on an explicit provision in the MSA to cover this.

163. The subsequent communications between the parties reinforce this conclusion. Mr Pedriks sent a number of emails expressing concern about the use Mr Grimaux might make of the Promissory Note and reminding him of the reassurance he had provided at the Mediation: for examples, see my account of the emails sent on 23 September 2015, 25 September 2015, 2 September 2016, and 9 September 2016 (para 55 above). I have no doubt that these expressions of concern were genuine and indeed heartfelt. Although Mr Pedriks had some awareness of the Promissory Note being granted in 2006, he had not viewed it as a genuine debt and he had not anticipated that it would be used by Mr Grimaux to attain priority over monies he was owed, particularly after what was said at the Mediation. I also noted that in his email sent on 7 June 2016, Mr Grimaux acknowledged that Mr Pedriks had earlier forgotten about the Promissory Note (para 72 above). Consistent with the provision of this reassurance at the Mediation, when Mr Grimaux did respond to the subsequent emails on this topic, he was keen to provide further (inaccurate) reassurance to the same effect, that the Promissory Note would not lead monies being paid to him in priority to monies owed to Mr Pedriks, see in particular his email of 28 September 2015 (para 56 ii) above).

164. Mr Pedriks was cross-examined on the basis that he was aware of the Promissory Note and so nothing said by Mr Grimaux at the Mediation could have led him to believe that this debt did not exist or that it would not be relied upon. Mr Lilly placed particular emphasis upon TL's accounts for 2013, which were considered by the board of directors on 20 January 2015. As I have already noted, Mr Pedriks said in evidence that he did not notice the substantial debts under the "*trade and other payables*" figure as he did not pay attention to the company's balance sheet (para 64 above). Whilst such an approach is somewhat hard to understand, given his concern about TL's financial position at the time, I do not consider it undermines Mr Pedriks' case that he relied on the representation. This document was only available *after* the Mediation and *after* he had entered into the MSA in reliance on the representation. Furthermore, his subsequent expressions of concern to Mr Grimaux evidence the fact that he had relied on the representation.

165. In his closing submissions Mr Lilly suggested that even if the ingredients for a representation by estoppel were made out, establishing the same would have no practical benefit for Mr Pedriks, as it would only operate personally as between him and Mr Grimaux and only in relation to the MSA, under which payment has been made. Mr Bradley submitted in response that if the estoppel was made out, so that Mr Grimaux was unable to rely on the Promissory Note in these proceedings, then, in turn, this would be highly relevant to any equitable or contractual account that the Court may order by way of relief. I am not dealing with remedies at this juncture and both parties will have

the opportunity in due course to make submissions on the impact of the estoppel that I accept has been established for the purposes of these proceedings, namely that Mr Grimaux is estopped from disputing that there were no loans owed by TL and its connected companies at the date of the Mediation, other than the sums owed to Mr Pedriks; and estopped from asserting that the Promissory Note is a debt owed to him by TL or its connected companies.

166. As I have found that an express representation was made, Mr Pedriks' alternative contentions that there was a duty on Mr Grimaux to mention the Promissory Note at the Mediation and/or that a failure to do so amounted to a form of implied representation, do not arise for my determination.

The 2016 Agreement

167. I have already found as a fact that Mr Grimaux told Mr Pedriks during their second telephone call on 13 September 2016 that the proposals he had set out in the texts he had sent earlier that day were agreed (para 89 above). Further that contrary to the Defendant's pleaded case, Mr Grimaux did not stipulate a need to enter into a written agreement before the terms were binding. Accordingly, judged objectively and placed in the context of the run-up to 13 September 2016 which I have described earlier, these communications plainly involved an offer and an acceptance, the contents of which were reflected in the email that Mr Pedriks sent at 17.27 hours that day. It is also clear that this was supported by consideration. In his communications of 13 September 2016, Mr Pedriks reduced the amount he had sought in his earlier waterfalls (of €4.1 million) and in return for Mr Grimaux's assent to his proposals, he agreed to sign the Incumbency Certificate (a step which he had previously been unwilling to take as he felt his financial position was insufficiently protected in the absence of an agreement).

168. Mr Grimaux contends that in any event, the other pre-requisites of a binding contract are absent, namely that there was no intention for the agreement to be legally binding and in so far as there was an agreement, it was insufficiently certain and complete. I consider these points in turn.

Intention to create legal relations

169. The fact that the parties contemplate the execution of a formal document recording their agreement, does not of itself preclude a binding agreement from arising before the written agreement in executed; the question is whether the parties intended to be bound immediately (para 124 above). Applying the principles I summarised earlier (paras 120 – 125 above), I conclude that the parties did intend to create legal relations. *Blue Ashley* confirms that the subjective understanding of the parties is admissible on this question, which is otherwise judged objectively (para 121 above). If I were to take the parties' subjective intentions into account it would reinforce the same conclusion. However, I am able to reach a clear conclusion simply by applying the objective approach. My reasons are as follows:

    i) It is evident from the communications in the run-up to 13 September 2016 that Mr Pedriks was not willing to sign the Incumbency Certificate because of concerns that Mr Grimaux would use the Promissory Note referred to in the draft Certificate to obtain priority over him in terms of monies owed. It is also evident from the communications that by this stage Mr Pedriks did not really trust Mr

Grimaux; and that an effective means of avoiding that eventuality was being sought as a high priority. In other words, objectively judged from the communications, Mr Pedriks was seeking an enforceable agreement as to his entitlement to payment before he would sign the Certificate. Consistent with this, in the texts and emails that Mr Pedriks sent to Mr Grimaux on 13 September 2016 he spoke of needing "*confirmation*" and asked him to "*confirm*" what was agreed;

ii) Furthermore, the communications show that Mr Pedriks wanted an enforceable arrangement to be agreed that day, given the deadline for providing the Incumbency Certificate, not at some later stage when a written agreement had been prepared. Equally, in light of my findings as to what was said on the telephone, Mr Grimaux did not give a contrary indication;

iii) After the second telephone call on 13 September 2016 Mr Pedriks rapidly indicated his willingness to release the Incumbency Certificate; the step which the contemporaneous communications indicate he had been consistently resistant to taking until he had obtained the confirmation that he sought. Equally, after the call, there was a cessation of the negotiations which he had triggered and repeatedly pressed Mr Grimaux on. This is consistent with a binding agreement having been reached by this point and inconsistent with the converse proposition;

iv) The terms of the emails passing between the parties in the aftermath of the second call support this. Mr Pedriks' email sent at 17.27 hours on 13 September 2016 listed four specific matters that he asked Mr Grimaux to confirm reflected their discussion. The language used is quite different from that of the two earlier texts he sent that day, where he was plainly at the stage of advancing proposals upon which he was seeking agreement. Furthermore, the reference to "*your lawyer will now draft this into a formal agreement*" reads as a step that had also been agreed by the parties on the telephone (rather than something additional that Mr Pedriks was proposing) and the language employed is that of transposing an agreement that has already been made. Mr Grimaux responded in (what was for him) unusually formal language saying: "*I hereby confirm that what you list below is our understanding*", rather than suggesting that nothing had yet been agreed and/or that it was all subject to a written agreement being concluded. Set against these features, I do not attach significance to the fact that Mr Pedriks referred to our "*discussion*". Mr Lilly submitted that use of this word indicated that matters were at a more formative stage, but I read it as Mr Grimaux being asked to confirm the outcome that was reached in that discussion; and

v) As I have described when setting out my findings of fact, the content of subsequent communications between the parties was consistent with a binding agreement having been arrived at on 13 September 2016, see in particular: Mr Grimaux's second email of 25 September 2016 (paras 94 – 95 above); the email he sent on 25 November 2016 (para 99 above); the email he sent on 13 February 2017 (para 106 above); the text he sent on 2 March 2017 (para 107 above); and the spreadsheet from Mr Grimaux's lawyer, Mr Konuch, emailed on 17 March 2017 (para 108 above). Whilst I address specific points made by Mr Lilly below, in general I note the absence of contemporaneous messages from Mr Grimaux or those acting for him disputing the proposition that a binding deal had been

arrived at, in the face of Mr Grimaux's references to agreement having been reached.

170. As I noted earlier, it is clear why no document reflecting the agreement was drawn up immediately after the call, namely Mr Grimaux's wish to liaise with Mr Vrba and to include arrangements for the sale monies to be held in an escrow account in the written contract (paras 85 and 90 above); it is not indicative of a failure to reach agreement during the call. Indeed, once agreement had been reached during the call, meeting the deadline for the Incumbency Certificate was the priority, rather than reflecting the agreement reached in a written contract. In any event, the communications indicate that Mr Pedriks envisaged the written agreement being prepared within a short period and they do not suggest that there were further negotiations to be undertaken before this could be prepared.

171. In so far as Mr Grimaux subsequently attempted to obtain agreement to paying Mr Pedriks a lower sum, the communications indicate that this was prompted by a reduction in the amount of the initial financial consideration that would be received from Live Nation, rather than it being attributable to a lack of an earlier intention to create a binding agreement (para 90 and 106 – 107 above).

172. For the avoidance of doubt, I appreciate that the certainty or otherwise of what was allegedly agreed can bear on the question of whether there was an intention to create legal relations. In the interests of clarity, I explain my reasoning in respect of that topic separately below, but I have considered those matters at this stage too.

173. As regards some further contentions raised on behalf of Mr Grimaux:

i) Mr Lilly emphasised recital (F) of the draft CAA (para 92 above), submitting that the words used contemplated agreement being reached in the future. He also noted that matters were included in the CAA which it was accepted were not part of the discussions on 13 September. However, as Lord Clarke recognised in *RTS Flexible Systems* (para 120 above), the fact that certain terms have not been finalised, is not necessarily inconsistent with a conclusion that, objectively judged, the parties have agreed on the terms regarded as essential for the formation of legally binding relations and that they did not intend any outstanding terms to be a pre-condition for this coming into existence. I consider that is the position here. Neither the emails of 13 and 14 September 2016, nor those in the aftermath, indicated that the parties considered agreement of any outstanding matters to be a pre-requisite to a binding agreement being reached;

ii) In a similar vein, Mr Lilly relied upon Mr Pedriks saying in the email sent to Mr Grimaux on 5 December 2016 (para 101 above), that he needed to have "*our agreements finalized*". In my judgment this is simply a reference to having the written agreement completed, as opposed to a suggestion that no agreement has yet been made. By way of illustration, in another email sent on the evening of the same day, Mr Pedriks made explicit reference to the agreement that had already been reached: "*I should have received euro 4m for all of this – which we subsequently agreed to reduce to euro 3.738m*";

iii) I have already explained why the questions raised by Mr Grimaux on 25 September 2016 do not assist him in this regard, if, as I find, the facts and

circumstances strongly point to an agreement having been reached before this email was sent (para 94 above);

iv) Although the CAA was never signed, this is easily attributable to the fact that Mr Vrba (the proposed holder of the escrow account) ceased to work for Ticketpro. That Mr Pedriks did not insist on a finalised CAA is consistent with an awareness and an intention that a binding agreement had already been made;

v) Whilst Mr Pedriks did not pay White & Case or Andrew Fielding (para 109 above) this is not inconsistent with him having agreed with Mr Grimaux that he would do so, particularly in circumstances where the obvious inference from the known circumstances is that he did not make these payments because he did not receive the specified sums from Mr Grimaux, which these fees were to be paid from. Furthermore, Mr Pedriks' reference in his 13 February 2017 email that "*we should have another discussion*" if White & Case's fees were higher than previously estimated, is no more than a suggestion that he would like to reconsider one aspect of what had been agreed in a particular eventuality. Raising the possibility of varying an aspect of an agreement is obviously not inconsistent with the proposition that a binding agreement has been reached;

vi) I view the reference in Mr Pedriks' text sent on 3 March 2017 to a pro rata reduction in the €3.738m due to him (in light of the further reduction in the initial financial consideration to be paid by Live Nation (para 107 above)) in a similar way. This is reinforced by the fact that the text makes explicit reference to what had already been agreed.

Certainty

174. If there remain further terms to be agreed, an earlier agreement is not invalidated unless the absence of subsequent agreement concerns an essential term that renders the contract as a whole unworkable or void for uncertainty (paras 122 and 126 above). I will address the various points raised in submissions which were said to support the proposition that any oral agreement arrived at on 13 September 2016 was too uncertain as to be enforceable.

175. Mr Lilly contended that if there was a concluded contract in September 2016 (contrary to his primary submission), it must be construed as limited to a share sale, since that was the transaction which the parties contemplated in September 2016, so that the condition precedent for the division of assets never occurred. However, the alternative of an asset sale was expressly referred to in Clause 1, Section 1 of the draft CAA produced by Mr Grimaux's lawyer (para 92 above); and neither party objected to nor queried this. Furthermore, I accept Mr Bradley's submission that during negotiations on 13 September 2016, the communications indicate that the parties were not concerned with the specific mechanism by which TL's business would be sold; and thus a subsequent change in the form of the sale does not render unenforceable the agreement on how the proceeds of sale would be divided up. The 13 September 2016 email sent at 17.27 hours did not specify the form that the sale would take, and I note that in the extensive communications between the parties after 13 September 2016, Mr Grimaux did not suggest to Mr Pedriks that the fact that the transaction was now proceeding as an asset sale voided their earlier agreement.

176. As regards the reduction in the size of the initial payment due from Live Nation, following Mr Pedriks' email of 25 September 2016 (para 94 above), the second draft of the CAA indicated in terms that if the initial financial consideration from Live Nation was less than €6 million, he was still to receive €3,378,000 (the figure that had been agreed on the telephone on 13 September). Objectively judged, this shows both that there was no real uncertainty about what had been agreed and that the parties' agreement had not been predicated upon that first payment from Live Nation remaining at €6 million. Indeed, nothing in Mr Pedriks' 13 September 2016 email indicated that payment of the €3.378,000 was dependent upon the initial payment by Live Nation remaining at the figure that was then anticipated.

177. I have explained in para 94 above why I do not consider that the queries Mr Grimaux raised in his 25 September 2016 email were indicative of ongoing negotiations and/or the parties not yet having reached an agreement. Furthermore, the matters which were the subject of Mr Grimaux's questions were nonetheless included in the second draft CAA in the terms Mr Pedriks had sought (in the email Mr Grimaux was replying to).

178. There is no doubt that both parties understood Mr Pedriks' reference in the email of 13 September 2016 to the 50/50 split in the "*excess cash/ working capital*" to be a reference to what Live Nation paid by way of the net assets adjustment (itself a part of the Heads of Terms agreed with Live Nation back in February 2016). Both parties confirmed this when giving evidence and it is consistent with the way this terminology was used during their communications.

179. Mr Lilly also emphasised the position in relation to Intellitix. He said that there was a lack of clarity as to the form the transfer was to take (if there was an agreement): did a 10% "*equity interest*" refer, for example, to a beneficial interest under a trust, or an equitable assignment of a mere expectancy in the dividends or an equitable assignment of a mere expectancy in the future proceeds of sale. He suggested that the uncertainty was deepened and underscored by the draft trust document which Mr Pedriks subsequently emailed as it was unclear whether it contemplated a bare trust or a discretionary trust and in any event its terms were inconsistent with an equitable assignment and internally inconsistent in a number of respects.

180. Mr Bradley contended that in so far as there was any confusion it really stemmed from the draft trust document which Mr Pedriks emailed after the agreement had been reached and which he did simply to illustrate that the separate documentation which Mr Grimaux said he would prefer for this aspect could be easily achieved (paras and 94 and 96 above). Mr Pedriks is not a lawyer and the document had plainly originated from a different transaction, as shown by the deletion of Graham Pollard's name. I accept that the focus should be on what had been agreed by that point. In his second email of 25 September 2016 Mr Grimaux was clear about the arrangement that he had given his "*word*" on (which, he said, should be sufficient for Mr Pedriks) which was that "*you will be receiving 10% of what I would be receiving whenever there would be a sale of the company or a liquidity event, such as money generated eventually via an IPO*". Mr Grimaux did not suggest that the arrangement was unclear and nothing in Mr Pedriks' response suggested that he dissented in any way from Mr Grimaux's description of the arrangement. Mr Grimaux's description at this stage was also consistent with what was set out in the earlier 13 September 2016 email. In his later email sent on 25 November 2016, Mr Grimaux re-affirmed that he had agreed to provide Mr Pedriks with 10% of what he owned in Intellitix. Whilst the contents of the

email indicate that he was unhappy with what had been agreed in light of the reduced initial consideration from Live Nation, he did not suggest that there was any uncertainty in what had been agreed in relation to Intellitix.

181. Accordingly, in my judgment, none of the alleged difficulties raised in these proceedings (but not at the time) are such as to render the oral agreement that was made on 13 September 2016 unworkable or unenforceable. The essential terms were as set out in Mr Pedriks' email sent at 17.27 hours that day.

Alternative grounds for finding a concluded contract

182. If I were thought to be wrong in the conclusion I have just expressed, I would find in the alternative that a concluded binding and sufficiently certain agreement was reached on 4 October 2016 when Mr Pedriks responded to the second draft CAA, which had been sent the previous day, indicating that "*this looks ok in principle*" (paras and 97 and 98 above). This made explicit provision for an initial financial consideration of less than €6 million from Live Nation and for the transaction to be byway of asset sale. Furthermore, Clause 6 made clear that the Promissory Note would not trump the sums agreed to be due to Mr Pedriks. Mr Bradley put this forward in closing submissions as his secondary case (without objection from Mr Lilly that he was not entitled to do so).

183. If I were thought to be wrong in concluding that a position of sufficient certainty was arrived at in relation to Intellitix, I would find in the further alternative that the part of the 2016 Agreement which related to the equity interest of 10% of Mr Grimaux's shareholding in Intellitix could be severed from the other agreed terms, so that there was nevertheless a binding agreement for Mr Grimaux to pay Mr Pedriks the sum of €3,378,000 from the sale of TL and to pay him 50% of the excess cash / working capital (and for the latter to pay the specified fees). These provisions were not dependent upon agreement being reached in relation to Intellitix. This is illustrated by the fact that the second draft of the CAA, set out a sufficiently complete and workable contract in respect of the other points of agreement. Although this was not an alternative raised in the pleadings, it was discussed without procedural objection from Mr Lilly during the parties' closing submissions.

184. In light of the conclusions I have reached in relation to the 2016 Agreement it is unnecessary for me to address the alternative case based on estoppel by representation or estoppel by convention.

Fiduciary duties as a result of the 2016 Agreement

185. Essentially for the reasons I identified when determining that a fiduciary relationship did not arise as a result of the MSA, I arrive at a similar conclusion in respect of the position following the 2016 Agreement. The friction between the parties had increased, rather than decreased since the MSA; and up to and including 13 September 2016 the parties were negotiating from markedly different starting positions, both seeking to protect their own interests and to find a workable way of terminating their ongoing business relationship.

Outcome and consequential orders

186. For the reasons I have explained, I find that the MSA was not breached as alleged and that no fiduciary relationship arose between the parties. However, I have accepted that a representation was made at the Mediation by Mr Grimaux that there were no loans owed, other than to Mr Pedriks, which has given rise to an estoppel by representation precluding reliance on the Promissory Note in these proceedings. I have also found that there was a binding and enforceable oral agreement made between the parties on 13 September 2016, as reflected in the email that Mr Pedriks sent at 17.27 hours that day. This agreement included a term that Mr Grimaux was to pay Mr Pedriks €3,738,000, less the €2,208,040 already paid, from the sale transaction to Live Nation. As I have indicated in para 10 above, it follows from these findings that:

    i) The agreement was breached, as alleged in paras 27.1 – 27.3, APOC; and

    ii) Mr Pedriks is entitled "*to interim judgment in the sum of approximately €1,529,960*" at this stage.

187. After seeing this judgment in draft, the parties indicated that there was now no need for a further trial. They also agreed that in relation to the 2016 Agreement, it followed from this judgment and para 6 of the pre-amble to the Order of Master Gidden dated 4 February 2021, that Mr Grimaux was liable to pay Mr Pedriks: (i) €1,529,960; and (ii) 50% of the agreed payment in respect of excess cash / working capital, less the fees of White & Case and Andrew Fielding.

188. As a result of pre-existing commitments in the period between circulation of the draft judgment and the hand-down, Mr Grimaux's legal team asked for additional time to make written submissions on: (i) the quantum of the net asset adjustment and the fees of White & Case and Andrew Fielding; (ii) the proper relief due in respect of those parts of the 2016 Agreement concerning Intellitix; (iii) applications for costs, including matters concerning potential interim payment on account; and (iv) an application for permission to appeal, including an application for a stay. They also proposed that sums due to Mr Pedriks be payable 28 days after I had determined the outstanding issues (if a stay was not granted). Mr Pedriks did not take issue with (iii) or (iv), but submissions on his behalf contended that the quantum of the net asset adjustment was already clear and beyond dispute (save for the credit to be given for the fees payable to the third parties); and that declaratory relief on the Intellitix aspect of the 2016 Agreement should be granted at this stage. Further, Mr Pedriks submitted that there was no good reason why the €1,529,960 should not be paid to him by 14 days from date when judgment was handed down (4 January 2022).

189. As regards (i), I agree with Mr Bradley that it follows from this judgment that the net asset adjustment figure was €949,000 and that, subject to the fees for third parties, Mr Pedriks is entitled to 50% of this figure (paras 104, 178 and 181 above). Accordingly, I conclude that the Order made at this stage should reflect this; it is only the sums payable to White & Case and Mr Fielding that need be the subject of further submissions (if agreement is not reached). However, I accept that it is appropriate to afford Mr Grimaux additional time to make written submissions on the appropriate wording of the relief concerning the Intellitix aspect. I cannot see how Mr Pedriks could be prejudiced by this. Although I note from the Defendant's draft Order, that the declaration sought by Mr Pedriks in respect of the 2015 Representation is not agreed;

no submissions have been made or further time sought for submissions in relation to this; and the proposed wording follows from this judgment (para 165 above).

190. I am mindful that Mr Pedriks has been owed the sums I have found to be due to him for a considerable time. However, taking all matters into account, I consider the just course is for me to consider submissions on permission to appeal, a stay and related matters before the time when the sums become payable. On Mr Bradley's proposed timetable, payment is already due before the proposed deadline for making these submissions. However, subject to any Order I am persuaded to make after considering those submissions, I see no reason why the sums should not be payable within 14 days of my further determination.

191. The Order on hand-down of the judgment will reflect these matters.