Neutral Citation [2018] EWHC (Ch) ……

Petition No. CR-2016-000997

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
Before Mr M H Rosen QC sitting as a deputy High Court judge

IN THE MATTER OF TRADEOUTS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

BETWEEN:

DAVID BROWN **Petitioner**

-and-

(1) BCA TRADING LIMITED
(2) ROBERT FELTHAM
(3) TRADEOUTS LIMITED **Respondents**

Mr John Brisby QC and Mr Alexander Cook (instructed by Candey Limited) for the Petitioner
Mr Sa'ad Hossain QC and Ms Joyce Arnold (instructed by Berwin Leighton Paisner LLP) for the Respondents

Hearing dates: 10-24 October 2017 Date of Judgment: 19 February 2018

JUDGMENT

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(1) INTRODUCTION

1. This is the Court's judgment on the trial of this action, an unfair prejudice petition under section 994 of the Companies Act 2006 ("the 2006 Act"), as to liability only.

2. The Third Respondent Tradeouts Limited ("the Company") was founded in 2012 by the Petitioner, Mr David Brown, to operate as an on-line marketplace for motor

vehicles using the web platform which he created, *Tradeouts.com* ("the Platform"). The Company did not own its own stock but car dealers and others could obtain access to the Tradeouts platform by paying a subscription.

3. In around November 2013, the BCA group of companies ("BCA"), which included the First Respondent ("BCA Trading"), entered into discussions to acquire the Company and in July 2014, following a period of due diligence and negotiation, BCA Trading acquired 51% of the Company's 1,000 issued ordinary shares from Mr Brown and his business partner the Second Respondent Mr Robert Feltham, for an initial consideration of £1.25 million.

4. The acquisition involved a Share Sale and Purchase and Option Agreement ("SPA") and a Shareholders Agreement ("SHA"). Mr Brown and Mr Feltham retained 49% of the shares in the Company between them - Mr Brown holding 441 shares and Mr Feltham 49 shares – which were subject to put and call options under the SPA. These had to be exercised at the end of the 2017 financial year, and the option price was to be determined by a formula that took into account a multiple of the Company's EBITDA (that is, earnings before interest, tax, depreciation and amortisation).

5. The Board was to comprise Mr Brown as managing director and two directors nominated by BCA Trading. BCA Trading was also able to nominate the company secretary. Although the BCA-nominated directors changed from time to time, they were latterly Mr Timothy Lampert and Mr Nikheel Shah. Mr Ian Farrelly of BCA was the Company's secretary.

6. The SPA and SHA expressly required BCA Trading (i) to act in good faith to Mr Brown (ii) to "introduce the services of the Company" and (iii) to conduct the business of the Company in accordance with a business plan to be agreed with a view to achieving maximum EBITDA.

7. In addition to these express obligations undertaken by BCA Trading in the SPA and SHA, Mr Brown's case is that the parties had a "Fundamental Understanding" that the Company would receive certain support from BCA by way of funding, marketing and the provision of vehicles for listing on the Platform.

8. Problems developed soon after the acquisition and there were delays in re-launching the Platform and changes to the Company's business model, as the charging basis moved from (i) subscriptions to (ii) fees on sales first (a) resulting from introducing vendors and purchasers through the Platform and then (b) as transacted and paid for on the Platform itself.

9. The Company required further funding and failed to generate sufficient turnover or management reports and plans to BCA's satisfaction, and by Autumn 2015 the relationship between the parties was breaking down: in February 2016 the Company, under BCA Trading's directors' control, ceased business.

10. Mr Brown blamed and blames BCA for this, claiming that the Company's failure resulted from breaches of the SPA and SHA, the Fundamental Understanding, and its nominees' fiduciary duties to the Company. He alleges that this conduct was unfairly prejudicial to his interests as a member of the Company, and seeks an order that his shares are purchased at the value they would have had if BCA Trading had complied with its obligations.

11. BCA Trading denies the Fundamental Understanding alleged and denies any breach of the SPA and/or SHA and any bad faith. It alleges that the Company failed despite its due support, that its failure was aggravated by Mr Brown and its closure was justified.

(2) BACKGROUND

12. BCA is a large automotive services group which sells about 1.3 million vehicles per year in the UK and Europe. Its ultimate parent company is BCA Marketplace Plc, which is UK listed and has many other subsidiaries including (i) British Car Auctions Limited ("BC Auctions") which operates the largest auction house in the UK for the sale of used cars between dealers and (ii) We Buy Any Car Limited ("WBAC") which acquires cars which are then sold to dealers through BC Auctions.

13. In 2013 BCA's core auction business served primarily larger dealers known as tier 1 but was less attractive for the sale of vehicles by smaller dealers in so-called tiers 2 and 3. BCA saw in the Company an opportunity to develop business with those smaller dealers, complementing its existing business. The following selective narrative of subsequent events is largely drawn from contemporaneous documents and on occasion mentions some of Mr Brown's allegations in order to explain relevance.

A. The negotiations

14. Discussions ensued between Mr Brown, Mr Matthew Treagus of Progenit, a consultant to BCA as regards prospective digital services, and Messrs D'Vidis Jacobs and Shane Robinson, Corporate Development Directors at BCA. Mr Treagus gave a high-level presentation at a meeting on 18 November 2013 and a number of other proposals were generated, so that structures, pricing and other aspects to be agreed fluctuated over the next 9 months until agreement was reached in mid-July 2014.

15. Mr Treagus' discussions with Mr Brown featured possible synergies from an acquisition. For example, a document from Mr Treagus dated 23 November 2013 set out a variety of ways in which he thought BCA could benefit from working with the Company and the strategic possibilities.

16. Progenit also conducted some investigation of the Company showing as at January 2014 that there was little overlap between BCA and the Company which had some 1,500 active registered dealers but only 15 dealers responsible for 60% of its listings, and no growth over the last year.

17. Messrs Robinson and Jacobs at BCA worked on what was known as the "*Yankee spread sheet*" to model the Company's potential revenue at nearly £450,000 in 2015 if 10% of the dealer-to-dealer vehicles listed on the Platform were sold at a margin of £50 per vehicle and referred to a "*Support from BCA wish list*" provided by Mr Brown which mentioned stock from BCA and marketing support such as advertising in BCA's auction halls.

18. The internal documents of BCA and from Mr Treagus and Progenit did not identify the Company as an actual or prospective competitor. Amongst others:

    (a) documents prepared by Mr Robinson and Progenit in late February 2014 identified Dealer Auction, owned by Manheim, as a prospective competitor, but treated the Company as a means for bringing more vehicles to BCA for auction and advertising BCA stock, and characterised the benefits as extending the number of subscribers and providing vehicle flows to BCA; and

    (b) an acquisition proposal paper sent to Jon Olsen, then BCA's CEO, in April 2014 again identifying Dealer Auction as a potential threat to BCA's core auction business, said that the Company might provide a "*new addressable market*" to BCA, and provided revenue projections on the basis that the Company would develop a transactional function and vehicles flow to BCA's auctions.

19. For his part, Mr Brown provided Mr Jacobs with a business map for the Company for the next year, showing what the Company might do independently and what it might do with BCA, on the basis of its existing and planned sources of revenue. It was he who suggested that the Company was a potential competitor to BCA and he forecast that "… *Without Project Yankee proceeding, Tradeouts anticipates revenues to exceed £3m pa by 2016. With Project Yankee, revenues would be greater still …*".

20. In due course Heads of Terms were agreed between BCA and Messrs Brown and Feltham and BCA's due diligence began, followed by negotiation of the necessary

documentation for the acquisition by way of the SPA, the SHA, and the new Articles for the Company, with legal advice on both sides.

B. The SPA and SHA

21. Schedule 12 of the SPA and clause 5 of the SHA contained Buyer's Covenants by BCA Trading in similar form. Using the numbering of the latter, clauses 5.1 and 5.2 are crucial (leaving aside BCA Trading's undertakings by clause 5.2.3 not to remove Mr Brown as statutory director of the Company save in specified circumstances, and by clause 5.2.4 not to allot or issue shares in the Company).

22. Clause 5.1 of the SHA provided that:

> *The Buyer undertakes to the Sellers to exercise its powers in relation to the Company to procure, so far as it is reasonably able by the exercise of such powers, that at all times between Completion and whilst the Sellers remain interested in the Option shares:*
> *5.1.1 to act in good faith to the Sellers;*
> *5.1.2 the business of the Company is maintained as a separate legal and operating entity within the Buyer's Group; and*
> *5.1.3 the services of the Company are introduced by the Buyer's Group in so far as it is at that time reasonably practicable for the Buyer's Group to do so…*

23. Clause 5.2 of the SHA provided that:

> *The Buyer undertakes to the Sellers that, between completion of the Sale and Purchase Agreement and whilst the Sellers remain interested in the Option Shares:*
> *5.2.1 the business of the Company will be conducted in all material respects in accordance with a business plan to be agreed between the Sellers and the Buyer with a view to achieving the maximum EBITDA (and for the avoidance of doubt, no management charges shall be provided in the EBITDA calculation without the consent of the Sellers, such consent not to be unreasonably withheld or delayed);*
> *5.2.2 the day-to-day management and control of the Company's business will be in the hands of David Brown in his capacity as a director of the Company…*

24. The SPA and SHA contained however no funding commitments by BCA. After receiving the first draft of the SPA, Mr Brown asked for the addition of an inbound investment clause to cover the cost of new staff and marketing, at no more than £40,000 per month for the first 18 months but neither this nor any other funding commitment was agreed.

25. The SPA and SHA also contain no specific marketing commitments by BCA, beyond the obligation "to introduce". Mr Brown noted that the drafts did not contain any

commitment by BCA as regards "*promotion in auction halls/literature etc, and access to BCA customer information for marketing purposes*". He was warned by his accountant that it was possible that if there was poor performance BCA could acquire the option shares in the Company for nothing. He did not request and the SPA and SHA did not contain a commitment by BCA to provide stock to the Company.

26. Mr Brown did however seek "*a restriction/limit of costs passed to Tradeouts by BCA which could restrict/reduce Tradeouts profit*" and raised the issue of earn-out protections through his solicitors Higgs & Co. But in the event, the only restriction in the Buyer Covenants in the SPA was that "*no management charges shall be provided in the EBITDA calculation* [for pricing the Option Shares] *without the consent of the Sellers, such consent not to be unreasonably withheld or delayed*".

27. Following a meeting on 6 June 2014, Mr Brown proposed a "*Marketing/Business plan to follow post-acquisition*" and on 11 June 2014, he proposed that the option consideration be subject to a minimum of £1.2 million. Mr Robinson rejected this saying that "… *Incorporating such a minimum payment would invoke the need for Tradeouts to deliver a very credible detailed 3 year business plan which could be difficult to deliver given the start-up nature of the business.*" Instead he emailed Mr Brown on 15 July 2014 saying that an agreed minimum of 12 working days to be included in Mr Feltham's contract, would hopefully "*provide time for you to conclude the business plan*". But no business plan was ever produced.

28. In that regard and others, under clause 3.3 of the SHA, the Company (of which Mr Brown was to be and was managing director) undertook to BCA Trading, Mr Brown and Mr Feltham that it would furnish information, including, among other things, monthly management accounts and other documents concerning matters that were material to the trading or financial position of the Company.

29. Clause 3.6 of the SHA provided that:

> *… The Sellers each undertake to the Buyer to exercise their respective powers in relation to the Company (whether as officer, shareholder or otherwise) to procure, so far as they are reasonably able by the exercise of such powers, that the Company does, performs or does not do or perform the acts or omissions which are required to be done performed or not done or performed by it in clauses 3.1 … to 3.5…*

C. The Company's marketing

30. As at acquisition, the volume of the Company's business had fallen somewhat from 23 May 2014, when a due diligence report by Tim McOwan of BCA stated that the Company had (a) about 4,300 registered users conducting about 75,000 page views

per month, of whom (b) some 340 were subscribers paying on average £34.38 per month (c) over 4,600 vehicles listed on the Platform and (d) nearly 1,600 further vehicles aggregated from 20 auction houses at which users registered with "CanBid" could bid on-line.

31. The Company recruited a new team of telesales staff in Chichester (formerly employed by "AutoTradeMail") and sought to attract more subscribers for more expensive services, in particular with HPI, a leading vehicle checking service. It also still had two previous sales employees from before the acquisition (a Mr Green and Mr Nigel Coombe) and the assistance of Mr Roger Evans who had been a sales director at HPI and later became the Company's Commercial Director.

32. Ms Kerry Fogden, the Company's then sales manager, produced weekly updates of sales figures for the Chichester office and a mailshot was sent out to car dealers advertising elsewhere, but Mr Brown was not happy with the team and results. It seemed that subscribers were not willing to sign up to the more expensive service with HPI checks and there were many cancellations after the free trial. By mid-September 2014, Mr Brown was telling the Chichester sales team that cancellations were too high and setting up a webcam to monitor them.

33. Mr Brown met with Mr Guy Thomas, BCA's Head of Product Development, on 2 September 2014 and Mr Thomas proceeded with cross-referencing the Company's customer base with those of BCA and AutosOnShow ("AoS") another company partially acquired by BCA Trading at a similar time to the Company.

34. The Company had increased its costs but was not increasing its revenues. Messrs Brown and Feltham or Mr Brown sent summaries to and spoke with Mr Jacobs weekly, focussing on sales activities and business links which they continued to pursue, for example, as at September 2014, with (a) Pistonheads, a large online forum for motoring enthusiasts (b) Razoom, which ran a dealer management system and (c) Cartell, to whom they hoped to provide a version of the Platform in Ireland

35. On 16 September 2014 there was a meeting at BCA's Blackbushe offices to introduce the Company and AoS to a number of people at BCA and this was followed by an initial meeting about marketing the Company between Messrs Brown and Feltham and Ms Elaine Roberts, BCA's group marketing director, who had previously spoken with Mr Brown about a press release to announce the acquisition of the Company, which was issued on 18 September 2014. Mr Brown then asked Mr Feltham to create a list of bullet points setting out why dealers should use the Company's services.

36. Mr Robinson arranged for the Company to have access to the Deltapoint pricing web service, which Mr Brown had identified as a helpful tool for stopping dealers listing

vehicles at retail prices, which had been a problem for the Platform. Mr McOwan discussed other pricing look-ups and customer relationship management systems with Mr Brown. BCA's head of HR, Ms Jo Nash, helped arrange a service agreement for Mr Kevin Watson, who Mr Brown wanted to engage as a consultant.

37. This support continued through October and November 2014, Mr McOwan assisting with access to various technical services and IT recruitment, Mr Thomas providing pricing information, and Mr Stephen Collyer, a BCA payments expert, advising on how the Company could take micropayments. Mr Thomas also conducted an analysis of the buyers in common between BCA, the Company and AoS, which showed that there was less overlap than had been anticipated.

38. But the problems with the existing subscription model and the need for product revisions delayed a full marketing campaign. The Company's Marketing Roadmap, prepared for a meeting on 7 October 2014, emphasised that it was essential that the core message for the Company's products be established before the Company communicated with customers and set out a wish list of possible BCA marketing actions.

39. On 14 October 2014, Ms Roberts asked Mr Brown a series of questions intended to shape a marketing campaign and Mr Brown stated in response that the Company's "*initial wish list*" was a presence in auction halls and an email campaign to BCA's Tier 2 and 3 customers. Following a meeting between them on 16 October 2014 meeting, Mr Martin James (BCA's Head of Product Marketing, who reported to Ms Roberts) arranged for an advert to be placed in the December sales guide and set up an email campaign to go to over 3,000 BCA customers, in batches over the course of November 2014.

40. Mr Brown however wanted the Company to have the BCA customer's associated information (such as address, phone number and BCA account number) so that a Tradeouts Platform account could be pre-created for the BCA customer; BCA did not have permission to share this information, as Ms Roberts explained to Mr Brown (and Mr Farrelly confirmed); and Mr Brown decided that without that information, he did not want the email campaign. By November Mr Brown began to complain about the extent of the marketing help provided by BCA.

41. Mr James provided Mr Evans at his request with a schedule of industry events. He arranged for the Company to exhibit alongside BCA at the Used Car Conference in Telford on 21 October 2014, providing tickets for Messrs Brown and Evans and a flyer, and Ms Roberts and Mr James worked with BCA Public Relations to publicise the "Tradeouts Awards", a marketing initiative also requested by Messrs Brown and Evans.

42. Messrs Brown and Evans raised concerns about the scope of marketing on 10 November 2014 during their weekly call with Mr Jacobs, and on this occasion Mr Robinson, who referred in a subsequent email to "… *Concerns raised by DB and RE as to the scope of marketing support being offered to Tradeouts compared to that discussed on acquisition*" and set out four items as "*Initial support discussed on acquisition*".

43. On 19 November 2014, Mr Brown spoke by telephone with Ms Roberts (to whom by then the Company reported, rather than Mr Jacobs who was less specialised in marketing). By email she noted that he had referred to four or five "*promises that had been made in acquisition. I'm assuming that these were pan-BCA and not limited to marketing*" and asked him to confirm what they were so that they could be addressed up front, but he did not reply.

44. Messrs Brown and Evans continued to discuss cross-promotional ideas and whether to place advertising in Car Dealer magazine and an email campaign for the Company's registered but non-paying users, but Mr Evans wanted this delayed until the Platform was developed with more features.

45. At the beginning of December 2014 Ms Roberts circulated weekly actions including a campaign to "upsell" more expensive services to the existing subscriber base and set out three areas of focus - completing integration tasks; maintaining a focus on tactical growth of the subscription base; and developing the longer-term growth plan on the basis of a transactional model. The costs of the telesales operation were not being covered and at the end of December, the Chichester office was closed.

46. In early December, Mr Robert Hazelwood, BCA's Commercial Director responsible for its major vendors, asked Mr Evans for a presentation about the Platform to share with his team, and subsequently set up a meeting with Mr Evans in January 2015.

47. Ms Roberts spent the day at the Company's offices in Daventry on 11 December 2014 among other things discussing the terms of Mr Evans' employment contract and new monthly management meetings, and the next day sent Mr Evans a draft model agenda and a plan for BCA's Business Development Executives ("BDEs"), a team of eight sales employees managed by Mr Darren Jackson who targeted tier 2 and 3 dealers, to help promote the Platform.

48. Mr Evans introduced the Platform to the BDEs at their next monthly meeting on 15 January 2015, having been given names and contact details in advance so that their log-ins could be set up. Mr James produced a Company flyer for BDEs to give to dealers they visited and Mr Jackson asked for Mr Evans' presentation so that he could go through it with those who did not attend. Mr James' flyer was also handed out at

BCA's annual management conference in Gaydon on 17 January 2015, at which the Company had a stand and other branded materials, and Mr Evans (but not Mr Brown) attended.

49. Ms Roberts also asked Mr Bradley Lucas, a member of the marketing team, and Mr Stephen Wren, BCA's Head of Business Systems Solutions, to work with Mr Evans to improve the cost effectiveness and results of the Company's CAP advertising and make CAP vehicle valuations accessible to the Company, to be used in the 'Star Cars' product relaunch, an improvement to the subscription Platform which Mr Evans and Ms Roberts envisaged as a marketing hook. Mr Wren contacted Mr Evans to implement this and Mr Robinson, following discussion with Mr Farrelly, confirmed that the Company could use BCA's CAP license.

50. The decline in the Company's revenue continued however and by February 2015, cancellations exceeded new subscriptions, and Mr Evans had told the Company's team that "*The new site and partnerships can't come a minute too soon…*". Mr Brown told Mr Evans on 10 February that Mr Green had been much more successful at converting leads into paying customers. They continued to try to persuade auction companies to list their stock on the Tradeouts Platform, but Aston Barclay, one of the largest auction houses, suspended its feeds on 25 February 2015 because it had not been receiving successful or quality enquiries.

D. Budgeting and financing

51. When discussions began with BCA from mid-August 2014 to set a budget and strategy for the Company, it appeared that performance remained flat, and the Company was making a monthly loss because of salaries, including those of Mr Brown and Mr Feltham.

52. Prior to the acquisition, Mr Brown and Mr Feltham had worked unpaid and the Company made a monthly average profit of some £1,300 between January and June 2014. After acquisition, Mr Brown took a salary and Mr Feltham was employed as a consultant; and once those costs were added to the Company's outgoings, it became loss-making.

53. Mr Brown had proposed to BCA from the outset (on 23 November 2013) that he and Mr Feltham be retained for five years on substantial day rates. His resourcing spread-sheet, included in the "*Yankee*" spread sheet, showed them receiving annual compensation of £144,000 and £72,000 respectively. He had then sought a high salary in the negotiation of the acquisition, but reduced it after Mr Robinson had remarked that this would " *directly affect the EBITDA on which the deferred consideration is calculated ...*".

54. All the accounting, invoicing and recording of subscribers was done manually by the Company's bookkeeper. Mr Brown himself was an IT expert with little or no experience himself of accounting or corporate matters or of running a business as part of a larger group.

55. On 11 September 2014, Mr Brown emailed Mr Feltham setting out rough costs and revenues, in preparation for Mr Jacobs' "*budget conversation*". Messrs Brown and Feltham met Messrs Robinson and Mr Tal Potishman a consultant to BCA on 16 September 2014, and Mr Robinson then sent Mr Feltham version 2 of the *Yankee* spread-sheet as used at the meeting which Mr Feltham had requested, telling Mr Robinson that the figures could be removed if sensitive and that the Company would insert the actual numbers.

56. Mr Potishman visited the Company's Daventry offices on 23 September 2014 having asked in preparation for some key information on which Mr Feltham was working, regarding the "*Budget 2015 and 3 Year Business Plan*" and covering projections of revenues and costs and "*strategic growth plans*", KPIs and an organisation structure. He met with Messrs Brown, Feltham and Evans.

57. Messrs Brown and Feltham then developed and sent to Mr Potishman a series of draft budgets which he forwarded in version 5 with its accompanying notes to Mr Jacobs and BCA's UK Finance Manager Mr Peter Lindars on 26 September 2014. This showed anticipated revenues from subscriptions and partnerships (with Cartell, Pistonheads, and HPI). The other revenue forecasts copied from the Yankee spread-sheet were to be discussed with Mr Jacobs the following week before the budget was finalised.

58. On 7 October 2014 there was an all-day meeting at Daventry, and Messrs Brown, Feltham and Evans presented plans which Company had itself developed – Sales, Product and Marketing Roadmaps and a *Gantt* chart – to Messrs Thomas and Jacobs, who had emphasised that they should base this only on what the Company knew.

59. On 21 October 2014, after further work with Messrs Feltham and Evans, Mr Potishman submitted a Company forecast to Mr Jacobs showing revenue mainly from subscriptions, forecast to rise by about £6,000 per month (equivalent to the sales' targets of the Chichester sales team) and some limited revenue from transport services, but no longer including the lines from the Yankee spread-sheet resulting from integration with BCA.

60. Mr Potishman told Mr Jacobs that Messrs Feltham and Evans had stressed the importance of support from BCA and he had "*urged them to stick to the plan where Tradeouts relies on its own ability. Any support from BCA would naturally benefit all*

parties but Tradeouts must show profitability based on their own resources." Messrs Feltham and Evans had previously noted that "*The responsibility for total revenue rest*[s] *with Roger* [Evans] *and David* [Brown]".

61. As for the Intercompany Account between BCA and the Company (alleged in paragraph 55 of the Petition to be "*a false construct by BCA which was designed to put the Company under financial pressure*"), this was reconciled every month between a member of Mr Lindars' team Ms Holly Jones and the Company's book-keeper, initially Ms Donna Roe and then from September 2015 Ms Dawn Kirk, who signed sheets which they returned to Ms Jones.

62. This Intercompany Account consisted of payroll for the Company's employees and for the consultancy fees of Messrs Feltham, Evans and Mr Richard Richmond (who succeeded Mr Evans as Commercial Director in summer 2015) and various ad-hoc expenses paid by BCA for the Company such as printing costs for marketing flyers and then recharged. On occasions Mr Brown variously asked either that costs *should* be allocated to the Intercompany Account (in June and August 2015) or for the Company's bookkeeper to ensure that a particular invoice was *not* charged to the Intercompany Account.

63. For the financial year-end for 2014, Ms Roe told Mr Brown that Mr Lindars "*has asked that Tradeouts repays some of the monies that is owed to BCA, at present it stands at £79,954.83, as it is year-end as of 31st December, the transfer needs to be made before this date, he is asking in the region of £15K to be repaid*". Mr Brown approved repayment of £15,000 made by the Company on 22 December 2014.

64. The Company's statutory accounts for 1 April to 31 December 2014 (signed by Mr Lampert after being sent to Mr Brown) recorded £99,176 as "*owed to group undertakings*" and said "*Amounts due to group undertakings are unsecured, interest free, have no fixed date of repayment and are repayable on demand…*".

E. HPIBid

65. At the meeting on 7 October 2014, the Company presented a Product Roadmap which envisaged two new products with a transactional element (required also for the Irish project) called "*TradeoutsDirect*" and a premium service "*Tradedesk*", a Gantt Chart proposing that Mr Brown work on "*Transactional Direct*" between 1 December 2014 and 27 February 2015, and a suggestion that BCA's "*offsite sales*" be handled by the Company in a "Dealer Auction" (that is, transactional) manner, acknowledging this might be complex.

66. Mr Feltham's and Mr Thomas' notes of the meeting refer to the development of a transactional model for the Platform as an important step. The Sales Roadmap explained that 60% of subscription cancellations were in the first three months and there was "… *clearly still a gap between what customer hopes the site will deliver for their subscription and the value they manage to realise.*"

67. On 20 November 2014, Ms Roberts sent Mr Brown a marketing plan for discussion, which included a "*transition from subscription to transactional model*" as a means of growing revenue, as well as a plan for increasing the subscriber base in the meantime; and on 24 November 2014, Mr Evans confirmed to Ms Roberts that the cancellations were running at similar levels to new sign-ups, that he had difficulty seeing many users paying for the more valuable subscriptions, and that – unsurprisingly in the circumstances – that they were all keen to develop the model into a transactional one as soon as possible.

68. On 25 November 2014, Messrs Brown and Evans met with Mr Lock, and Ms Roberts and others, to discuss the move to a transactional model and a "*budget holiday*" for the Company. Mr Brown contends that it was agreed at that meeting not only that the Company would not have to meet its budget objectives for a period of time, but that funding advanced through the Intercompany Account until launch of the transactional Platform would not be repayable.

69. Mr Brown also contends that it was agreed that there would be no changes as to the functionality of the proposed transactional model but no scoping out appears to have taken place until several months later. On 3 February 2015, Ms Roberts arranged a Tradeouts Strategy Workshop with Messrs Brown and Evans and Messrs Jacobs, Robinson, Thomas, Hazelwood, and Mr Tom Bird, BCA's Head of Digital, with objectives including:

> … *Brainstorm what we would need to provide in a proposition to meet the needs of Tier 2 and 3 dealers. Note this is a wide ranging conversation and involves other parts of our business and product set. I'd like to focus upon the transactional part of the marketplace ie the deal between a buyer and seller …* [and] *Debate the options re pricing ie subscription vs transaction …*

70. In the meantime during the early part of 2015, the Company was developing HPIBid, which HPI prepared to market and launch on 1 April 2015 (later moved to 7 April) so that when a dealer was offered a vehicle in part exchange, he or she could carry an HPI check on the vehicle to check its provenance and then advertise and accept bids for it from other dealers, all through the Company's Platform, charging a transaction fee.

71. On 6 February 2015 Mr Evans arranged a meeting with Mr Farrelly to discuss the contract with HPI for HPIBid, and Terms and Conditions for HPIBid and the new transactional site. Mr Farrelly supplied Terms and Conditions for the site on 31 March 2015 which he updated in the light of Mr Evans' comments on 2 April 2015. He also helped draft the contract between the Company and HPI and referred to the importance of signing it on at least 8 occasions between March and October 2015.

72. The HPIBid launch was a disappointment and it engendered much less activity than HPI and the Company had anticipated. Mr Evans told HPI on 7 May 2015 that he was "*genuinely flummoxed as to why so little activity – it isn't hard to make a cheeky low bid, what have people got to lose and adding a car is easy enough*" and that, whilst he was happy to brainstorm ways of improving activity, he lacked tangible feedback from the (HPI) sales team as to why dealers were not engaging.

73. In late September, HPI produced a set of slides for a discussion about the business with the Company's then Commercial Director Mr Richmond, which showed that (a) the number of sign-ups and deals increased from the April launch to June 2015 (when over 100 cars were sold) but then declined from July to September 2015, despite thousands of telephone calls and dealer visits made by HPI's sales team who could not seem to gain commitments from smaller dealers to list vehicles (perhaps because of their culture and volume target, concerns raised about the appraisal process and the price cap, and the fact that fewer than one in ten vehicles being listed was being sold); and (b) only six dealers had bought more than one car on the site, possibly preferring their local relationships and discouraged by technical process problems.

74. On 27 February 2015 Mr Evans had circulated a new revenue forecast, which was reliant on HPIBid revenues to bring the Company into profit. The absence of those revenues meant that as the Company worked on introducing a more sophisticated transactional model, it made significant monthly losses.

75. BCA continued to provide help and support in other areas. The Company was given access to BCA's valuations service and BCA Logistics (which transported vehicles from sellers to buyers and provided a much better mileage rate for the Company's customers than for AutoTradeMail customers. Ms Roberts lobbied Mr Lock to approve the hiring of an additional developer by Messrs Brown and Evans; Mr James presented the Company's services to BCA's customer services telephone team on 21 April 2015; and Messrs Thomas and McOwan sought to make the BCA web appraisal available to Mr Brown.

76. It was initially anticipated by the Company that dealers doing HPI checks would be the source of stock for HPIBid once it was up and running. Mr Evans circulated slides to Ms Roberts, Messrs Lock, Jacobs, Robinson and Farrelly and Mr Brown on 2

February 2015 stating "… *With over 45,000 HPI checks a day and dominant market share with used car dealers, HPI has the customer base and platform to market cars and transact them at the earliest point in the sale process.*"

77. At this point, the Company hoped that WBAC would act as a buyer on HPIBid and underwriter, rather than as a supplier of stock. But at the management meeting on 13 February 2015, there was a discussion about the possibility of BCA seeking "*seed stock*" for HPIBid - vehicles that were loaded on the first day of the site's operation, in order to attract buyers.

78. Mr Brown contends that Mr Lock promised to provide 500 vehicles for the Platform. WBAC was the only company in the BCA group with title to stock and on 24 February 2015 Mr Evans emailed Mr Brown (on holiday) to let him know that Ms Roberts was "*on the case with WBAC stock for go live – she is lobbying Spencer*".

79. Ms Roberts indeed asked WBAC's chief executive Mr Noel McKee to provide vehicles as seed stock for the HPIBid launch, recognising that the HPIBid model did not align with WBAC's usually quick cash flow, but asking for help to another group company. Mr McKee, despite his reservations about whether HPIBid would succeed and the problems that providing stock would cause to WBAC's processes, agreed by email on 8 March 2015 to provide 100 cars for a one week trial.

80. The next day, Mr Robinson emailed Messrs Steve Nobes and Darren McKee, respectively the CFO and Purchasing Director of WBAC, to arrange a call with Mr Evans on 10 March 2014 about how the process map could work while disturbing WBAC's procedures as little as possible.

81. On 10 March 2014, Mr Robinson emailed the participants noting that the pilot process, particularly the data and information flows, needed to be documented and shared with WBAC, for which he and Mr Evans would be responsible. Mr Evans emailed Messrs Nobes and Darren McKee agreeing to move the HPIBid launch date to 7 April 2014 – the week after Easter weekend, rather than the week before as had been planned – and saying that he would be in touch once he and Mr Robinson had mapped out the process.

82. On 18 March 2015 Mr Robinson, following a meeting with Mr Evans, circulated a process "*strawman*" setting out how WBAC cars would be placed on HPIBid and noting that there were a number of "*open questions/decisions*" to be resolved before the process could work. Thus (a) for the 100 "*fresh stock*" vehicles, a stock file would need to be produced when the vehicles arrived at the BCA branches, then passed to WBAC to set prices for them; (b) similarly, for WBAC vehicles that had been unsold at auctions (some of which were also planned to be added to HPIBid), WBAC would

have to review the vehicles and reprice them if necessary; (c) new stock files, with prices, would be passed to the Company to upload to HPIBid; (d) the timing of how long the vehicles would stay on HPIBid before being re-entered in an auction had to be agreed with the BCA branches and WBAC; (e) the Company needed to agree with WBAC a process where a bid on a WBAC vehicle would be accepted automatically, or the WBAC team would have the opportunity to formally accept a bid; (f) there was an outstanding question over whether delivery to the buyer should be compulsory, failing which the buyer would collect the vehicle from the BCA branch, in a process that also needed agreement.

83. The "*strawman*" envisaged that the details on the buyer collected in the process on the Platform would be passed to BCA Finance in order to raise a private treaty invoice to the buyer, collect payment from the buyer, and authorise a release note that could be passed to the branch holding the relevant vehicle. This appeared a complex process requiring active coordination.

84. Mr Robinson was away on compassionate leave for much of this period and Mr Evans did not get in touch with BCA Finance until 31 March 2015 or with WBAC's BCA Account Manager until 1 April 2015, after Mr Robinson had returned and expressed concern that no progress had been made. Ms Roberts set up a conference call to try to drive the process forward although neither Mr Brown nor Mr Evans appear to have raised concerns with her in the previous 10 days.

85. Mr Brown's response to the lack of progress was to write to Ms Roberts, and Messrs Jacobs and Robinson, saying "*As you know, there are wider implications if BCA is seen to not assist with my mandate to grow Tradeouts".* BCA allege that he failed to engage with issues which urgently needed to be resolved but looked to blame it instead for every setback.

86. On the afternoon of 1 April 2015, Mr Evans raised with Ms Maria Brewin, BCA's WBAC Account Manager, questions as to how WBAC would determine the prices of the vehicles and for how long the adverts would remain live – issues first raisedthat day. There also remained uncertainty as to how payment by buyers of WBAC cars would work, on which a possible process had been outlined, along with a number of concerns, by Mr Collyer the day before, when Mr Evans first contacted him.

87. Mr Collyer said that the invoices would have to be manually raised, and the bank account then manually monitored for payment, flagged possible VAT and tax issues, and asked whether it would be more logical for WBAC to invoice the buyers. Those issues could not be solved by the end of 2 April 2015 (the last working day before the HPIBid launch).

88. WBAC was not willing to shoulder the administrative burden of invoicing buyers and collecting funds and Ms Roberts reminded Mr Evans and Mr Robinson by email on 2 April that they needed to deal with the payment issues. None of them could think of a suitable solution that could be deployed in time, and Ms Roberts circulated an email explaining that WBAC vehicles would not be used as seed stock because the payment transaction could not be managed without unacceptable commercial risk to BCA.

89. Whilst Mr Brown alleges that the HPIBid platform went live without any saleable cars, there were in fact over 2,000 'Buy it now' cars advertised on the Tradeouts Platform as of 30 March 2015, and these advertisements were migrated to HPIBid. Those which lacked photographs or were overpriced were removed, and on 21 April 2015 Mr Evans reported that the Platform was "*good stock, well described and at Trade Prices"* – 1,400 vehicles on the site, with increasing numbers of bids from dealers coming to the site through HPI.

90. On the same day, 21 April 2015, Mr Brown told Mr Evans of the need to leave a clear record in correspondence "*for when things get legal*".

91. After the launch of HPIBid, attention turned back to the development of a fully transactional Platform, to deal with all invoicing and payment rather than leaving that separately as between the vendor and buyer. It was recognised that the Company needed to break even by year-end (which required the fully transactional model to bring in revenue of some £260,000 by then) and that this model required among other things an accounting system capable of self-billing and incorporating software for dispute resolution.

92. Although the Company initially targeted a launch of the fully transactional model by 1 September 2015, the complexities necessitated a phased approach – "Tradeouts Direct" (as per HPIBid but with e-auctions functionality) to be launched in September, and the fully transactional "Tradeouts Pro" by 1 October 2015 but continuing challenges with self-billing and a lack of sufficient stock delayed this further.

93. In the meantime, on 29 July 2015 Mr Evans was dismissed by Ms Roberts, whose script for the conversation was to the effect that Mr Evans was not driving the Company's business forward, and had damaged his relationship with BCA by criticising the company and being discourteous to junior BCA employees.

94. Whilst Mr Brown claimed that he was not aware of Mr Evans' dismissal in advance, Mr Richmond, who replaced Mr Evans, had met with Mr Brown on 6 July 2015 and Mr Brown arranged for BCA IT to redirect emails addressed to Mr Evans to Mr Brown's own inbox on 28 July 2015.

F. Provision of stock

95. After Mr Evans had circulated a set of slides on the minimum viable proposition ("MVP") for a transactional re-launch in late May 2015, Ms Roberts sought to identify for Mr Craig Purvey (the Sales General Manager) people within BCA who might know about stock opportunities for the Company, ahead of a stock workshop for the Company organised for 12 June 2015 which Mr Evans described as "*very positive*".

96. Mr Purvey's team discussed opportunities with Mr Evans and Ms Brewin (BCA Business Development Manager Dealers UK, and one of those who had tried to arrange WBAC stock for HPIBid) emailed Mr Evans on 18 June 2015 asking for a presentation on the Platform so that she could walk her client Mercedes Benz Retail Group through the benefits.

97. Mr Purvey asked Mr Evans to introduce the Platform at the next Sales team meeting for the National Sales Team Account Managers who managed the Corporate, Dealer and OEM vendors but as Messrs Brown and Evans were both on holiday, Mr Thomas presented the Platform instead. On 3 July 2015 Mr Purvey emailed Mr Evans to say that he had discussed the Platform's re-launch with Messrs Dave Burden (the Dealer Sales Director) and Stuart Pearson (Head of UK Auction Operations) and that they would like to visit Daventry to see the systems and processes, and discuss the re-launch in more detail.

98. A meeting was arranged for 5 August 2015 at the Company's Daventry offices, attended by Mr Brown and Richmond of the Company and Messrs Purvey, Burden, Pearson, Thomas and James and Mr Sam Vickers (an Account Manager) of BCA, to investigate ways for BCA to help find sources of stock.

99. The minutes emphasised that the Company's business was to be complementary to BCA's: "*The intention is that the propositions will generate incremental income and conquest business and will not cannibalise current auction volumes or income. However it is acknowledged that there may be some leakage but it is important that the income is protected and stays within group rather than competitors jumping into this market space.*"

100. Following the meeting, possible opportunities for stock were pursued with and by the various teams in BCA: the BDEs, who targeted tier 2 and 3 dealers; Partner Finance, which offered financing to dealers; the Sales team under Mr Purvey, which worked with corporate, dealer and OEM vendor clients; and the Auctions department, which managed the physical auctions.

101. Whilst Mr Brown later alleged that the BCA attendees at this meeting confirmed "*that they could provide vehicles to the Platform … Tradeouts was promised 2,300 cars per month",* that figure appears to have been taken from Ms Roberts' later email of 3 September 2015, in which she suggested potential "*targets*" for the various BCA teams (BDE, Partner Finance, Dealer and Corporate Sales) which were to seek to persuade third parties, mostly customers, to list stock on the Platform.

102. Ms Roberts said that her targets "*…are my provisional figures. They should be used as an opening discussion.*" In an email to BCA employees working to locate stock for the Company on 16 September 2015, Mr Richmond described Ms Roberts' figures as "*suggested commitments*". His project update slides continued to describe Ms Roberts' provisional figures as targets.

103. Mr Brown may have understood this to some extent at the time, saying in relation to the BDE figure that "*While I would like to think that the BDEs could rustle up 100 cars per month, given the profile of the people they visit, rarely do they trade cars out, … it'll be interesting to see whether this materialises.*" Even on 22 October 2015, he was suggesting that that there be clarification on who was responsible for vendor acquisition (that is, stock) rather than alleging that BCA had promised and not delivered.

104. Although Mr Brown alleges that BCA was merely "*putting on a show"* but in reality not doing or trying to do anything, BCA staff were taking active steps to obtain more stock. For example: (a) by 23 October 2015 the BDEs had registered 14 customers, who had loaded six vehicles and Mr Richmond told Ms Roberts that Mr Jackson from the BDEs was very supportive; and (b) Partner Finance staff were offered a cash incentive, and a mailing was sent to all their customers advertising the Platform as "*an integral part of your stock management system".*

105. Mr Purvey provided the names and email addresses of all the Sales and Corporate team Account Managers to Mr Richmond at his request and set up meetings and log-ins. They provided many introductions to possible vendors corporate and dealing vendors, including Mercedes Retail, Dawson Rental, Inchcape, Jardine, Avis, Northgate, AA Driving School, and Bill Plant Driving School, amongst others, and some listed stock on the Platform: but on the whole it was not successfully sold.

106. Efforts to acquire more stock for the Platform were not wholly unsuccessful. Hertz, Europcar and G3 Remarketing provided a total of 170 vehicles as at the end of September 2015 although the Company lost Hertz as a vendor in mid-October. And the Company did not simply rely on BCA for stock. Mr Evans and then Mr Richmond approached vendor contacts. The response from one, at Lookers (a large dealer group) explained that while they might look at selling over-age stock through the Platform,

their dealers were happy sending part exchange cars to auction as it provided a quick disposal.

107. By 19 November 2015, Mr Richmond reported to Ms Roberts that there was plenty of corporate stock from rental companies, manufacturers, driving schools, and so on, but that it was not being bought. He noted that Europcar (a long-standing vendor client of the Company) had listed over 700 vehicles over the past six months but only sold five.

108. Ms Roberts also discussed the possibility of using the Platform for repeatedly unsold auction stock with Mr Pearson. Like Noel McKee of WBAC and others at BCA, he raised concerns about artificially supporting the Company to the detriment of the physical business (although Mr Hazelwood responded pointing out that there were customers, both vendors and buyers, who would never use auctions, and that on-line sales would be necessary to fulfil BCA's growth targets). Cash incentives were again proposed for staff but, in part because of the busy auction season and in any event, the necessary board approval was never obtained.

G. The fully transactional model

109. After the launch of HPIBid on 7 April 2015, Tradeouts subscribers continued to pay their subscriptions, and were not charged buyer or seller fees on the new, transactional Platform; and advertisements migrated to the new Platform were subject to new quality controls. But there had not been any significant work done since February 2015 on what features or commercial propositions the transactional Platform should offer, other than those that were part of HPIBid, although a March strategy deck listed as an example of best practice that there would be "*Only one transaction – TO pays vendor less their fee and buyer fee*"

110. Mr Brown alleges among other things that BCA wrongfully, against his wishes and in violation of previous agreements, caused delays in the launch of the transactional model; imposed requirements of self-billing (by an accounting package called Navision) and dispute resolution (by an on-line system called Modria); and failed to market the transactional Platform and would not allow the Company to employ its own field sales force to find stock.

111. Whilst Mr Brown claims that Ms Roberts insisted on adding self-billing and dispute resolution at a meeting on 29 May, Mr Evans had circulated slides after a strategy review workshop on 30 April 2015 of the MVP for a transactional re-launch including self-billing and dispute resolution and saying "*I think we're aligned on what the end goal is*". These included a slide on "*Payment options to be scoped*", which said that "*Establishing a strong Trust and Redress process is the pre-requisite to success*" and "*Self Billing process required*".

112. On 8 June 2015 Mr Evans circulated a further set of documents for the re-launch of the Platform on 1 September 2015, including slides explaining the difference between Tradeouts Direct, on which payments would be managed dealer-to-dealer with limited dispute resolution, and Tradeouts Pro (then called Tradeouts Premium) which would manage the payment process and dispute resolution.

113. Mr Evans' project initiation document set out the various work-streams assigned by Ms Roberts a week earlier and said that he, as Project Manager "… *will manage the day-to-day tasks for the project and will manage the work to be carried out and ensure that all tasks are carried out within the agreed time constraints…"* and was also responsible for the 'Business case – P&L', 'Dispute resolution and arbitration' and 'Reporting & Stats' work-streams.

114. Mr Brown was responsible for the Platform system itself. The 'Legal – T&Cs' work-stream was assigned to Mr Farrelly, the 'Invoicing and Finance' workstream to Mr Lindars, the 'Brand & Sales Collateral' and 'Lead generation & BDEs' workstream to Mr James; and the 'Stock' workstream to 'Sales', specifically Messrs Purvey, Burden, and Neil O'Keefe (Business Development Director) and the BDEs.

115. Messrs Brown and Evans produced documents from early June 2015 looking at how much activity was needed for the Company to break-even that year (but not how that would be achieved). Mr Brown calculated backwards from the additional revenue needed, that the Platform would require between 95 and 860 new vehicles every day. Mr Evans calculated that the Platform would need a minimum of 10,000 properly appraised and sensibly priced vehicles added between September and December.

116. Although Mr Brown alleges that "*Mr James had no interest in seeing Tradeouts succeed*", Mr James and other BCA staff continued, at least in appearance, to assist the Company in marketing. Mr James arranged for the Company to exhibit at the Car Dealer Expo at Silverstone on 9 June 2015, and for an advert for the Platform in the show guide and for a branded pop-up stand at a cost of £500 which BCA covered.

117. Mr James then gave a marketing workshop on 10 June 2015 and spent 16 and 17 June 2015 at the Company's Daventry office, following Mr Evans' recommendation that he might usefully immerse himself in what the Company was doing. He then developed a costed, detailed launch plan for the transactional model and a member of his team, at Mr Evans' request, analysed competitor transactional platforms.

118. After the meeting of 5 August 2015, Mr James involved a number of other marketing colleagues in supporting the transactional model launch and provided Mr Richmond with regular updates on his activities including (a) an advertisement for the Platform in BCA's October 2015 Sales Catalogue published on BCA's website and sent to

2,000 BCA Top Buyers, with a further 2,500 distributed in branches and (b) product flyers for both Tradeouts Direct and Tradeouts Pro, as well as (c) a direct mail campaign promoting the Platform to Partner Finance's customers and (d) an email campaign to promote the re-launch (which Mr Richmond asked to be sent by BCA out of a concern that the Company had emailed its customers so much that they had probably blocked it).

119. These emails were to be sent out once the Company had enough stock, not only to the Company's customers but also to Partner Finance customers and to BCA's Blue, Silver, and Gold cardholders, regardless of whether they had recently bought from BCA (and were therefore classed as "*active*") – over 10,000 unique email addresses, only 479 of which were also registered with the Company.

120. Mr Richmond eventually asked Mr James to start the email campaign in tranches even though he was still concerned about the amount of stock. The first tranche went out on 13 November 2015 to inactive BCA Blue Card Account holders, and Messrs Brown and Richmond seemed pleased with the advertisement and its results. The second tranche, on 19 November 2015, went to over 2,100 BCA Blue Card Account holders but shareholder discussions and a breakdown in constructive relations intervened, as summarised below.

121. As for the development of the transactional model, the accounting process for "*Self billing*" - by which a buyer would pay the Company for a vehicle, and the Company would then pass on the money, less its fees, to the vendor – required the vendor to give permission to the Company to generate an invoice on its behalf for the sale of the vehicle to the buyer, receive payment and deduct its commission, and then generate a self-billed invoice on behalf of the vendor to the Company which it would then pay.

122. This meant that (a) an accounting system to support self-billing had to be identified and implemented; (b) the invoices, Terms and Conditions, agreements with vendors and record-keeping all had to be VAT-compliant as set out by Mr Robert Preedy, BCA Group VAT Compliance Manager, on 1 July 2015; and (c) the necessary processes for accounting were put in place as set out in a project finance update created by Mr Lindars on 19 October 2015.

123. Mr Brown alleges that BCA required the Company to implement "Navision" as the accounting system and there was a six-month delay as a result, without which the Tradeouts Pro Platform would have been launched much sooner. However, the Company and BCA explored alternatives to Navision, and BCA was content for the Company to implement the eventual solution, which was "Sage", as decided at the management meeting on 4 September 2015; the investigation of Navision – a decision taken by the Company – therefore took more like two months; and during that time

there were other aspects of Tradeouts Pro which were not ready, including the VAT compliance and process aspects of self-billing.

124. BCA was intending to move its accounting system to Navision and this was a slow process. A meeting in early July 2015 on the finance work-stream for the transactional launch (attended by Mr Evans) concluded that given the short expected life of the Company's accounting system at the time "QuickBooks", Navision would be the best replacement package but Mr Robinson's note of this meeting refers to concerns as to when it would be implemented.

125. Mr Evans then investigated, with the assistance of Mr Robinson, whether QuickBooks' online version or Microsoft Dynamics NAV could operate self-billing instead, but decided on Navision. Mr Brown emailed Mr McOwan to ask about the next step, without specifying any date by which the Company needed Navision in place.

126. On 10 August 2015, Mr Richmond (who had replaced Mr Evans at the Company) made it clear that the Company required self-billing urgently but on 13 August 2015 BCA's Navision consultant made it clear that basic functionality could not be live by 1 September 2015 and that self-billing functionality and an interface to the Platform would require bespoke development.

127. Mr Shah and Mr Paul Blackburn (BCA's UK Financial Controller) were in close contact with Mr Richmond over the next few weeks and, while it was agreed that the Company's new book-keeper would continue to use QuickBooks for basic functionality, they investigated whether the transactional function used by BCA Remarketing Solutions or BCA's core commercial system, ACS, might be a better interim means of self-billing. They were not suitable however, and whilst Mr Brown told Mr Shah on 26 August 2015 that "*It is with the utmost urgency that Navision is implemented*", that could simply not be done quickly.

128. At the management meeting on 4 September 2015, it was agreed to move forward with Sage, as it was capable of operating self-billing. But the Company's new book-keeper Dawn Kirk who replaced Donna Roe at the same time, had challenges with using Sage, as she told Mr Richmond and Mr Brown on 14 and 25 September 2015. By 15 October 2015, Mr Richmond had decided to engage external support from Polkadot & Wellkept ("Polkadot"), a firm of accountants in the same building as the Company. Its report stated that Sage had been incorrectly installed and inaccurately operated by Ms Kirk and she resigned on 13 November 2015.

129. On 9 September 2015 Mr Richmond emailed Mr Brown asking to discuss a basic process for Tradeouts Pro. A week later he raised again the need to agree the payment

process and process flows. No progress appears to have been made as at 7 October 2015 when he said that the process flows had still not been documented and tested. Weekly minutes of the Company's team meetings showed that this task (assigned to Ms Kirk and Mr Robinson) was still incomplete as of 27 October 2015.

130. Technical work on integrating the Platform with Sage, for which Mr Brown was responsible, continued until the latter part of October, although as Mr Richmond repeatedly told Ms Roberts, Mr Brown did not provide detailed updates on the functionality.

131. As regards VAT compliance, Mr Preedy had set out the high-level requirements on 1 July 2015. He too spent 21 and 22 September 2015 at the Company's Daventry offices, conducting a VAT audit and working through the VAT issues posed by self-billing. Mr Lindars provided sample BCA self-billing invoices which Mr Richmond passed on to Mr James Grant of the Company on 28 September 2015. Mr Grant worked on templates with Mr Preedy's assistance, and provided a set for sign off on 26 October 2015. Mr Preedy approved them and suggested that he return in about a month to check transactions as they were actually happening.

132. The need for a dispute resolution system had also been agreed during the scoping of the transactional model and on 4 August 2015 Mr Brown met with and obtained a quote from Modria, an on-line dispute resolution systems supplier which he and Mr Evans had identified. Mr Richmond provided Modria with projected volumes of disputes for just the Company in late August 2015. There was a kick-off call between Modria and the Company in late September 2015, and the system was projected to be live in mid-December.

133. Although Mr Brown alleges that Modria's services were required for both BCA and the Company (and that Ms Roberts then went back on this agreement out of concern for the jobs of BCA's customer services' staff and insisted that the Company pay for Modria's services, even though BCA would also be using them), when Ms Roberts said at the time that it had been agreed that there would be a pilot of Modria's services at the Company alone, Mr Brown accepted that he had misunderstood the position.

134. Similarly, although Mr Brown also now says that the presence of Mr Gibbons at his meeting with Modria shows that BCA wanted Modria's services for itself, the documents show that Mr Gibbons was deputising for Mr Bird, who had been assisting the Company with research into how other transactional online platforms managed dispute resolution but was then away.

135. BCA Logistics, which provided transport of vehicles bought through the Platform, worked with the Company from late June until mid-October 2015 when the test

processes were completed and, at the request of Mr Evans, released Mr Mike Crocker, a business development consultant, to support the project of developing the transactional propositions.

136. Mr Farrelly outsourced the drafting of the Terms and Conditions, under his supervision, and they were signed off by Mr Richmond on 9 October 2015. As Mr Richmond reported to Ms Roberts, Mr Farrelly delivered on time and was very helpful.

137. On 7 October 2015 Mr Richmond sent Ms Roberts the list of tasks which Mr Brown had to do before launch. Nine of the eleven items on the list covered aspects of the Platform that would be used by potential customers, such as the need for them to agree to the new terms and conditions, provide their VAT numbers if buying through Tradeouts Pro, and for logistics to be auto-booked.

138. On 21 October 2015 Mr Brown told Mr Green to work on the appraisal screens for the Platform, saying "*We are unable to go live until those screens are done, and the board meeting tomorrow will ask why we've not gone live*". As of 27 October 2015, the Platform still lacked a new homepage and product pages (although Mr Richmond had asked that these be updated as early as 5 October 2015 and Mr James had warned that these were needed before a marketing email was sent out). On 19 November 2015, Mr Richmond was reporting to Ms Roberts that there were still irritating bugs with vehicle listing.

H. Business opportunities

139. Two corporate opportunities which Mr Brown claims that BCA wrongly prevented the Company from developing, with Volkswagen and Trust Ford, were introduced to the Company by BCA.

140. Volkswagen's tender request had specified a fully transactional dealer-to-dealer exchange and on 13 July 2015 Ms Roberts asked for the Platform to be included, if appropriate, in the response, but Mr O'Keefe appears to have been unaware of Tradeouts Pro, then in the early stages of development, and the tender response gave AutoTradeMail as an example of the type of platform which BCA proposed to provide.

141. Mr O'Keefe subsequently made Volkswagen aware of the Platform and it was used for a trial which it requested, vehicles being loaded onto it on 21 September 2015, and Mr James prepared an email campaign to advertise them but work on this stopped at Mr Richmond's request on 28 September 2015. BCA also sought to include the Platform in two other tender responses, to PSA Peugeot Citroen and RAA vehicles.

142. The opportunity to list cars which Trust Ford, a large dealer network, wished to sell discreetly, was mentioned at meetings on 29 July and 5 August 2015 and on 10 August 2015, its BCA Account Manager Ms Spencer, met with Messrs Brown and Richmond to discuss Trust Ford's requirements for a fully transactional model.

143. On 8 September 2015 Mr Richmond emailed Ms Spencer to let her know that the fully transactional Platform was planned to be live by 1 October 2015. Ms Spencer said that Trust Ford had had limited success on BNBN's fully transactional model and she arranged for Mr Richmond to meet Trust Ford to discuss the Platform.

144. Mr Richmond emailed her on 2 October 2015to report on the meeting, and said that Trust Ford was apparently used to a basic fee-per-vehicle system, and had recently signed up to AutoTradeMail, which was disappointing; but Trust Ford said they would allocate some units to the Platform, and Mr Richmond remained in touch with them about it. Mr Brown nonetheless alleges that BCA deliberately stopped the Company from servicing Trust Ford and that Ms Spencer's statement that it required a fully transactional model was made in bad faith.

145. Mr Brown says that the Company also lost an opportunity with Solera, the US parent company of HPI because first Mr Farrelly delayed in engaging solicitors to consider the draft contract, and then in late January and February 2016, BCA Trading prevented the Company from pursuing it.

146. Mr Richmond discussed the Solera contract with Mr Farrelly at a meeting on 15 September 2015 and Mr Farrelly only asked Shoosmiths solicitors to draft the contract on 21 October 2015, because he initially planned to do the work himself but then found that he did not have the time to do so. By 27 October 2015 Shoosmiths produced a draft that Mr Brown shared with Solera.

147. The SHA contained (at clause 3.1.5) a prohibition on the Company carrying on business outside the United Kingdom without BCA Trading's prior written consent and although initially it supported the Solera proposal, in the light of developments to late January 2016, was no longer content for the Company to enter into long-term commitments of that nature without its written permission.

148. Mr Brown also wanted the Company to sell vehicle data produced by the site scanning software he had developed, he says, (a) to WBAC for an annual fee of about £36,000 per annum (b) to Glass' Guide and for an annual fee of about £60,000 (c) to CAP Valuations similarly.

149. The data sales to WBAC were for a project called Carland, for which the Company provided a data feed from early December 2014. The Company tried to negotiate a

contract from mid-March 2015, on the basis that the Company would receive an income stream through premium rate phone numbers.

150. On 18 May 2015, however, Noel McKee of WBAC stated that the site was not going to be commercialised, and there would probably not be any income opportunities for a few years; and on 25 May, Mr Brown said that the Company would not move the project forward, as it had opportunities to commercialise the data elsewhere.

151. Mr McKee suggested to Ms Roberts that the Company should share the data for free because it would benefit the group and asked what "*muscle*" BCA had to try to make the feed happen, but Ms Roberts said that the Company wanted to monetise the investment it was making.

152. When Carland would not pay, the Company ceased to provide it with data from late April 2015. Then, in September 2015, Mr Brown and Mr McKee agreed that the Company would supply Carland with data for a payment of £3,200 per month, which was Mr Brown's estimate of the costs to support the data product, and Carland paid the first three months in advance. In early January 2016, however, Mr Lampert asked WBAC to close down their activities with the Company, as Mr Brown had apparently agreed subject to finalising settlement documents.

153. Mr Brown says that Glass' Guide and CAP Valuations also made enquiries as to vehicle data. Messrs Brown, Richmond and Green met with Glass' Guide in October 2015, but were told that there was no budget for the data that year and none would be available until at least the new year. Mr Farrelly suggested to Mr Richmond that the Company "*hold fire*", as the provision of data was under strategic review, but Mr Richmond continued in discussions with Glass' Guide.

I. The breakdown in relations

154. In June 2015 Mr Brown started to complain about BCA's treatment of the Company, saying he was going to sue BCA. At a meeting on 30 June 2015 he referred to his email of March in which he had warned of "*wider implications if BCA is seen to not assist with my mandate to grow Tradeouts*", which he then forwarded to Ms Roberts and Messrs Jacobs and Mr Hazelwood.

155. Ms Roberts and Mr Brown discussed this at the management meeting on 29 July 2015. On 2 September 2014 Mr Brown emailed a copy of the SPA to Mr Susheel Gupta, the solicitor who had acted for him on the acquisition, directing him to the Buyer's Covenants in Schedule 12.

156. Mr Brown's grievances were ventilated at the management meeting 22 October 2015 and he said that he was thinking of resigning. The Intercompany Account, which

stood at around £336,000 as of the beginning of October was raised either during the meeting or at least (by reference to an "*interest-free loan*") in Ms Roberts' notes and in the minutes circulated on 28 October 2015 and Mr Brown questioned at least whether it was a liability of the Company to BCA. He then emailed Mss Roberts and Nash (of BCA HR) and Messrs Jacobs, Lock and Richmond setting out his complaints and referring again to BCA's buyers' covenants.

157. Mr Brown now alleges in summary that (a) the Intercompany Account was a false construct by BCA designed at and after the management meeting of 22 October 2015 to put the Company under financial pressure; (b) he was hectored and bullied by the BCA-nominated directors and Mr Farrelly at and after the board meeting of 12 November 2015; and (c) the requests for information about the Company's finances and business plan from January 2016 were unnecessary and no more than a pretext.

158. By October 2015 when the fully transactional model was finally launched, changes were afoot in BCA's management. A Ms Avril Palmer-Baunack resigned as BCA Trading's nominated director in the Company and Mr Shah was appointed. Mr Shah and Mr Lampert (the CFO of BCA Marketplace Plc and a director of the Company since 2 April 2015) had had little if any previous detailed involvement in its difficulties but were involved in a review by BCA of its investment in the Company – a not uncommon process in large companies.

159. Prior to the Company board meeting called for 23 November 2015, Mr Brown had privately expressed an intention to use it as an opportunity to gather evidence before deciding whether to sue BCA. He also prepared at the request of Mr Farrelly a "Managing Director's Report", which began "*Progress has been hampered further by fear and resistance at all levels within the BCA Group…".*

160. Mr Brown's report claimed among other things (a) that BCA had promised stock but not delivered; (b) that the Company's poor financial performance had been due to BCA's demand that it move to a transactional model; (c) that HPIBid had failed due to WBAC's failure to provide seed stock; and (d) that the Intercompany Account had never been discussed.

161. Whilst the report asked BCA to commit variously to a target of 5,000 customers per month or 6,000 customers per annum, it did not propose any detailed plan and said nothing about how customers had responded when contacted (or the lack of success by vendors who had listed on the Platform).

162. At the board meeting attempts were made to discuss the viability of the Company's future business and funding. Mr Brown made it clear among other things that he considered it BCA's absolute responsibility to provide more stock, regardless of

making the Platform attractive to vendors, and would need to take legal advice regarding the funding position.

163. Early on 13 November 2015, Mr Brown drafted what appears to be a series of notes relevant to a lawsuit, noting that he had again contacted his lawyer Mr Gupta after the 22 October 2015 management meeting, the possibility of an unfair prejudice petition, and that given that BCA was "*scared stiff of bad publicity*" he might be able to extract a favourable settlement: "*£5m x 3.5 is OTE .. Claim for that. Headline: BCA in £18m law suit. Settle for £3.75m…".*

164. On the same day, there was a without prejudice call between Mr Brown, Mr Farrelly, and Ms Roberts (in which the parties waived privilege). Mr Brown said that he would not be able to make any statement about whether the Intercompany Account was repayable or about whether he was willing to share in funding the business until he had taken legal advice. This was the first of several conversations that Mr Brown secretly recorded despite, on this occasion, telling Mr Farrelly that he understood the call was "*off the record*".

165. Following the negative meeting, Mr Lindars of BCA submitted four invoices for payment within 7 days of the disputed Intercompany Account. That resulted in no progress and once the invoices were overdue, Mr Farrelly emailed Mr Brown saying that BCA's funding could not continue in those circumstances, and that services for which it paid, such as email hosting, could cease.

166. Mr Brown replied to the BCA-nominated directors and Mr Farrelly in a series of emails, mostly drafted by his solicitor Carl Garvie, stating that the Company should challenge BCA over the invoices and the Intercompany Account but Mr Farrelly stated, as the Company's Secretary and General Counsel, that he could see no basis for doing so.

167. There were discussions to effect a so-called "Burial Proposal" whereby the Company would be moth-balled and Messrs Brown and Feltham's transfer their shares to BCA. On 4 December 2015 Mr Farrelly emailed Mr Brown to tell him that the "*the legal documentation that will cover our agreement is in the process of being prepared*". On at least 4 occasions Mr Farrelly chased for Mr Brown's response, and was put off for a variety of reasons including Mr Brown's instruction of new solicitors (Candey in place of Mr Garvie).

168. Eventually on 11 January 2016 Mr Brown said that in his view he had not agreed to anything. However, in the interim it was obvious that Mr Farrelly thought that the Burial Proposal was agreed in principle. So did Mr Lampert, who told AoS that the Company was going to close and WBAC to cease business with it and withdrew the

Company's IT services. Mr Brown subsequently complained of this and of Mr Farrelly's "*badgering*" him to agree the Burial Proposal.

169. Board meetings then resumed, on 14 and 22 January 2016 (audio-recorded by Mr Brown against the BCA-nominated directors' wishes) and there was further correspondence between the parties. By then the Intercompany Account was climbing above £450,000.

170. Mr Brown's position as at 21 January was that the Company was not trading at a loss, despite stating earlier in the Managing Director's report that the business was making a loss of around £30,000 a month. Mr Shah circulated November 2015 management accounts and a short term cash flow forecast, noting that this was a best guess, given that accounting records for the Company no longer seemed to be maintained.

171. Mr Brown failed to bring any financial information to the 22 January 2016 board meeting and whilst he now alleges that BCA had all they needed and that Polkadot were still awaiting information from them, he did not say this at the meting in the conversations as to why Polkadot had failed to produce the accounts. He was not interested in exploring BCA's question as to whether he would share in funding going forward.

172. After this meeting, Mr Farrelly (who had been vetting BCA's correspondence with Mr Brown) proposed by email that the Company incur no further liabilities until management accounts were produced for December 2015 and Mr Lampert and Mr Shah (who had been unable to attend the meeting) agreed; and Mr Brown asked that the board reconvene at short notice.

173. Mr Farrelly called a meeting for 2 February 2016 at 2 pm, requiring physical attendance by the directors and no deferral but Mr Brown emailed the BCA-nominated directors and Mr Farrelly on 1 February 2016 to propose that it be adjourned because the management accounts were still not available. Mr Lampert replied:

> "*… I do not agree to adjourning the Board meeting as for a company of this size the accounts should be able to be produced on a timely basis. Therefore if they are not produced and tabled the Board must consider the future viability and operating basis of the company using the knowledge it has in a way as to minimise risks and liabilities...*"

174. Given that the accounts had still not been produced, Mr Lambert also asked again for a copy of a signed engagement letter between the Company and Polkadot. At 12.46 pm an 2 February 2016 Mr Brown replied saying he had not signed Polkadot's engagement letter. He again suggested that the meeting be adjourned (it was

obviously already too late for him to travel there) or that he be able to attend by telephone.

175. He then sent a third email just after 2pm, as the meeting was starting but Messrs Lampert and Shah, allegedly given the limited visibility of the Company's financial position and considering that Mr Brown was not acting properly as managing director and was seeking to force an unpalatable delay, proceeded and resolved that there were limited and diminishing funds available to the Company and its business should therefore cease with immediate effect.

176. Whilst the steps then required to "mothball" the business were then undertaken by Mr Lindars and others –the Company's Daventry lease was allowed to lapse, its IT facilities were terminated and its remaining employees (Messrs Green and Grant) were dismissed - Mr Brown presented his present section 994 petition within 3 weeks of the 2 February meeting, on 22 February 2016.

(3) THE PROCEEDINGS

177. It is not possible or helpful to set out *in extenso* all the many allegations and counter-allegations in issue, and the details of the procedures followed in this matter. Instead this section highlights some selected features of the proceedings including the trial. It should not be read as comprehensive and in particular does not examine every aspect relevant to every step or witness.

A. The statements of case – bad faith

178. Paragraphs 120 to 123 of Mr Brown's petition dated 22 February 2016 summarised his allegations of breaches of obligation. I need only quote verbatim at this stage from paragraphs 120 and 121 (paragraphs 122 and 123 alleged breaches of information and directors' duties, which I address later below):

> *120. In the above-pleaded premises, it is averred that BCA has acted (both itself and through its agents and nominated directors on the Board of the Company) in breach of its obligations under the SPA, the SHA and pursuant to the Fundamental Understanding. In short, BCA has failed and/or refused to conduct the business of the Company in good faith and/or with a view to maximising the Company's EBITDA. On the contrary, BCA has (for its own reasons, and in its own interests) sought to inhibit and stifle the Company's ability to carry on business, with the ultimate objective of shutting down the Company, thereby neutralising it as a potential competitor of BCA. Furthermore, BCA has, by its conduct of the Company's affairs, attempted to exclude the Petitioner from the Company and reduce to nil (or to a minimal*

level) the value of the Petitioner's earn-out through his interest in the Option Shares.

121. In support of this averment, the Petitioner relies on all facts and matters pleaded herein, but relies in particular upon the following facts and matters:

121.1 BCA has failed and/or refused to agree a business plan for the conduct of the Company's business, in order to generate maximum EBITDA;
121.2 BCA has sought to delay and/or hamper the launch of the Tradeouts Platform;
121.3 BCA has failed to provide any (or any significant) stock to the Company, including in particular for the Tradeouts Platform and for HPIBid;
121.4 BCA has required the Company to change the planned functionality of the Tradeouts Platform - a step which caused severe prejudice to the Company;
121.5 BCA has failed to market the Company and/or attempted to prevent other companies owned by it from hosting marketing content in relation to the Company;
121.6 BCA has sought to divert and/or sabotage potential business opportunities of the Company, including in particular those relating to Trust Ford, VW Group and Solera;
121.7 BCA has sought to cut off the Company's funding, thereby rendering it unable to meet its obligations (including to staff, its landlord and in respect of other vital services) and ultimately rendering it unable to carry on its business effectively
121.8 BCA has suspended the Company's IT systems, similarly rendering the Company unable to carry on its business effectively;
121.9 BCA has sought to suggest that the Company is saddled with a false debt in the form of the Purported Intercompany Loan and has sought to enforce that purported loan;
121.10 BCA has failed and/or refused (for its own interest) to introduce the services of the Company to other parts of the BCA Group and/or to clients of the BCA Group;
121.11 BCA has attempted to force the Petitioner out of the Company (whether in his capacity as an employee, director or as a shareholder), thereby procuring that the day-to-day management of the Company would cease to be in the hands of the Petitioner; and
121.12 BCA has failed to procure that its officers desist from breaching their duties to the Company.

179. BCA Trading served a Statement of Defence dated 29 April 2016 of some 50 pages, denying any breaches of obligation by itself or its nominees on the Company's board, and setting out the many reasons, many positive reasons, for that denial. The Reply dated 10 June 2016 said little persuasively to deal with those reasons, claiming for example:

(a) as regards BCA's support, only that "*not a single vehicle was made available by WBAC or any of the BCA divisions*" (paragraph 17);

(b) that it was the Petitioner's understanding *"... that while there was an intercompany accounting, this was simply accounting procedure and the costs incurred would be written off as development costs ..."* (paragraph 21.1); and

(c) the Company and BCA were "*plainly competitors or at least potential competitors...*" and that (paragraph 9) "*BCA could not have allowed the Tradeouts Platform to gain any further traction and had to stop it by the Acquisition*".

180. Mr Brown's counsel stated in opening the trial (which took place over 11 days in October 2017) that BCA's challenge to the allegation in paragraph 120 of the Petition that "… *BCA has (for its own reasons, and in its own interests) sought to inhibit and stifle the Company's ability to carry on business, with the ultimate objective of shutting down the Company, thereby neutralising it as a potential competitor of BCA*…" was an "Aunt Sally" or false target, because it related solely to the period from October 2015 and not previously.

181. But that typified some of the oddities in Mr Brown's case and it remained replete with allegations that throughout his relationship with BCA it had acted in bad faith and in conspiracy with and through its various employees to damage the Company and his interest in it.

182. In many if not all respects these allegations were contrary to the contemporaneous documents and far-fetched. In some cases they verged on the irrational. They extended to a mantra of empty allegations against BCA Trading and most if not all of its witnesses, to the effect that they had been and were lying in order to advance and then conceal bad faith and conspiracy. Any court would be cautious as to the proof necessary to satisfy it in that regard.

183. Whilst there is a distinction between alleging bad faith in the relevant dealings, and dishonesty in testimony, Mr Brown's case and the conduct of it tended to elide the two. It might be thought problematic to resist an inference, from the honesty of a witness in seeking to rebut a particular outlandish allegation, that there was no bad faith in the dealings whatsoever. However my general assessment of the witnesses as below does not entail a conclusion that none of Mr Brown's allegations of bad faith were justified, if there had been other reliable evidence in support.

184. A striking aspect of this dispute relate to the ways in which the two sides sought to bolster the proposed claim and defence whilst the Company and its business supposedly remained on foot. Neither side was concentrating on using their best efforts to nurture the business (to the possible detriment of their other interests) and both had more than an eye to the possible legacy of its demise.

185. The relationship had broken down and Mr Brown, whilst still the Company's managing director and thus steward of the ship, did little or nothing to save it from the rocks, perhaps considering himself powerless or more likely – given his immediate receipt of more than £1 million and his ruthlessness in the course of the proceedings - to benefit in the wreckage. Indeed he possibly hoped (to quote his note of 13 November 2015) to obtain up to £3.75 million by suing his supporter - which was losing its entire investment and was hopefully scared of bad publicity - to the extent of £18 million.

186. As regards the many significant respects (for example as regards the Intercompany Account and BCA's alleged efforts to support and assist the Company) in which BCA Trading set out its positive case and the details of its support, Mr Brown made little real attempt at a detailed rebuttal nor as regards his own efforts nor further information to that end other than his repeated barrage of one-sided blame.

187. There were more than 20 bundles at trial of contemporaneous documents (including numerous email trails and electronic spreadsheets) a fair proportion of which (but far from all) were pored over during the hearing. Much of the debate was as regards the consensus or miscommunication, action or inaction they evidenced.

188. The key examples cited on behalf of Mr Brown and explored with the witnesses are referred to below. Whilst the picture they revealed may have been incomplete, it was sufficient to demonstrate that many of Mr Brown's accusations or suspicions were erroneous, that his Fundamental Understanding was a subjective and biased theory, and that many of BCA's positive answers were well-founded.

B. Mr Brown's evidence

189. At trial, Mr Brown himself gave evidence and called Messrs Feltham, Evans and (by compulsion) Richmond. Little or none of this seemed to me reliably to add to the contemporaneous documents. Mr Brown himself often failed to answer questions directly, instead sticking to his agenda against BCA and the case constructed on the basis of his suspicions as to its motivation and a selective construct from its documents out of context.

190. Thus several of Mr Brown's answers in cross-examination included the phrase "*As the evidence will show…".* It emerged from his treatment of the documents in cross-examination and his accusations and excuses that he might have persuaded himself of his case through misunderstanding and misremembering what was realistically expected of each side – including BCA companies outside BCA Trading – and a culture clash with BCA's more corporate world, to which he reacted with a confused and destructive mixture of passivity and then aggression. Thus for example his misplaced criticism that BCA Trading's employees spent too much time in discussion and preparation - what his counsel called "*jaw-jaw*" – compared with action.

191. Some of the specific respects in which I am afraid that Mr Brown's evidence left a poor impression were as follows:

(a) he said that he had no interest in making a commercial proposal to BCA when he met its representatives in November 2013 but belatedly had to delete that false assertion from his witness statement (paragraph 55) but still claimed that it was BCA who insisted that he should be paid a salary, when documents showed him proposing the same, and indeed seeking an increase;

(b) whilst he accepted that parts of the Petition were incorrect (and said that the claim in his Reply that "not a single vehicle" had been made available by BCA was because he had not checked) he was repeatedly reluctant to accept corrections to his several business miscalculations even when clear on the documents; and

(c) he appeared not the slightest abashed at maintaining allegations of bad faith and speculating for example that (i) that Mr James "*had no interest in seeing Tradeouts succeed*" even while accepting his marketing work for it as summarised at the trial in the schedule referred to below, and (ii) a meeting with Mr Jacobs had taken place on a date (which he later accepted was incorrect) when Mr Jacobs was in fact on holiday, because Mr Jacobs could have *"… taken time out* [from his holiday and] *travelled not far … from the New Forest to Blackbushe*…"; and

(d) he also had a habit of plucking figures from the air or elevating them from his recollection of disclosure, for example (i) that BCA had promised funding of £250,000 per annum or (ii) so as to he transform Mr Lock's high-level reference to obtaining 500 vehicles for stock on 13 February 2015 and the target of 2,300 vehicles in September/October 2015 into promises from which BCA could not withdraw.

192. The testimony of Mr Feltham, including his alleged knowledge of matters said to constitute the Fundamental Understanding and its consequences, was also somewhat affected by Mr Brown's agenda. Messrs Evans and Richmond's evidence was not cluttered in the same way, and indeed did not address some issues within their knowledge (such as alleged promises by BCA to procure more vehicle stock).

193. Unsurprisingly perhaps, none of Mr Brown's witnesses had a detailed recollection which enabled them safely to distinguish between the complex events at the time, and what they now knew of the dispute and selected documents. Mr Brown's assertions that he did not know that Mr Evans was to be dismissed from the Company and that Mr Richmond had been threatened against giving evidence may also have some bearing on credibility.

C. BCA Trading's witnesses

194. For the main part, the reliability of the witnesses called by BCA Trading – Messrs Jacobs, Robinson, Lock, Farrelly, Lindars, Shah and Lampert and Ms Roberts - seemed to me in marked contrast to Mr Brown and far less influenced by the dispute (although evidence from a Mr Thompson as to some marketing sent out by email or post seemed to me, without imputing him personally, of no use whatsoever).

195. When they offered explanations for the documents in cross-examination, they were relatively straightforward; when they were unable to do so, they seemed to me to make appropriate concessions. I should stress that this is not intended as complete vindication. There were parts of their evidence (including that of Messrs Lock and Lindars) which I did not always follow, or tended to undermine minor parts of BCA Trading's case; or which stumbled in the light of comments in and about the documents.

196. However, they were honest witnesses who as normal, given the complexity and passage of time, could not remember or fully explain everything. Mr Brown ignored this in maintaining the basis on which he pursued his claims and allegations to the end.

197. Despite the extreme and sometimes convoluted attacks upon their honesty, BCA Trading's witnesses maintained their focus in seeking accurately and moderately to respond. In particular and in contrast with Mr Brown, I was favourably impressed by the professionalism of Mr Lampert in dealing clearly and succinctly with the later financial management points and Ms Roberts in trying fairly to address the earlier marketing and support issues.

198. By way of example, it is clear that from mid-2015 BCA feared that Mr Brown's main effort might be in preparing to sue, and investigated the record of its previous communications with him, and required further communications to be vetted by Mr Farrelly.

199. Mr Brown treated this as manifesting a conspiracy against him, to the extent that an internal email from Ms Roberts dated 18 August 2015 saying that "… *My comments are made in the context that this might get legal and as such might need to prove that we have been diligent in our approach to support. This email will self-destruct in 5 mins*" (which of course it did not – this being an obvious joke) was regarded as reflecting some gangsterish *dictat*.

200. It is also necessary to say that a number of allegations of or akin to bad faith were made against Ms Roberts which were not put to her in cross-examination and which I must formally dismiss, in particular (a) that she attempted to sabotage HPIBid (it being put to her instead that she "*was not keen on progressing its launch*"); (b) that she sent a text to Mr Richmond telling him to "*remember who he works for*" tin order to influence his response to requests from Mr Brown; and (c) that she created purported minutes in an attempt to "cover tracks" as regards Trust Ford.

201. In my judgment, Messrs Lampert and Shah (accountants) and Mr Farrelly (solicitor) were genuinely and justifiably bemused by the unfounded challenges to their honesty and competence (for example questioning whether was qualified to understand the Intercompany Account) and the calumny to which they and their colleagues (or former colleague, in Ms Roberts' case) were subjected.

202. In that regard I should also record that the allegation in paragraph 79 of the Petition that Mr Shah created the draft financial documents circulated on 14 January 2016 to "*saddle the Company with various…bogus expenses*" and put the Intercompany account "*inexplicably at £451,495*" was not put to him and as with other aspccts of Mr Brown's case, was left without making any sense.

(4) BCA'S ALLEGED OBLIGATIONS

203. Mr Brown's case is based on alleged breaches of contractual and equitable obligations by BCA Trading and breaches of duty by the directors of the Company nominated by it, constituting unfairness in the conduct of the affairs of the Company and causing prejudice to him as shareholder.

204. He claims that BCA Trading breached legal and/or equitable obligation arising from the SPA, SHA and the Company's Articles of Association, on their proper

construction and/or the alleged Fundamental Understanding; and that there was in substance a joint venture between Mr Brown and BCA (with which Mr Lampert, on becoming subsequently involved, did not disagree) under which both sides were participate in the management of the business, and in fact did so, and the relationship relied on a degree of mutual trust and confidence between them.

A. Legal principles

205. There are six aspects on which it may be useful to outline some of the legal aspects, which I now seek to do, drawing on the parties' helpful submissions.

(I) Good faith

206. First as regards good faith:

(a) a good faith clause does not usually give rise to a separate substantive obligation but merely requires the party to act honestly in a subjective sense: see *Re Coroin Ltd (No 2)* [2013] EWCA Civ 781, [2013] 2 BCLC 583, construing a Shareholders' Agreement.

(b) the unfair prejudice remedy may extend to acts of a company which involve bad faith or an illegitimate ulterior purpose on the part of its directors when carrying out their fiduciary duties, for instance because the terms on which the parties agree to do business together may include by implication an agreement that their nominated directors will properly perform their duties as such: *Re Tobain Properties Ltd* [2013] BCC 98;

(c) the implication of a duty of good faith (absent an express contractual term or traditional fiduciary obligations as in say a partnership) may be justified between long-term, committed parties, such as joint venturers (see *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] 1 CLC 712, citing *Yam Seng Pte*):

> "*… a high degree of communication, cooperation and predictable performance based on mutual trust and confidence* [and] *expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements*";

(d) in such a "relational" case, *Bristol Groundschool v Intelligent Data Capture* [2014] EWHC 2145 (Ch), it was stated that the test of a breach of the duty of good faith depends "*on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people*";

(e) in a (non-relational) commercial context, *CPC Group Ltd v Qatari Dier Real Estate Investment Co* [2010] EWHC 1535 stated that the duty of good faith is to "*adhere to the spirit of the contract, to observe reasonable commercial standards of fair dealing, to be faithful to the agreed common purpose, and to act consistently with the justified expectations*" of the other party; and

(f) it was held in *Horn v Commercial Acceptances Ltd* [2011] EWHC 1757 (Ch) at [76] that dishonesty is not a pre-requisite for a finding that a party has not adhered to a standard of good faith.

(II) Section 994

207. Secondly, as regards the scope of section 994 it was and since remains established, as summarised in *O'Neill v Phillips* [1999] 1 WLR 1092 at {1098G-1102G:

(a) the "… *terms of the association* [between members] *are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed* … [and this] *leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted…* ";

(b) the fact that company law has developed from a contract of good faith in partnership, means that there will also be circumstances in which "… *unfairness may consist in … using the rules in a manner which equity would regard as contrary to good faith*" [1098B] but in order to come within this exceptional category where an equitable restraint on legal rights will be imposed based on the legitimate expectations of the parties outside the terms of the binding agreements reached "*... what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former…*"; and

(c) the characteristics that will commonly give rise to a relationship of the requisite personal character will be "*….(1) an association formed or continued on the basis of a personal relationship involving mutual confidence; (2) an understanding that all, or some, of the shareholders shall participate in the conduct of the business; and (3) restrictions on the transfer of shares, so that a member cannot take out his stake and go elsewhere*" .

208. It may be added that, as stated in *Re Guidezone Ltd* [2001] BCC 692, "unfairness":

> "*… may arise from agreements or promises made, or understandings reached, during the life of the company which it would be unfair to allow the majority to ignore. Applying traditional equitable principles, equity will not hold the majority to an agreement, promise or understanding which is not enforceable at law unless and until the minority has acted in reliance on it. In the case of an agreement, promise or understanding made or reached when the company was formed, that requirement will almost always be fulfilled, in that the minority will have acted on the agreement, promise or understanding in entering into association with the majority and taking the minority stake. But the same cannot be said of agreements, promises or understandings made or reached subsequently, which are not themselves enforceable at law. In such a case, the majority will not as a general rule be regarded in equity as having acted contrary to good faith unless and until it has allowed the minority to act in reliance on such an agreement, promise or understanding*".

209. Similarly - see *Khoshkhou v Cooper* [2014] EWHC 1087 (Ch) - in principle an agreement in respect of which a breach would give rise to a claim of unfair prejudice

> ***"…** might be made at the time of or after he became a member, and need not be an agreement that would be separately enforceable as a matter of law. Thus, for instance, it would not necessarily be a bar to the equitable jurisdiction if the agreement made lacked the certainty to be enforceable as a contract. But in my judgment this does not mean that any assurance however vague can be treated as sufficient; the members must have reached a sufficient degree of agreement that it can be said that there has been a breach of good faith in departing from it*".

(III) "Understandings" in equity

210. Thirdly, whilst I do not seek to define all the circumstances in which "understandings" enforceable in equity may arise, I take into account in the present evaluation, amongst other things (a) factors which indicate for or against a quasi-partnership (b) the parties' conduct and (c) any relevant acquiescence therein as evidence of their agreements and expectations, as in *Fisher v Cadman* [2006] 1 BCLC 499 and *Re Southern Counties Fresh Food* [2008] EWHC 2810 (Ch).

211. The background by way of a personal relationship or not, beyond a merely commercial one, is an important factor, following the guidance is found in *Re Coroin Limited (No 2)* [2013] 2 BCLC 583, in which Richards J:

(a) restated the established principle that

> "*… equitable considerations, affecting the manner in which legal rights can be exercised, will arise only in those cases where there exist considerations of a personal character between the shareholders*

> *which makes it unjust or inequitable to insist on legal rights or to exercise them in a particular way…"*;

(b) held that there was no room in that case for equitable considerations because the investors were sophisticated and experienced business people and

> "*… there was little prior relationship between many of the investors… more importantly, articles of association and a shareholders' agreement were negotiated and drafted, containing lengthy and complex provisions governing their relations with each other and with the company … I find it hard to imagine a case where it would be more inappropriate to overlay on those arrangements equitable considerations*…".

212. Apart from the existence of such a personal relationship (wholly absent in the present case), other considerations as to whether equitable constraints should apply are: (a) the formality by which the parties have regulated their relationship; (b) the scope of the agreements formally agreed (to which an entire agreement clause is also relevant); and (c) whether the equitable constraint is by way of moderating the exercise of some legal right or (as here) to produce some self-standing positive obligation that is not to be found in the parties' agreements.

213. Thus for example *Re Ringtower (ex parte Schwarcz)* [1989] BCLC 427 involved detailed, professionally drafted agreements, outside which no "legitimate expectations" could arise since, at [441]:

> "*the parties had not left the basis of their relationship only to the articles of association which were adopted as part of the transaction ...., but had spelt out in detailed agreements all the matters which were to govern their relationship ...*".

214. It was also observed at [440] that *Ebrahimi v Westbourne Galleries* [1973] AC 360 (cited by Mr Brown) has

> "*… only too often given encouragement to pleaders to aver association based on mutual confidence in circumstances very different from those which, I venture to say, the House of Lords ever contemplated. No doubt in almost every case of a small or private company persons coming together to form a new company would not do so without placing trust and confidence in those who are to be the directors and managers of the company. But the fact that the company is small or private is not enough and that mutual trust and confidence would not in itself be sufficient to make the members' association in substance a partnership with partner-like obligations owed by each member to the others in the absence of proof of a mutual understanding as to those obligations.*"

215. In *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731 (Ch), [2012] Ch 613 an allegations of various "understandings" between the members not found in the LLP's constitution was rejected at [21]:

> "*Judged on an objective approach, the parties agreed that the terms of the Agreement should govern their relationship, without it being qualified by such understandings as F&C alleged. This position was further underlined by the inclusion of an "entire agreement" clause in the Agreement, stating that the Agreement constituted "the entire understanding between the parties relating to the LLP.*".

216. Thus whilst an entire agreement clause does not necessarily entail the absence of any equitable considerations, it can be persuasive to show that the parties did not intend extra-contractual "understandings" to regulate their relationship. But generally the operation of equitable constraints is not to supplant the members' contractual arrangements but to place limits on the way that legal rights given by those agreements are exercised - see *Moxon v Litchfield* [2013] EWHC 3957 (Ch) at [43]:

> "*... neither equity nor the jurisdiction under section 994 sweeps away contractual arrangements; at most, the exercise of contractual rights is subjected to equitable restraint if it would be unconscionable or unfairly prejudicial.*"

(IV) Contractual construction

217. Fourthly, I seek to apply the modern approach to construction summarised by Lord Neuberger in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15]:

> "*… When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann…. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.*"

218. Summarising how it was put on behalf of Mr Brown:-

(a) The ultimate aim of contractual construction is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant., and the reasonable

person is taken to have all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.

(b) Where a term of a contract is open to more than one interpretation, it is generally appropriate for the Court to adopt the interpretation which is most consistent with business common sense, and a Court should always keep in mind the consequences of a particular construction and should be guided throughout by the context in which the contractual provision is located.

219. I also accept that:

(a) in this case, the words in the SPA and SHA are to be construed in the light of the factual background known to Messrs Brown and Feltham and the representatives of BCA who negotiated and concluded the terms and must take into account the communications between the parties prior to the entry into the agreements;

(b) the parties' subsequent words or conduct may constitute a variation of the terms upon which they deal with one another, so that the Court takes into account not only the content of the written agreements but also any subsequent agreement, or established understanding or pattern of acquiescence which may have led those in control of the Company to act or continue to act in a certain way: see *Re Southern Counties Fresh Food* [2008] EWHC 2810 (Ch); and

(c) sometimes, if it is not inequitable to do so, a party who has waived or acquiesced may revert to the terms of the original agreement upon giving reasonable notice to the other(s).

220. Finally on this aspect, an entire agreement such as clause 10.1 of the SHA clause may preclude reliance on understandings extraneous to it arising prior to the agreement - see for example ***Sutcliffe v Lloyd*** **[2007] EWCA Civ 153** - but on its proper construction may not purport to oust an estoppel which arises after the making of the agreement. Thus if by words and/or conduct a party objectively gives clear assurances outside the scope of the entire agreement clause, and watches the other party act to its detriment in reliance upon them, it may not revoke or repudiate such assurances.

(V) The articles of association

221. Fifth, in general the relationship between shareholders is governed exclusively by the articles of the company and any shareholders' agreement: *Straham v Wilcock* [2006] EWCA Civ 13 [2006] 2 BCLC 555 at [18].

222. Any breach of the articles of association or a breach of duty by a director is *prima facie* a ground for relief under section 994 of the 2006 Act: see *Re Tobain Properties Ltd* [2013] BCC 98 at [21-28]. However in this case, BCA Trading relies on Article 14 which provided that:

> "*14.1 The directors may, subject to and in accordance with this article 14, authorise any matter or situation which would otherwise result in a director breaching his duty under section 175 of the 2006 Act to avoid conflicts of interest…*
>
> *14.5 A director, notwithstanding his office, may be a director or other officer of, employed by, or otherwise interested (including by the holding of shares) in, any subsidiary or holding company of the company or any other body corporate in which the company is otherwise directly or indirectly interested and no further authorisation under article 14.1 shall be necessary in respect of any such interest.*"

223. BCA Trading was a holding company of the Company under section 1159(1)(b) of the Companies Act 2006 since that it was *"(b) …a member of it and has the right to appoint or remove a majority of its board of directors*" and there was therefore no need otherwise to authorise any conflict of interest on the part of Messrs Lampert, Shah, or Farrelly arising from their interests in BCA Trading or its holding companies.

224. BCA Trading also relies, in the light of the Company's apparent financial difficulties at the end of 2015, on section 172(3) of the 2006 Act by which the duty to promote its success under section 172(1) "*has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of the creditors of the company.*"

225. As held in *Winkworth v Baron Development Co. Ltd* [1986] 1 WLR 1512 (HL), at [1516E]:

> "*a company owes a duty to its creditors, present and future. The company is not bound to pay off every debt as soon as it is incurred, and the company is not obliged to avoid all ventures which involve an element of risk but the company owes a duty to its creditors to keep its property inviolate and available for the repayment of its debts. The conscience of the company, as well as its management, is confided to its directors. A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors.*"

226. It was also said in *Brady v Brady* [1988] BCLC 20, CA at [40G] that whilst the duty to creditors may be of limited materiality when it is solvent, "*Conversely, where the*

company is insolvent, or even doubtfully solvent, the interests of the company are in reality the interests of existing creditors alone".

227. The duty arises when there is a real, as opposed to remote, risk to the creditors' prospects of being paid or as Rose J put it recently in *Bti 2014 Llc v Sequana SA* [2016] EWHC 1686 (Ch), [2017] 1 BCLC 453 when the Company was *'on the verge of insolvency'* or of *'doubtful' or 'marginal' solvency*" or was *'precarious'* or *'in a parlous financial state'*.

228. BCA Trading contends that by November 2015 the Company fell within all of these expressions, and once the duty had arisen, the directors had to consider the interests of the creditors as paramount: *Re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch), [2014] BCC 337, at [89] and [92]. Unless BCA Trading was obliged to provide all the necessary future funding to the Company, that seems to me correct.

(VI) Prejudice

229. To state the obvious, it is for the Petitioner to demonstrate that he has suffered unfair prejudice, and prejudice is usually damage to the financial position of the member so where there is no financial loss, prejudice is much harder to prove: *Re Coroin* at [630]. And there must be a causal link between the conduct and the unfair prejudice suffered: *Re Southern Counties Fresh Food* [2008] EWHC 2810 (Ch) at [46].

230. A failure to comply with formalities for conducting the affairs of a company may not cause any prejudice if the same result could have been achieved if the requirements had been observed: see *Irvine v Irvine (No 1)* [2006] EWHC 406 (Ch), [2007] 1 BCLC 349, where the failure to hold general meetings and obtain the required approval for remuneration made no difference as against the majority shareholder who could have could have voted for and received whatever approval he wanted.

231. It is not for me to comment at this stage on Mr Brown's claim that he has lost the future hypothetical value of his earn-out had the Company thrived in the 3 years following acquisition with BCA's greater support. I merely note that without further funding by BCA, it could not be disputed that the Company was insolvent.

232. Whilst the present proceedings split liability and quantum, it was held in *Re Tobian* [2012] EWCA Civ 998, [2013] 2 BCLC 567 at [11], [46] that

> "…. *If the company is insolvent, that means that – in general – the petitioner must show that his shares would have had a value but for the wrongdoing of the respondents...,* [and] *... where the company is insolvent, the court has to be flexible in its approach. This is because there is the complication that the petitioner may not be able to show that he obviously has some interest in the company meriting relief because his sole interest constitutes shares which at*

the moment of trial are valueless because no relief has yet been given in respect of the matters of which he complains. The court has to do what is necessary in that situation to achieve a just and fair result … the right course … is for the judge to consider whether enough has been shown to justify a further hearing. Normally this will involve showing a provisional case to an appropriate standard in the circumstances of the case. The appropriate standard will usually be a real prospect of success. The usual dividing line between the liability hearing and the quantum hearing is not set in stone."

B. The SPA/SHA

233. Mr Brown submitted among other things that:

(a) clause 5.1.1 of the SHA ought to be construed so as to require BCA Trading to observe reasonable commercial standards of fair dealing and be faithful to the agreed common purpose and justified expectations of Mr Brown;

(b) clause 5.1.3 of the SHA required introductions so far as reasonably practicable to the BCA group's customers, most appropriately (i) its Tier 2/3 buyer customers; and (ii) its vendor customers (including Tier 1 dealers) who wished to sell vehicles other than by auction; and

(c) clause 5.2.1 of the SHA provided both for (i) an agreed business plan and (ii) efforts to maximise the Company's EBITDA whether or not a business plan was agreed.

234. There is no reason to treat these propositions as controversial in themselves. However I reject Mr Brown's contention that it was agreed by BCA (as alleged, through Mr Jacobs and Mr Robinson or at all) in any binding or specific terms that in order to maximise the Company's EBITDA, BCA would have to (i) market the Platform (ii) provide stock for the Platform and (iii) fund the development of the business in the meantime.

235. Such obligations cannot be construed out of the written agreements. That is not to say they were not possible means, amongst others, to assist the Company in increasing its EBITDA. Moreover these means of assistance and others were discussed and efforts were persistently made on both sides to secure and implement them. But they were moving targets to be assessed in the light of changing circumstances, along with other aspects of managing the Company; and it would be (and in Mr Brown's case is) fallacious to presume that, regardless of the exigencies, resources and conduct of the business, Mr Brown was entitled to any specified support on these aspects.

236. This is all the more so in the light of the need for an agreed business plan, the provisions as to information in clauses 3.3 and 3.6 of the SHA, and the complexity of

the Company's proposed development of the Platform and its customer and stock base, in which its interests and those of other BCA companies were known not entirely to align.

237. The only proposed business plans produced after the acquisition were by BCA, and Mr Brown's failure to cooperate in and implement an agreed plan with BCA Trading, deal with the Intercompany Account and prioritise management information is inconsistent with his claims as to BCA Trading's obligations. I dismiss his allegation that "*the BCA Group (or, at any rate, BCA) would conduct the Company's business with a view to maximising the Company's EBITDA and/or would not take steps to reduce or extinguish the value of the Option Shares*".

238. This seems to me to reveal a fundamental misconception as to the nature of SPA/SHA and how the Company was to cooperate, which may underlie some of Mr Brown's more outlandish complaints. Nor can he be correct in submitting that because "… *BCA were effectively taking over the Company albeit they would only acquire their 100% interest upon exercise of the put/call options…it made sense that … it would put in place a business plan …* " in the interim or otherwise assume unilateral obligations without regard to his duties as managing director.

239. Be that as it may, the relevant express obligations in clause 5.1 and 5.2 are far from absolute. BCA was not in a position to procure that the Company best utilise its assistance or maximise its turnover and profits. Mr Brown's attempt to construe those obligations as unqualified promises to provide specific marketing, stock or funding, come-what-may, is misconceived.

240. Of course it should have been in BCA Trading's commercial interests to maximise the Company's EBITDA (that is, without harm to itself or other group companies) and to do so by seeking and planning improvements to the Platform, and assisting in funding, marketing and stock procurement. But unless there was bad faith or some actionable "Fundamental Understanding" as to what exactly it was obliged to do to that end, the SHA/SPA do not provide Mr Brown with a basis for his legal or equitable complaints.

C. The "Fundamental Understanding"

241. Mr Brown has sought to characterise pre- and post-contractual statements and conduct as adding to the SHA, SPA and Articles a "*Fundamental Understanding*" between the shareholders, some of which is based on his later complaints and attempts within BCA to discern what had been earlier discussed but never recorded as obligations at the time.

242. Mr Brown seeks to rely on breaches of that Fundamental Understanding to ground his claim of unfairly prejudicial conduct. In my judgment, this carries a considerable burden and in the present case I am wholly unsatisfied that there was any "Fundamental Understanding" in the terms alleged which gave rise or could give rise to obligations sufficient to found the claim of unfairly prejudicial conduct or at all.

243. Thus Paragraph 28 of the Petition alleges "*a common and fundamental understanding in relation to the management of the Company*" shared by Mr Brown and BCA Trading as follows:-

(a) That "*the Petitioner and BCA [Trading] would both participate in the management of the Company in accordance with the provisions of the SHA and SPA*". BCA Trading says that this adds nothing to the SPA/SHA, under which the Company was to operate separately from the BCA Group under the day-to-day management and control of Mr Brown.

(b) That "*the BCA Group would support the Company by marketing and/or introducing its services and products to appropriate targets*". To this BCA Trading submits that its obligations were wholly contained in clause 5.1.3 of the SHA, as properly construed.

(c) That "*the BCA Group would provide stock (i.e. vehicles) to be sold through the Tradeouts Platform*". In answer to this, BCA Trading contend that no obligation, defined or of that sort, arose under or as necessary to give effect to, SHA clauses 5.1.1 (good faith), 5.1.3 (introductions) and 5.2.1 (business plan).

(d) That "*the BCA Group would provide financial support to the Company until such time as the Tradeouts Platform could be launched*". BCA Trading's case is that it had no funding obligation of any kind under the written contracts or otherwise.

(e) That "*the BCA Group (or, at any rate, BCA) would conduct the Company's business with a view to maximising the Company's EBITDA and/or would not take steps to reduce or extinguish the value of the Option Shares*". This is at the heart of the dispute over good faith.

244. As explained above, Mr Brown's claims as to the Fundamental Understanding depended on various extracts from the documents which he cited, including the following prior to the acquisition in July 2014:-

(a) Reports and emails to BCA from its consultant Mr Treagus of Progenit dated between September 2013 and February 2014 -

"*The question is What alternative can BCA offer to auction? How can we find better ways to help dealers source vehicles? How can we better deal with unwanted PX and overage units? How does this leverage our auction scale? How does this feed auction? … The obvious flip side of which is to create a sourcing solution for dealers which is an alternative to auction… The question is How do we continue to be the biggest aggregator of trade vehicles…The short answer is by consolidating all vehicles in all BCA channels, including the new ones we'll create in 2014, along with* [redacted] *vehicles … Secondary is the consideration of deals that could be done with regional auction firms. One search. Many many cars. Multiple sources. Easy transaction. First place to visit…*".

"… Help our dealers trade cars. New disposal service: buy cars, offer D2D or auction. Integrated dealing support and transport. Direct access to auction stock. Alternative-to-Auction+Auction. Enabled w/ one-off BCA IT connection… Leverage assets. Using existing assets – cars, buyers, branches, WBAC locations, transactional capabilities – gets extra value from them, creates a more rounded offer, and increases our chances of success … [b]*uild out from Yankee – their offices under his management …invest in developers and dealer sales/admin/support…bring their business manager in full-time to support initiatives…* [w]*rite business plan (w/ Yankee)*. Investment. *… Tradeouts.com is very early stage and of limited value standalone. Any deal only makes sense if BCA is willing to commit resource post-deal to driving the commercial success of the venture...* Engagement from BCA (marketing and support). *… BCA will need to engage at the following levels:*

- *CEO: clear communications to senior BCA stakeholders providing an overview of the venture, its benefits to BCA and requirements from the BCA team.*
- *Management: board member to be ultimately responsible for the P&L and the success of the venture; also responsible for managing integration / opening doors with the rest of BCA*
- *Sales & Marketing: new venture to be incorporated in online and physical marketing materials; Dealer & Buyer Development sales team trained & incentivised to drive subscriptions as part of their wider role*
- *IT: ultimately dealer-dealer must be seamlessly linked to BCA's existing online platforms, this is likely to require a significant level of engagement from BCA IT*".

"*GENERAL POST-DEAL INTENT …[Mr Treagus was] not expecting to size out the post-merger costs and projects just yet but for context and consideration there will be requirements to: … provide a feed of BCA units to tradeouts.com for search*".

"*Purpose of Meeting:*

- *Do we need a D2D proposition? Yes, Defensive. Touch more cars.*
- *How do we enter? Acquire Yankee. Too late and too busy to build.*
- *How do we operate? Run separately. Share inventory. Promote.*
- *How do we make money? Subscription. Add value to subscription.*
- *How do we accelerate? Add BCA stock and services inc. WBACP…".*

(b) Discussion documents from Mr Brown dated November 2013 and February 2014 -

"*Opportunities with BCA BCA is invited to include its auction lots in UK Tradeouts search results as part of the TradeView Project. Doing so would drive more visits, bids and branding to BCA. As the largest auction house in the UK, BCA would become the largest advertiser within Tradeouts…. As discussed with D'Vidis Jacobs, an API could be setup to give dealers the ability to bid on BCA auctions without leaving the Tradeouts site. This multi-source stock aggregation concept can be applied to other territories… TradeBid… Tradeouts will offer multiple disposal routes to both trade and retail customers, which could include WeBuyAnyCar.com and BCA Auctions…Other opportunities… Dealers that advertise their stock on Tradeouts could also opt to 'send their vehicle' to a BCA auction (if not part of CanBid)…*"

"*BCA/Tradeouts benefits … No competition By acquiring Tradeouts, BCA 'removes' the largest trade-to-trade website from its competition. Sites like Dealer Auction seen as alternatives to auction will no longer pose a problem, as BCA will have its own…*".

(c) BCA's investment papers and presentations, including the Yankee spread-sheet, dated January to March 2014 (which envisaged initial growth costs of £856,000 and a loss of £405,000 in the first year) –

"*Background to deal thinking… Requirements for success …Tradeouts.com is very early stage and of limited value standalone. The deal only makes sense if BCA is willing to commit resource post-deal to driving the commercial success of the platform and integrating with existing BCA platforms/services*".

"*BCA is the largest marketplace. BCA will use digital channels to continue to be so … No matter how well we execute auction does not meet the needs of all buyers and sellers … Dealer-to-Dealer and online auction alternatives are establishing and look dangerous …* [n]*ew subscription models and low fees are hard to stomach but can't be ignored*"

"*BCA/WBAC providing enablers*:
- Promote Alternative-to-Auction to BCA Buyers and Vendors, proactive or reactive
- BCA needs to provide:
- a live list of auction vehicles and BNBN [BCA's "*Bid Now Buy Now*"] *stock*
- in-hall and auction centre advertising material…
- means to receive and process proxy bids of vehicles (via existing centres)
- in time, offer a single-sign-on and deeplinks to BCA sales channels"

"*Rationale for Acquisition…* [s]*tem potential flow to online auction sites.. The Tradeouts platform will compete directly with DA* [Manheim's *Dealer Auction*] *offering comparable functionality and helping retain the customers*

within the BCA 'eco-system' … there is a risk that at a later stage, DA and other online auction platforms, that offer cheap fees for low value cars, may start climbing up the value chain, further encroaching on BCA's territory"

"*Details of the offer … BCA commits to investing a minimum of £250k into Tradeouts to help develop the full potential of the business (mostly developers and sales people)…* ".

"*Acquisition Risks … cannibalisation … vendors that currently use BCA's auctions choose to downgrade to the new cheaper platform …* [a]*ccept a small level of slippage of auction customers to the Tradeouts platform. However, the upsides brought in through the acquisition will more than offset this…* [Tasks for the first month post acquisition included] *Marketing/PR of Tradeouts at/on BCA locations/products…BCA to provide vehicle stock feed for Tradeouts (+CanBid) … BCA to provide customer information to Tradeouts for marketing …BCA to identify 'Too good/cheap for auction' stock ' …* ".

"*Support from BCA wish-list …*

Stock Feed	*Feed of BCA stock to populate Tradeouts (linking back to BCA*
Marketing	*Tradeouts advertising in auction hall / E-mail shots / banner ads*
PR	*Regular press releases from Tradeouts via BCA PR company*
Customers	*Access to customer list/approval to talk to Dealer Groups (inc new customers?)*"

245. In my judgment, none of these documents or the others cited, in context, separately or together with the other evidence, established or came near to establishing the necessary elements of the Fundamental Understanding, beyond the SPA and SHA, alleged by Mr Brown. The diverse statements of different aspirations, at different times and from different people, did not give rise to any obligations in the ongoing joint business (especially concerning third party companies in the BCA group) beyond the SPA and SHA, nor could they radically affect the construction of those written contracts.

246. Still less was this demonstrated by the extracts cited by Mr Brown from the documents following the acquisition in July 2014, as the Company developed for better or worse, including emails and meeting notes. These included emails and meeting notes in October and November 2014 between Messrs Brown, Feltham, Evans, Robinson, Lock or Thomas or Ms Roberts, variously envisaging or requesting that BCA would provide or source more assistance to the Company with "*Tradoeouts marketing, PR and Promotion*" and more vehicles for the Company.

247. Mr Brown heavily relied on Ms Roberts' PowerPoint presentation of 10 March 2015, saying that: "*Tradeouts.com growth was based upon the aggregation of BCA UK stock and access to BCA's buyer base. This was not fulfilled due to the commercial*

risk to the BCA UK P&L. Without inventory the Tradeouts.com subscription numbers and revenue are in decline…".

248. Whatever Ms Roberts's take on what the Company expected - and her evidence was frank and to the point - that does not satisfy me as to any of Mr Brown's material allegations. Her presentation and other internal discussion within BCA did not indicate its legal position concerning Mr Brown's claims, but was on the whole concerned to explain and make efforts to meet them.

249. To the opposite effect, Mr Jacobs' contemporaneous proposal, that is, before and about the proposed acquisition said nothing about BCA's procuring stock for the company. If as a company and part of the BCA group, BCA Trading did *not* commit to or record it, why would or could its officers and employees later accept the allegation that it was contractually required?

250. Thus, on receipt of Mr Brown's claims, in his Managing Director's Report of 10 November 2015, as to what was promised pre-acquisition, Ms Roberts' email the next day commented :

> "*… The crux of the situation is and always has been – the expectation that BCA would provide the inventory for Tradeouts.com – BCA marketing Tradeouts.com to all BCA buyers. This has been contentious since the every first discussion on 25 November [2014], the same meeting where we agreed to move to the transactional model".*

251. And Mr Lampert said facetiously on receipt of Mr Brown's managing director report:

> "*… it feels like the business is running on its own agenda based on what it was told when BCA acquired the 51% in 2014 i.e. BCA will fund, sell the product to every vendor and help Tradeouts take over the world*".

252. It was not clear to me what Mr Brown sought to establish by his reliance on this reaction from Mr Lampert, but again, in my judgment and in its context, it did not assist him in seeking to prove what was in fact agreed or promised prior to the acquisition. On the contrary, I found Mr Lampert clear and sensible as regards BCA's response to the Company's crisis in the light of Mr Brown's position.

253. In any event, on the facts, whilst BCA's representatives clearly intimated a variety of intentions and objectives as regards the Company's financial, marketing and supply needs, that fell far short of promising any fixed, specific facilities and Mr Brown was not entitled to treat them as having done so. This was a commercial relationship and the parties were and must be taken to have been aware of and able (absent bad faith) to protect their own interests.

254. In contractual terms, there was no certainty or consideration for any such statements to be legally enforceable. By their very nature, they envisaged that the Company's needs and BCA's means of assisting in them were subject to change, including commercial considerations in which the parties might not be necessarily aligned or in accord.

255. In a less legal and possible equitable sense, statements of genuine aspiration, and efforts to give effect to the parties' varying expectations as they developed and fluctuated from time to time, were a far cry from any form of binding promise. These parties started at commercial arm's length; their negotiations culminated in contractual documents; to add to those documents on the basis of what was alleged to have been said previously, without formally recording such additional obligations on both sides, would be the opposite of fair or even sensible.

256. This is stark in the present case in which the BCA-nominated directors of the Company in late 2015 were struggling to assess and progress the Company against what seemed a controversial previous history between the parties. It would not be reasonable or practicable to expect a party like BCA to proceed on what Mr Brown, or individual employees of BCA and/or the Company, might construe from previous discussions as to funding, marketing or stock provision, in the absence of clear, formal documentation.

257. This was all the more so in the light of Mr Brown's prevailing approach by summer 2015, which was to revisit and cherry-pick previous disappointments and frustrations (such as marketing, stock provision and process complications), to lay them all at BCA's door and disclaim his responsibilities, and manoeuvre into a stronger legal position in order to abandon the Company and sue BCA. This included using the flexibility of the Intercompany Account, and the fact that it had never been recorded as a loan (that is, on formal terms) to that end.

258. Although some aspects of the Fundamental Understanding are said to arise as a matter of construction of the SPA and SHA, others are not, but Mr Brown did not plead or in my judgment prove these as collateral contracts or variations or waivers of the SPA and SHA or estoppels affecting the parties' obligations or reasons for imposing equitable considerations on the exercise of the parties' legal rights.

259. If the boot was on the other foot, and BCA sought to hold Mr Brown legally accountable for the failure of the Company on such a basis, he too would no doubt see it as anything more than a blame-game, designed to extract an unfair reward from an unsuccessful venture at the expense of a counterparty which had already lost its substantial investment.

260. In addition to breaches of the SPA/SHA and alleged Fundamental Understanding, Mr Brown alleges that Messrs Lampert, Shah and Farrelly breached their directors' duties. There was no dispute as to the content of those duties. I address below the factual dispute as to whether they were breached.

(5) ALLEGED BREACHES/UNFAIRNESS BY BCA TRADING

261. The breaches alleged by Mr Brown in particular prior to October 2015 relate mainly to BCA's alleged failures to support the Company with funding, stock and marketing. Thereafter Mr Brown claims that the BCA-nominated directors brought to fruition a "*cynical strategy*" (whenever it was devised) to close down the Company as an alleged competitor and rid themselves of him and his future earn-out.

A. Alleged failure to support the Company

262. Mr Brown's general position - that BCA did nothing significant to support and assist the Company or genuinely to seek to do so - is clearly unsustainable, given the facts set out above and the weight of evidence. On the contrary, its support was extensive and reasonable in the circumstances.

263. By way of example, this is counsel's schedule of the written evidence of Mr James' work for the Company as regards marketing (referred to also above). He was just one of many individuals involved; and one of the difficulties in Mr Brown's case was in ascribing any individual's perceived fault to BCA Trading, but ignoring their efforts.

"2014

October	*Organised Tradeouts exhibit and flyer at the AM Used Car Conference at Telford [E6/1577], [E6/1576].*
November	*Placed Tradeouts advert in BCA's December 2014 Sales Guide [E6/1721], [E8/2211]. Organised email campaign (not sent at the request of Tradeouts) [E7/1997].*
December	*Arranged the design of "awards buttons" for the Tradeouts Awards [E2/2210], [E8/2216].*

2015

January	*Produced Tradeouts product brief for use by the BDEs and at the BCA Annual Management Conference [E8/2266-2267]. Organised Tradeouts stand at the BCA Annual Management Conference [E8/2137].*
June	*Organised Tradeouts' exhibit at the Car Dealer Expo at Silverstone [E10/2792], [E12/3356]. Organised a flyer [E10/3000], a Tradeouts advert in the show guide [E11/3089-3092], [E11/3120], and a pop-up*

stand [E11/3126]. Produced updated product briefs for Tradeouts [E12/3447]. Attended marketing workshop for transactional product [E12/3358]. Spent two days at Tradeouts' Daventry office to immerse himself in the business and help with marketing [E12/3354].

July *Produced detailed launch plan for Tradeouts' transactional product [E12/3619]Arranged (at Tradeouts' request) for Clive Davies to do competitor mapping of Dealer Auction and 13 other trade sites [E12/3613], [E13/3642]. Put Tradeouts in touch with Partner Finance [E13/3644].*

August *Attended 5 August 2015 stakeholders' meeting. Subsequently involved another four marketing colleagues in supporting transactional model workstreams [E14/3967], [E14/3969]. Produced Tradeouts Direct product flyer [E15/4402].*

September *Arranged for Tradeouts Direct product flyers to be provided to BDEs [E15/4488-4489]. Placed Tradeouts advert in BCA October Sales Catalogue [E17/4947]. Produced Tradeouts Pro product brief [E17/4885], [E17/5031]. Provided Tradeouts with a list of BCA customers who had bought VW stock, as part of supporting the VW trial [E17/4946].*

October *Drafted email campaign to promote transactional model and arranged for analysis of data of BCA Blue/Silver/Gold card holders, Tradeouts registered account holders and BCA Partner Finance customers [E18/5184], [E18/5275].*

November *Organised teaser email, sent first tranche to over 2,000 BCA Blue Card holders, and sent second tranche [E19/5479], [E19/5668], [E20/5793], [E20/5816]. Organised direct mail campaign promoting Tradeouts to all Partner Finance customers [E20/5779-5780], [E20/5789]."*

264. Further as regards marketing, underlying Mr Brown's complaints was the allegation that (a) it was agreed with Mr Jacobs before acquisition that the Company would suspend marketing and (b) that subsequently the move to a transactional model was imposed on the Company, there was no point in selling subscriptions and BCA took over the sales function.

265. These key contentions were fatally undermined by the documents. The Company continued to market pre-acquisition, the Company took on the Chichester sales staff thereafter, and its documents projected a rise in subscription revenues but also in October/November 2014 the development of and move in due course to a

transactional model. Many alleged delays were neither side's fault, but due to the complications in developing the Platform and business along agreed lines.

266. For example, I accept the evidence of Mr Lock and Ms Roberts that Mr Brown did not argue against the move to a transactional model foreseen in Roadmaps and initiated at the meeting on 24 November 2014 and from Mr Evans that he was "fully on board" with the fully transactional model (that is, with self billing and dispute resolution). Mr Brown himself was the IT/design expert for that purpose, as well as the Company's managing director: it would make no sense at all for it to be "imposed" upon him and this was instead a strong example of his seeking to blame others for collective problems.

267. However, Mr Brown's way of dealing with the situation as at November 2014 was to claim that whilst the 2015 Budget agreed in October was effectively the 'Business Plan' envisaged in clause 5.1.3 of the SHA, "*within a month of the 2015 Budget having been agreed, BCA effectively tore it up by insisting on a change from the Subscription Model to Tradeouts Direct*".

268. Mr Brown's complaints about (a) marketing thereafter (b) delays in the development of the transactional model (c) the lack of sufficient stock and (d) failure of HPIBid and other lost opportunities, in my judgment, have a similar quality. He took on the burden of establishing these complaints, essentially single-handed at trial, and failed.

B. The closure of the Company

269. Against that background, the BCA-nominated directors in October and November 2015, in my judgment, genuinely and reasonably feared for the value of its investment in the Company. That included questions over the Company's viability and Mr Brown as its managing director.

270. BCA was taking a hard, fresh look at the position, as stated in Mr Lock's email to Ms Palmer-Baunack of 29 September 2015 stating that BCA should make a decision

> *"… either to try to make this work once and for all or subject to the terms of the SPA, exit or close the business. Personally I think we should give it until the end of January and see if we can get it to break even. To do this we will need to get the organization behind Tradeouts (instead of its being regarded as a threat) and the biggest challenge is getting some inventory…".*

271. From this point relevant management at BCA seems to have been handed over to Messrs Lampert and Shah (in whose favour Ms Palmer-Baunack purported to resign on 30 October 2015). From their perspective, some review was undoubtedly required, including up-to-date management information. They had no reason to question the 2014 statutory accounts, notwithstanding Mr Brown's contentions in the proceedings

that, whilst he was sent them in draft on 29 September 2015 (and asked how he should return them) he was not notified of the board meeting which formally approved them the next day nor sent a signed copy.

272. BCA Trading contends that its nominated directors were entitled to view Mr Brown as a managing director and co-shareholder who (a) made unjustified complaints and threats without providing all necessary information; (b) denied the validity of the Intercompany Account (the Company's only source of funding); and (c) would not engage in a discussion of how the Company should or might become more viable.

273. The key question, in my judgment, relates to the Company's financial position and whether BCA was unjustified in ceasing to fund the Company, including its expenditure on premises, IT systems and staff, and burden it with the Intercompany Account to protect BCA as a creditor.

274. In my judgment, the Intercompany Account represented a debt from the Company to BCA Auctions as the Company's 2014 statutory accounts stated. In the absence of any agreement that the money would not be repayable – which Mr Brown entirely failed to establish – the funding was repayable on or within a reasonable time after request.

275. This would not be abnormal: see *Seldon v Davidson* [1968] 1 WLR 1083 at 1088, 1090. In that regard I prefer Mr Lampert's evidence to Mr Lindars who was vague and ultimately neutral, if not meaningless, to the effect that terms of intercompany debts vary and "… *intercompany accounts are for settlement when the company was in a position to settle them…".*

276. As it happens, Mr Brown alleged far more than this - that the Intercompany Account was a false debt designed by BCA to put the Company under financial pressure. He claimed (see paragraph 21.2 of the Reply) that the funding was not a gift but was an investment to the advantage of BCA that "*would be written off as development costs*".

277. That having been explored in cross-examination on both sides, made no sense to me whatsoever. After all, if matters had proceeded well and the Company had been developed into making a profit, its debt to BCA would still have featured in the EBITDA calculations for Messrs Brown and Feltham's earn-out.

278. Mr Brown's case regarding the Intercompany Account, stressing that the word "loan" itself was not used until Ms Roberts noted it in respect of the 22 October 2015 meeting - including his contention that she had deliberate falsified the record - was unacceptable.

279. Mr Brown has sought to date the decision by BCA unlawfully (as he alleged) to close the Company from a reference to a meeting in an email from Mr Robinson to Mr Potishman dated 26 October 2015, seeking to investigate in what terms the 2015 business plan for the Company might have been concluded.

280. However, I prefer the evidence of Messrs Lampert and Shah that the decision followed Mr Brown's managing director's report and his refusal to acknowledge the Intercompany Account. I also reject Mr Brown's allegation that the Partner Finance mailing sent out in mid-November 2015 (whether by email or post, as to which Mr Thompson's evidence was confused)

> *"... was part of a pre-conceived scheme to make it appear as if BCA was supporting the Company... the reason why it was switched from email to post was that BCA would have known that – in contrast to emails – it would not be possible to demonstrate one way or another whether a postal mailer had been sent out or not ..."*

281. I do not go so far as to find that Mr Brown deliberately chose not to supply up-to-date management accounts to the BCA-nominated Company directors. Mr Lindars had been a significant part of the management accounts process and Tradeouts' bookkeeper depended on his team. However, the seeming inability or unwillingness of Mr Brown and Polkadot to produce any management accounts at the end of 2015 may well have been a factor at least as far as Mr Lampert was concerned.

282. On the other hand, Mr Brown's claim that references to whether (a) the Company was unlawfully trading whilst insolvent and (b) wrongfully using the BCA logo and (c) WBAC was not paying the Company money it owed, were spurious devices intended to exert illegitimate pressure on him, appear to me makeweights, far from amounting to unfairly prejudicial conduct in context.

283. It is clear that Messrs Lampert and Shah were not fully informed as to every aspect of the Company's history (and thus Mr Shah qualifying his evidence as regards the far earlier "budget holiday" pending the transactional model). But they knew enough to attempt to deal with Mr Brown in their discretion in order to improve the process and seek to agree upon either the continuation of "burial" of the Company.

284. By the end of January 2016, the parties were daggers drawn. Mr Brown's non-attendance at the 2 February 2016 meeting, and his decision not to pursue the Burial Proposal but instead to sue, with hindsight, justified a fear from Summer 2015 that his aim was compensation rather than persistent cooperation. In all the circumstances, his central allegation of a wrongful strategy to close the Company from October 2015 if not earlier, implemented by Messrs Lambert, Shah and Farrelly, assisted by others on behalf of BCA Trading and its group, must fail.

C. Breaches of directors' duties

285. I therefore dismiss the allegations in paragraph 121 of the Petition. Although the above also largely deals with Paragraphs 122 and 123 of the Petition, as regards alleged failures to provide information and procuring breaches of duty by the Company's directors, I should briefly summarise the position in that regard separately.

286. As mentioned, as well as Messrs Lampert and Shah being latterly the BCA-nominated directors of the Company, Mr Farrelly was its Secretary. I am not satisfied that he was also a shadow director as alleged by Mr Brown, although he clearly acted as legal adviser in BCA's dealings with Mr Brown.

287. There was no breach of duty by any of these in failing or refusing "*... to investigate and/or dispute the validity of the Purported Intercompany Loan*", that is the Intercompany account, Mr Brown offering them no reasonable grounds of challenge to the repayability of the Intercompany Account.

288. In relation to the withdrawal of the Company's IT facilities, the lapse of the Daventry lease) and the Company's termination of the employmenst of Messrs Brown, Green and Grant, these were not breaches of directors' duties. Once BCA decided not to advance more finance to the Company, the directors acted legitimately and according to their duty to the Company's creditors.

289. I do not find that there was any unjustified refusal to discuss the Company's affairs and/or provide documents relating to the management of the Company. The Company's management accounts and "*other reasonably required documents or information*", were *prima facie* for the Company not BCA. The absence of signed board minutes (including those for meetings which he secretly audio-recorded) caused no significant prejudice.

290. Mr Brown's position including accusatory stance in this managing directors' report and his failure to provide other information complicated matters. Whilst the manoeuvres were not all one way, his plan was clearly to exacerbate a confrontation and in that he succeeded.

291. Mr Brown's allegations of failures to provide information are unrealistic and cannot found section 994 relief as claimed. Any residual "*conflict of duty*" on the part of the BCA-nominated directors can only refer to a conflict of the type covered by Article 14.5, for which no further authorisation was required.

(6) CONCLUSIONS

292. For the above reasons, I am not satisfied that BCA Trading was guilty of any breach of contractual or equitable duty owed to Mr Brown or any unfair conduct as regards the affairs of the Company so as to cause prejudice to him or at all.

293. On the contrary, among other things, on the documents as explained in the oral evidence:

(a) BCA Trading made reasonable efforts to assist the Company in its business at least from July 2014 to October 2015 and did not promise to supply or procure more funding, marketing or stock;

(b) it did not "impose" on Mr Brown the development of the Company's business including changes to the functionality of the Platform and was not culpable of causing delays, nor for the Company's failure to sell more motor vehicles or secure other business opportunities; and

(c) the Company was indebted to BCA Auctions in respect of the Intercompany Account and the BCA–nominated directors did not act in breach of duty in seeking to resolve its business difficulties and future at the end of 2015.

294. I also dismiss Mr Brown's claims as regards BCA Trading's alleged misconduct in delaying/hampering the launch of the Platform, diverting/sabotaging potential business opportunities of the Company, procuring that its nominated directors breached their duties to the Company, in an attempt to force Mr Brown out of the Company or deprive him of his earn-out or at all.

295. In many cases there was apparent consensus as to purported delays, for example in not proceeding with Tradeouts Direct pending HPIBid or whilst individuals may on occasion have lacked some of the energy demanded, it made no difference to the whole. But Mr Brown has sought to turn this into evidence of bad faith. Such allegations, at the heart of his claims and his attempt to assemble liability on BCA Trading's part, are unfounded.

296. Furthermore, Mr Brown's case as to BCA Trading's alleged obligations (a) ignored the complexities of a corporate group such as BCA and the realities of its business; (b) was based on naïve or at least simplistic suspicions and assumptions that whatever BCA's employees said was (i) a promise by BCA Trading or (ii) demonstrative of a conspiracy against him. This was at best naïve, at least simplistic and at worst misleading.

297. Mr Brown himself bears some responsibility for the failure better or more promptly to solve problems, his failing relationship with BCA Trading and the Company's demise as a result. As Norfolk said in the first act of Shakespeare's *Henry VII* – "*Be advised; Heat not a furnace for your foe so hot That it do singe yourself: we may outrun, By violent swiftness, that which we run at, And lose by over-running*….".

298. Accordingly, the Petition will be dismissed. Following the handing down of this judgment (after any corrections or clarifications as may be notified), I will hear further submissions as to costs and other consequential matters as soon as possible, in the usual way. I am grateful to all counsel and solicitors for their assistance.